

RIGHT TO ACCESS TO JUSTICE Vs DUTY TO PAY TAX: A Critique of the Constitutionality of the 30% Tax Deposit.

Oscar Kamusiime Mwebesa

I. INTRODUCTION

Taxation arguably breeds political contestation. A sum of money is extracted from a taxpayer by the state with the help of the law, for no item of equal value in return. The giver often worries that the taker is taking too much for so little in return, while the taker worries that the giver is ungrateful and does not give all that is due. In the circumstances, a dispute is bound to ensue, and indeed, it does ensue when the taker seeks more from the giver by way of a tax assessment. The courts being the guardians of the most sacred symbols of political life- rights/freedoms and the constitution, are the last hope for taxpayers disputing tax assessments. While some hindrances to access to the guardians of the most sacred symbols of political life may be permissible, the debate on the constitutionality of the provision requiring a taxpayer who has lodged a notice of assessment, to pay 30 percent of the tax assessed, pending final resolution of the objection, has been resurrected by the Constitutional Court in *Fuelex Uganda Limited v Uganda Revenue Authority*.¹ The issue seems to have been put to rest by the Supreme Court in *Uganda Project Implementation and Management Centre v Uganda Revenue Authority*.² The focus of this commentary is the right to access to justice. However, since the former is a decision of the Constitutional Court and the latter is a decision the Supreme Court, discussing the role of courts in social reform is valuable because it creates context. A comparison of the said decisions leads to the conclusion that judicial activism promotes the right to access to justice and as a result it subordinates the duty to pay tax to the right to access to justice.

II. COURTS AND SOCIAL REFORM

Judicial power is derived from the people and is exercised by the courts in the name of the people and in conformity with the law and with the values, norms and aspirations of the people.³ Consequently, the role of courts cannot be understood without seeing them as actors in a complex and dynamic struggle over public policy.⁴ The power of courts is manifested in the voiding of illegitimate legislation when championing human rights. Today, there seems to be a political consensus that it is sometimes appropriate for citizens to pursue social reform goals through the courts in what has become known as "social impact litigation."⁵

¹ Constitutional Reference No. 3 of 2009

² Constitutional Appeal No.2 of 2009

³ Article 126 (1) of the Constitution

⁴ M.H. BOSWORTH, COURTS AS CATALYSTS: STATE SUPREME COURTS AND PUBLIC FINANCE EQUITY (2001).

⁵ *id*

The Constitutional Court is established under Article 137 of the Constitution⁶ with the mandate to adjudicate over questions such as to the interpretation of the Constitution. Proceedings can be commenced by lodging a petition⁷ or a reference⁸ by a court of law. The structural might of the Constitutional Court is expressed by its ability to nullify unconstitutional provisions.⁹ This positions the court as an active and relevant participant in dialogue over reform¹⁰ and litigation as an avenue for reform.

Tax reform pits revenue providers against the state in the course of contestation over reform. Revenue providers enjoy variable bargaining positions in the different arenas and as such litigation presents an opportunity to gain a favourable bargaining position when setting the tax reform agenda against the status quo. This is because litigation provides access to an influential arena where those without political power can raise issues of concern and receive attentive hearing on the merits of their cause.¹¹ It legitimises political issues, and even where the cases are not successful, litigation shines light on issues which may gain traction in other arenas.¹² The courts as a revenue bargaining arena inherently recalibrate the bargaining positions of revenue providers and the state since the setting of the tax reform agenda ordinarily requires political power.

Appellate jurisdiction lies with the Supreme Court sitting as a Constitutional Court of Appeal and all other courts are bound to follow the decisions of the Supreme Court on questions of law.¹³ However, the *Fuelex* case attempted to defy this doctrine of precedent. The question as to whether it succeeded or not, may be answered by one's appreciation of the impact of the decision on the implementation of the 30% deposit rule. Nonetheless, the case epitomizes the role of courts in social reform. The subsequent section demonstrates how the Court of Appeal sitting as a Constitutional Court departed from the decision of the Supreme Court on the same question of law.

III. FROM UPIMAC TO FUELEX

In 2006, Uganda Project Implementation and Management Centre¹⁴ lodged TAT No. 16 of 2006 against Uganda Revenue Authority seeking review of the decision of the URA and a declaration that no tax was

⁶ Under Article 137 (1) the Court of Appeal sits as a constitutional court.

⁷ A party seeking to institute proceedings for a declaration or redress against the constitutionality of a law or anything done under the authority of any law or an act or omission by any person or authority.

⁸ Under Article 137 (5) of the Constitution, where any question as to the interpretation of the Constitution arises in a court of law, the court may, if it is of the opinion that the question involves a substantial question of law, and upon the request of a party to the proceedings refer the question to the constitutional court. see

⁹ Article 137 (4) of the Constitution

¹⁰ *Supra* note 4

¹¹ S.A SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (1974)

¹² R.A.L. Gambita, *Litigation, Judicial Deference and Policy Change*, 3 *LAW & POLICY* Q 141(1981).

¹³ Article 132 (3) of the Constitution

¹⁴ A Non-Governmental Organisation that carried out a number of community activities during the National Housing and Population Census 2002, and voter education during the National Referendum 2005,

due. URA had audited UPIMAC's books of accounts, assessed the company to value added tax (VAT) amounting to Shs 394,700,051 (Three Hundred Ninety Four Million Seven Hundred Thousand Fifty One) and demanded payment. UPIMAC objected to the demand¹⁵ but URA disallowed the objection and proceeded to issue third party agency notices¹⁶ against company's bank accounts. When the application came up for hearing before the Tribunal, URA raised a preliminary objection, that the application was premature and incompetent since the petitioner had not complied with the provisions of Section 34 (C) of the Value Added Tax Act. The section required a taxpayer to pay 30% of the tax assessed before lodging an application in the Tribunal. UPIMAC contended before the Tribunal that the requirement to pay 30% of the tax assessed before it could lodge an appeal against such an assessment, contravenes Articles 21 and 126(2) (a) of the Constitution, in that it is denied the right to access justice.

In the subsequent year, Fuelex, a fuel business company lodged TAT No. 25 of 2007 against URA seeking review of the decision of the URA regarding a tax liability of Ushs. 160,525,530 (One Hundred Sixty Million Five Hundred Twenty Five Thousand Five Hundred Thirty) assessed against the company in respect of its fuel business. The issue of the constitutionality of the mandatory payment of 30% of the tax levy objected to arose before the Tax Appeals Tribunal.¹⁷ The said issue was entertained by the Constitutional Court on two occasions. UPIMAC graced the first occasion pursuant to Constitutional Reference No. 18 of 2007 while Fuelex was accommodated vide Constitutional Reference No. 3 of 2009. On 10th February 2009 the Constitutional Court unanimously dismissed Constitutional Reference No. 18 of 2007, and years later (24th July 2019) Constitutional Reference No. 3 of 2009 was determined in favour of Fuelex but the court was divided.

In Constitutional Reference No. 18 of 2007 UPIMAC's arguments were premised on fundamental human rights in general, with emphasis on the right of access to justice which was claimed to be part and parcel of fundamental rights. URA contended that access to court is not denied by the impugned section and that even if it was found to be a limitation to the right to access to justice, the same can be justified under article 43 of the Constitution. The court having addressed itself to some of the principles of constitutional interpretation,¹⁸ ruled that,

¹⁵ On grounds that VAT could not be charged on the said projects as there was no taxable supplies and that even if there was, the money was collectable from the Electoral Commission

¹⁶ A third party agency notice is written demand to a person holding money on behalf of a taxpayer, usually a bank, ordering the person holding money on behalf of a taxpayer to remit the sum specified in the demand.

¹⁷ When the application came up for hearing before the Tribunal, URA raised a preliminary objection, that the application was premature and incompetent since the petitioner had not complied with the provisions of *section 15* of the Tax Appeals Tribunal Act that requires a tax payer to pay 30% of the tax assessed before lodging an application.

¹⁸ The court cited the principles as follows:

The principle applicable is that in determining the constitutionality of legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining constitutionality of either an unconstitutional purpose or unconstitutional effect animated by an object the legislation intends to achieve. This object is realized through the impact produced by the operation and application of the application of the legislation. Purpose and effect

...There is no doubt that access to court is one of the fundamental rights and freedoms that every individual in society is entitled to. There is no doubt that the impugned provisions impose restriction to the enjoyment of a fundamental right... The question is whether the impugned section imposes limitation on the right of access to court to the petitioner and if so, whether such limitation can be justified under *Article 43* of the Constitution. Payment of tax is a duty of every citizen under the Constitution- See *Article 17*. Taxes must not only be paid but they must be paid promptly for the public good. The requirement to pay 30% seems to be premised on the fact that the assessment done by the tax authority is correct in accordance with *section 33(supra)*. Service delivery by Government is dependent upon prompt payment of taxes and tax due and payable under the Act is considered a debt to Government- See *section 35* of the Act... We have not been persuaded that the limitations imposed by the impugned section are arbitrary, unreasonable and demonstrably unjustifiable in a free democratic society.¹⁹

UPIMAC appealed to the Supreme Court vide Constitutional Appeal No. 2 of 2009. Among the six grounds of appeal, two related to the infallibility of the URA/conclusiveness of a notice of assessment while the rest dealt with the 30% deposit as a hinderance to access to justice. Little was said about how the duty to pay tax is a justifiable limitation to access to court. The Supreme Court dismissed the arguments associated with the infallibility of the URA/conclusiveness of a notice of assessment on the basis that these did not form any part of the basis of the unanimous decision of the Constitutional Court but were merely a preamble to its decision. The appellate court opined that the issue for determination was whether the appellant's access to court was completely restricted by the impugned section and the appellant was discriminated against. In this regard the court agreed with URA's argument that the appellant had other avenues open to access court.²⁰ In regard to the constitutionality of the 30% deposit, the court concurred with the Constitutional Court and emphasized that,

It may be hardship on the taxpayer but according to Article 17 of the Constitution a citizen has a duty to pay taxes and to do so promptly, so that government business

respectively, in the sense of the legislation's object and ultimate impact are clearly linked if not indivisible. Intended and actual effect has been looked up for guidance in assessing the legislation's object and thus, its validity.

In interpreting the Constitution the court would be guided by the general principles that (i) the Constitution was a living instrument with a soul and consciousness of its own, (ii) fundamental rights provisions had to be interpreted in a broad and liberal manner, (iii) there was a rebuttable presumption that legislation was constitutional, and (iv) the onus of rebutting the presumption rested on those who challenged the legislation's status save that, where those who supported a restriction on a fundamental right relied on claw back or exclusion clause, the onus was on them to justify the restriction.

¹⁹ *Uganda Project Management and Implementation Centre v Uganda Revenue Authority* Constitutional Reference No. 18 of 2007

²⁰ He argued that if the appellant was incapable of paying 30% of taxes, he could have applied to the Commissioner General according to section 34(4) of the Act, to extend the time within which to pay or to make other appropriate arrangement. In case the Commissioner General unreasonably refused the application, the appellant could have applied to the Tax Appeals Tribunal to review the Commissioner General's decision

can go on.²¹

This unanimous decision was delivered on 28th October 2010. When *Fuelex* came up for hearing URA's argument was that the question of the constitutionality of the 30% deposit had already been determined while the taxpayer considered the matter a *fiat accompli*. The Constitutional Court was alive to the decision in *UPIMAC* and in so doing, Justice Owinyi-Dollo opined that the 30% deposit was unconstitutional but deferred to the precedent while Justice Obura ruled that there was no need to make the reference since the issue had already been determined. However, the decision of Justice Kakuru which constitutes the opinion the majority was that,

The framers of the 1995 Constitution purposefully, intended to ensure that parties before the Courts of law are placed at the same footing. Section 15 of the Tax Appeals Tribunal Act, derogates from the principle and right to a fair hearing enshrined under the 1995 constitution, to the extent that it places one party at a disadvantage, while at the same time giving an advantage to another...Under the impugned section a person who cannot raise 30% of the assessed tax is denied justice on account of inability to pay. It may be equated to a boxing match in which one of the contestant's arms is tied behind his back.²²

Despite the finding that the provision as a whole places one party at a disadvantage while at the same time giving an advantage to another, the unconstitutionality was limited to a specific category of disputes. To this end, Justice Kakuru ruled that,

Accordingly, I would declare that Section 15 of the Tax Appeals Tribunal Act is unconstitutional as it is inconsistent with Article 44 (c) of the Constitution so far as an objector to a tax assessment whose objection does not relate to the amount of tax payable to the tax authority, to pay 30 percent of the tax assessed.

This limitation formed the basis of the Constitutional Court's departure from *UPIMAC*. Justice Kakuru found the decision in *UPIMAC per incurium* to the extent that it did not deliberate on circumstances where the taxpayer contends that he or she is exempted from tax or where a waiver is obtained or is not a taxpayer in Uganda, or where the tax is assessed under a wrong or non-existent law. These circumstances may be close to impossible in a practical setting. However, clarification seems to have been made the words "where the issue for determination before the Tax Appeals Tribunals does not relate only to the amount of tax payable."

The principle in *Fuelex* is yet to be invoked before the Tax Appeals Tribunal yet the challenge posed by

²¹ *Uganda Project Management and Implementation Centre v Uganda Revenue Authority* Constitutional Appeal No. 2 of 2009

²² Constitutional Reference No. 3 of 2009

30% deposit prevails. This may be attributed to the confusion regarding the circumstances to which it applies. Be that as it may, the effects of *UPIMAC* underscore the value of the right to access to justice. The next section provides further understanding of the challenges presented by the 30% deposit in light of the right to access to justice.

IV. EFFECTS OF UPIMAC

There was once an alternative avenue open to a taxpayer to access court without paying the 30% until the decision in *Uganda Revenue Authority v Rabo Enterprises (U) Ltd & Mt. Elgon Hardwares Ltd.*²³ A taxpayer could lean on the unlimited jurisdiction of the High Court in order to survive the 30% requirement. This procedure had been sanctioned by the Supreme Court in *Commissioner General Uganda Revenue Authority v Meera Investments Ltd.*²⁴ In *Meeera* the taxpayer challenged an assessment by commencing a suit in the High Court. When this was objected to by URA, the High Court overruled the objection, the Court of Appeal reversed the decision of the High Court but in 2008 the Supreme Court held that the taxpayer had the liberty to choose whether to commence proceedings in the Tax Appeal Tribunal or the High Court. However, while deciding *Rabo* in 2017 the Supreme Court ruled that all tax disputes should be commenced in the Tax Appeals Tribunal thereby overruling *Meera*.

In *Sausage Master Ltd v URA*,²⁵ the latter conducted a post clearance customs audit for the period 2012-2016 and assessed the company tax in the sum of Ushs. 1,161,947,554 (One Billion One Hundred Sixty One Million Nine Hundred Forty Seven Thousand Five Hundred Fifty Four) on the basis that the taxpayer applied the wrong customs procedures code, thus resulting into a misdeclaration of goods. However, in 2011 the taxpayer was de-registered on the basis that its products were not subject to VAT. The company applied for judicial review contesting the revocation of the decision that the goods were not vatiable but the court referred the matter to the Tax Appeals Tribunal thereby condemning the taxpayer to the 30% deposit.²⁶ The taxpayer lodged an application in the Tribunal vide TAT 14 of 2018 and sought a temporary injunction restraining URA from enforcing the assessment. The Tribunal declined to grant the application on the basis of non-payment of the 30% deposit. When TAT 14 of 2018 came up before the Tribunal, URA raised the 30% issue and prayed that the matter should be dismissed. Consequently, the Tribunal dismissed the application on the ground that the taxpayer did not show any intention of paying the 30% deposit and while doing so cited *UPIMAC*.

²³ Supreme Court Civil Appeal No. 12 of 2004

²⁴ Supreme Court Civil Appeal No. 22 of 2007

²⁵ HCMC No. 249 of 2017

²⁶ *Sausage Master* sought leave to appeal the said decision but the court declined to grant the same.

A Better Place Uganda Ltd filed TAT No. 53 of 2018 against an assessment of Ushs. 8,300,438, 951 (Eight Billion Three Hundred Million Four Hundred Thirty Eight Thousand Nine Hundred Fifty One) by URA. In October 2019 TAT granted a temporary injunction restraining URA from collecting the tax assessed and ordered the parties to agree on how the 30% deposit would be paid. In April 2019 parties entered into a partial consent pursuant to which they agreed that the company pays Ushs. 250,000,000 (Two Hundred Fifty Million) towards the tax the reduction of the taxes in dispute and that the parties would conduct a comprehensive reconciliation. However, by August 2019, no reconciliation had been conducted and the 30% deposit had not been paid. Consequently, the TAT dismissed the application for failure to pay the 30% deposit. The company appealed to the High Court vide Civil Appeal No. 37 of 2019. URA invoked the decision in *UPIMAC* in support of the decision of the TAT. The High Court ruled that the TAT should not have dismissed the application but rather issued a definitive order regarding compliance with the requirement to pay 30%.

In *Century Bottling Company Ltd v URA*,²⁷ the Applicant was assessed Ushs. 58,141,883,182 (Fifty Eight Billion One Hundred Forty One Million Eight Hundred Eighty Three Thousand One Hundred Eighty Two). In seeking to comply with the 30% deposit requirement, the company wrote to URA requesting to pay the said sum in instalments but the latter rejected the request. The taxpayer applied to TAT seeking review of decision by URA rejecting the request to pay the 30% deposit in instalments and also sought injunctive relief. URA cited *UPIMAC* and argued that the power to permit payment of the 30% in instalments was the preserve of Commissioner General and the decision was only challengeable by way of judicial review. The TAT entertained the application on the ground that the decision of URA fell within the definition of a taxation decision under the Tax Appeals Tribunal Act and allowed the company to the 30% deposit in five equal instalments.

Among the three cases above, *Sausage Master* and *A Better Place* may be ranked in the same category-inability to pay, while *Century Bottling* may be ranked among the outliers. The prevalence of challenge caused by the consequence of inability to pay in terms of access to justice looms. This challenge to access to justice was exacerbated by the enactment of the Tax Procedures Code Act, 2014. The Act repealed Section 100 of the Income Tax Act which permitted commencement of proceedings in the High Court. As seen above, mitigation of the burden to pay the 30% deposit is limited to reconciliation of the tax assessed and payment of the money in instalments. However, as a matter of discretion, the TAT may consider the use of some other security other than cash as a way of accommodating taxpayers when applying Section 15 of the Tax Appeals Tribunal Act.²⁸

²⁷ Miscellaneous Application No. 32 of 2020

²⁸ This was obiter dictum in *Elgon Electronics v URA* HCCA No. 11 of 2007

V. CHANGE IN COURT COMPOSITION

Constitutional matters especially those that deal with rights are susceptible to perceptions of justices regarding the proper role of court in a democratic process,²⁹ ideological preferences³⁰ and to some extent personal values,³¹ because of the of the degree of discretion involved. Consequently, justices may be categorised into judicial activists and judicial restraints. Gibson defines ‘restraintism’ as the following of precedents, strict construction of the constitution and deference to legislative intent. He defines ‘activism’ as subordination of precedents, statutes and deference to the judge’s personal attitudes, values and goals.³² This section not only demonstrates that the variance in *UPIMAC* and *Fuelex* is attributable to the change in the composition of the court but also entails the basis of the argument that judicial activism promotes the right to access to justice while judicial restraintism hinders the enjoyment of the right by subordinating it to the duty to pay tax.

Constitutional Reference No. 18 of 2007 (*UPIMAC*) was presided over by Lady Justice Mukasa-Kikonyogo, Justice Egwau, Lady Justice Byamugisha, Justice Kavuma and Justice Nshimye. However, at the time of the hearing of Constitutional Petition No. 3 of 2009 (*Fuelex*), these had been replaced by Justice Owinyi-Dollo, Justice Kakuru, Justice Egonda-Ntende, Lady Justice Obura and Justice Muhanguzi. The Coram that presided over Constitutional Reference No. 18 of 2007 may be described as judicial ‘restraintists’ while the *Fuelex* Coram may be described as judicial activists. As such the variance in the decisions is attributable from the change in the composition/Coram from judicial restraintists to judicial activists. It follows that if the Constitutional Reference No. 18 of 2007 Coram had presided over *Fuelex*, the latter would be rendered a non-starter.

It is probable that the division in opinion in *Fuelex* was as a result of existence of judicial activists and restraintists, while the outcome is attributable to the numerical strength of the judicial activists. Restraintism as exhibited by Justice Owinyi-Dollo is expressed by the following phrase:

It is quite apparent that in coming to this decision, the Supreme Court did not fully or adequately address the issue of access to justice as a fundamental right; denial of which would be unconstitutional. While this is so, I must hasten to point out that, however, the courts of judicature operate under the discipline of hierarchical order; which ensures that the decision by a higher court of record binds all courts below that court, on the principle of *stare decisis et non quieta movere*... Thus the interpretation by the Supreme Court in *Uganda Projects Implementation and Management Centre* case... fully binds this court. I can say no more than to express my fervent wish and

²⁹ L. Gibson, *The Role Concept in Judicial Research*, 3 J.L. & Pol’y. Q 291 (1981).

³⁰ B. Canes-Wrone, *Bureaucratic Decisions and the Composition of the Lower Courts: An Analysis of Wetlands Permitting*, 47 AM. J POL SCI. 205 (2003).

³¹ R.J. Cahill-O’Callaghan, *The Influence of Personal values on Legal Judgements*, 40 J.L. & Soc’y. 596 (2013)

³² *Supra* note 36

hope that the Supreme Court will at some point, have the occasion to revisit its decision on this matter; and settle the law in this regard with finality. In the event, despite my finding that the impugned provision of the Tax Appeals Tribunal Act contravenes provisions of the Constitution pointed out herein above, I would most regrettably dismiss this reference...

This when contrasted with the decision of Lady Justice Obura, showcases the varying degrees of restraintism. Upon finding that *UPIMAC* and *Fuelex* were on all fours, she opined that,

There was therefore no need to make this reference as the question relating to the constitutionality of the payment of the tax dispute or that part of the tax assessed and the tax not in dispute, whichever is greater, by a person lodging an application with TAT has already been determined. In the premises, it follows that the answer to the question framed for interpretation by this Court in this reference is in the negative.

It follows that Lady Justice Obura saw no need to inquire into the constitutionality of the 30% deposit on the basis that it had already been answered.

Judicial activism is manifested in the subordination of *UPIMAC* and deference to the justices' views on the scope of section 15 of the Tax Appeals Tribunals Act and access to justice. Having construed section 15 of the Tax Appeals Tribunals Act and found that it did not apply to circumstances where the issue for determination before the Tax Appeals Tribunal does not relate only to the amount of tax payable, the justices appear to have limited the application of *UPIMAC* to circumstances where the issue for determination before the Tax Appeals Tribunals relates only to the amount of tax payable.

When the Supreme Court revisits the issue, it is likely to return a divided opinion on the matter because; (1) the Coram in *UPIMAC* has since retired with exception of Lady Justice Kisakye; and (2) Justice Owinyi-Dollo currently presides over the court as Chief Justice. Consequently, the effect of the change in composition of the Supreme Court will be construed from the outcome of the appeal. The subsequent section weighs the right to access to justice against the civic duty to pay tax i.e. whether civic duty to pay tax is a justifiable limitation to the right to access to justice.

VI. RIGHT TO ACCESS TO JUSTICE VERSUS CIVIC DUTY TO PAY TAX

The right to access court not specifically provided for under the Constitution while the duty to pay tax is provided for under Article 17. In *UPIMAC* the justification for the requirement to pay the 30% deposit as a limitation on the right to access justice was premised on the duty to pay tax in a timely manner. However, in *Fuelex* the court subordinated the duty to pay tax to the right to access to justice. This section weighs the right to access to justice against the duty to pay tax on the basis of the effect of

adjudication on the duty to pay tax *vis-à-vis* the effect of non-payment of the deposit, equal access to justice and the fallibility of the URA.

A. Effect of adjudication on the duty to pay tax v Effect of non-payment of 30% deposit

In order to understand the duty to pay tax one has to understand the tax process. A tax registered citizen in fulfilment of their civic duty declares what is due from them to the state and makes payment of the declared sum.³³ If URA in examining the citizen's affairs discovers any additional tax liability, an additional assessment is issued against the taxpayer. However, contestation of the additional liability by the taxpayer does not extinguish the citizen's duty to fulfil future tax obligations nor the duty to pay the additional tax liability in the event that the contestation is found wanting.

On the contrary, the non-payment of the 30% deposit has the effect of not merely restricting or fettering, but altogether barring or serving as an absolute impediment to access courts of justice. In this regard, Justice Owinyi-Dollo (in *Fuelex*) opined that,

Admittedly, the right to a fair trial is a component of access to justice as a right; but this is only possible where the disputants are accorded the opportunity to appear before a Court or Tribunal, or other adjudicatory body, in the first place. Otherwise, without appearing before an adjudicating body, the issue of a fair trial would not arise.

In addition, Justice Kakuru emphasised that,

An objector who does not have the 30%, his/her objection however plausible cannot be heard. Once the opportunity to be heard is denied on account of failure to raise the 30% of the assessed tax, Uganda Revenue authority is at liberty to recover the whole of the disputed sum whether that amount is legally owing or not irrespective of what decision the Tax Appeals Tribunal would have made...A person who cannot raise the 30% deposit is denied justice on the account of inability to pay.

However, in *UPIMAC* the Supreme Court likened the requirement to pay the 30% deposit to an intended appellant who may be required to furnish security for the due performance of the decree or to deposit the decretal amount in court before proceeding with the appeal process. This argument is inapplicable to the extent that security for due performance is ordered where a judgement debtor has been condemned after trial and the order is made pursuant to court proceedings. In both cases the judgement debtor has access to court unlike the case of the 30% deposit. Therefore, it is only fair that any part of the contested additional tax liability is only paid after the dispute has been resolved by an independent tribunal.

³³ This is known as a self-assessment regime.

B. Equal access to justice

In *UPIMAC* the appellant argued that the Constitutional Court gave a restrictive meaning of the word discrimination because the appellant and the respondent were both parties to a dispute before the Tax Appeals Tribunal and that both of them should have been required to pay 30% of the assessed taxes. The Supreme Court held that the respondent could not have paid the 30% of the assessed tax to itself and as such the Constitutional Court rightly considered discrimination to be treatment between tax payers.

However, in *Fuelex* the issue was considered as follows:

Payment of the 30% deposit is unjust as it favours one of the disputants to the detriment of the other and it is exacerbated by the provision that the objector must make the impugned payment to the adversary in the dispute...It places on an objector a burden that the adverse party does not have to bear while at a disadvantage because he or she is required to pay money before the dispute can be entertained...The framers of the Constitution purposefully intended to ensure that parties before courts of law are placed at the same footing. Such a hearing cannot be said to be a fair hearing.

This position is buttressed by the fact that when a taxpayer seeks a refund, and a dispute arises in regard to the refund, no part of the refund is paid by URA until the dispute is determined in the taxpayer's favour. It follows that the requirement to pay the 30% deposit is unjustifiable because it favours URA at the detriment of the taxpayer.

C. Infallibility of the Revenue Authority

In *UPIMAC* the Constitutional Court opined that the requirement to pay 30% seems to be premised on the fact that the assessment done by the tax authority is correct. This decision formed the basis of two of the grounds of appeal. The Supreme Court in dismissing these grounds of appeal held as follows:

In my view the court simply gave a background to the payment of 30% of the assessed tax. The correctness of the assessment was not the reason why the court concluded that the payment of 30% is constitutional. This was a preamble to its decision.

However, a distinction between the conclusiveness of the assessment being the basis of the decision of the Constitutional Court and the effect of such a perception of court in determining the constitutionality of the 30% deposit is worth noting. Whereas it may be argued that the conclusiveness of the assessment was simply a preamble/background, it is probable that this perception (which was based on misconstruction of the law) influenced the conclusion of the court on the constitutionality of the 30% deposit. In *Sausage Master Ltd*, the taxpayer acted on the "wrong" advice of URA but was unable to access court due to the inability to raise the 30% deposit. Therefore, since the URA is as fallible as any prudent taxpayer, imposition of the 30% deposit is an unjustifiable hindrance to access to court.

VII. CONCLUSION

Courts play a crucial role in social reform owing to their power to nullify legislation. The exercise of this power is influenced by factors attributable to the individual justices. A comparison of *UPIMAC* and *Fuelex* demonstrates that judicial activism promotes the right to access to justice while judicial restraintism hinders the enjoyment of the right. Consequently, the change in the composition of the court presents both a risk and an opportunity for setting the tax reform agenda. This implies that the change in the composition of the court is an important variable in choosing litigation as a strategy where it has not been successful in the past. The right to access court outweighs the duty to pay tax within the context of payment the 30% deposit. This is because: (1) even if the 30% deposit is not paid, the tax is recoverable when the decision is determined in favour of the URA; and (2) the fact that a notice of assessment is not conclusive implies that upon dismissal of an application for non-payment of the 30% deposit, the taxpayer suffers the tax burden irrespective of what decision the Tax Appeals Tribunal would have made. Therefore, since tax due and payable to the Government, remains a debt due and recoverable, while a right to access to justice when denied or taken, is unrecoverable, it follows that what is recoverable is subordinate to the unrecoverable. If such “wisdom” is found to be persuasive by the Supreme Court, it is probable that *Fuelex* will overturn *UPIMAC*. Even if it is argued that the justification of the 30% deposit was to prevent the misuse of courts by taxpayers who default against their tax obligation, the remedy lies in the efficiency of courts. This also negates the worry that Government would have to write off more taxes going forward.