**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 242 OF 2005**

**EMMANUEL HATANGIMBABAZI....................................PLAINTIFF**

**-VERSUS-**

**THE COMMISSIONER OF CUSTOMS & EXCISE......DEFENDANT**

**J U D G M E N T**

1) This matter has a long history. The case was brought by the Plaintiff by a plaint dated 8th November, 2005 against the Commissioner of Customs & Excise claiming that on 22/08/2002 the Defendant's subordinates wrongfully seized his truck Reg. No. KV 7662C-HZ3689C (hereinafter "the truck") when it was parked at a garage in Changamwe Mombasa and subsequent thereto detained the truck at the Kilindini Port. That a notice of seizure of the said truck was served upon the Plaintiff on 1/10/2002 on ground that the truck and the trailer had been found to have been used in the conveyance of unaccustomed goods contrary to section 197(1) of the Custom & Excise Act.

2) It was further pleaded that the Plaintiff immediately, after the said seizure, wrote to the senior assistant commissioner of customs & excise department challenging the seizure and demanding the release of the truck. The Defendant did not comply with the demand and consequently the Plaintiff initiated judicial review proceedings against the seizure vide H.C.C.C JR. MISC. CIVIL CAUSE NO. 138 OF 2003 in which the Plaintiff sought and was granted relief for orders of certiorari and prohibition against the Defendant. The defendant's decision for seizure was accordingly quashed by the court after it was found unjustified. When the truck was handed back to the Plaintiff most parts had rusted and required repair. The Plaintiff therefore sought for damages for wrongful seizure of the truck, special damages for Kshs. 16,394,484/= and of course costs and interest.

3) By its defense filed here on 7th December, 2005 denied that its officers ever failed to respond to the claim and challenge raised by the Plaintiff and that there were reasonable grounds to warrant the seizure. It was contended that the Defendant is not liable to any subsequent claim for damages resulting from seizure of the Plaintiff vehicle. All was subject to strict proof. It was added that the entire suit was time barred and that the defendant intended to apply to the court to have the suit struck out. No application to that extend was made at any stage.

4) When the trial opened before Hon. Lady Justice Mary Kasango, the Plaintiff testified on his behalf as PW1 before the Honourable Judge on 2/6/2015. He relied on his witness statement filed in court on 8/05/2012 as his evidence in chief and added that the truck subject to these proceedings had been hired on 26/07/2002 to transport transit certain goods to Malaba under the escort of Kenyan police and custom officers. That the transit documents showed that the consignment left Kenya when delivered and transited at Malaba contrary to the allegations by the Defendant that the goods were sold in Kenya. The proceedings in JR. 138 of 2003 were determined in his favour with the seizure Notice being Quashed and the truck was released back to him on 24/12/2003 but was in bad condition when so released. He averred that the truck had been parked near the sea and because of salty water the truck was spoilt completely and all he could do is to tow it to garage for repairs.

5) It was his further testimony that he engaged the services of Rally Motors Assessors to assess the damage on the truck as per the assessment report the repair would cost up to Kshs 987,680/=. The receipts were produced as exhibits 29(a)to(f). The Plaintiff told the court that the truck was used for transit business and for the reason of seizure he suffered loss of business of up to Kshs. 14,249,600/=. He sought the court to order compensation of the sum used to buy the repair parts and for the loss of business.

6) The Plaintiff was cross-examined on the irregularities on the receipts for payment of the spare parts he said that the shop he bought the spares from might have used different receipt books. The Plaintiff then sought leave to call the assessor but this never happened before the matter was placed before me 16th September, 2015 and the plaintiff announced inability to avail the assessor. The court, by consent of the parties, gave directions that the matter was continues from where it stopped. The first witness to be presented before me was one Philip Kariuki Mwangi who testified as DWI on 30th August, 2019. M/s Odundo counsel for the Defendant in her opening statement gave a summary of the Defendant's case; that the Plaintiff is not entitled to the prayers sought because the truck was lawfully seized in accordance with Section 197(1) of Custom and Excise Act on the basis that there were reasonable grounds to seize the truck for conveying uncustomed goods liable for forfeiture. The counsel added that the JR. Case was decided on a technicality since three crucial documents were expunged from the record. according to the learned counsel the documents relied by the Plaintiff were ambiguous and sought the court to expunge the same from the record.

7) In evidence, DW1, Philip Karoki Mwangi told the court that he would rely on his statement filed in court on 30/12/2012 as his evidence in chief. He reiterated that there were reasonable grounds to seize the goods under Section 196 of the Custom and Excise Act. Further that the bond documents relied by the Plaintiff were confirmed falsified and as a result the government lost Kshs. 1,700,000/= in revenue and the Plaintiff should not be let to benefit from that loss.

8) On cross-examination he confirmed that transit escort was request for the goods alleged to be uncustomed. That once escort is requested then the custom exercise officer takes the documents and are supposed to be in his custody till the goods exit the country. He conceded that the defendant's truck was among 56 convoy of motor vehicles that transported the goods and as per the documents the goods reached Malaba and further that the custom escort officer never denied that goods exited the country through the Malaba border point. He further agreed that the truck was held by agents of KRA until court ordered its release.

9) DW2 was James Masiro Ojee. He told the court that he did search and confirmed that pin numbers for certain companies he was instructed to work on and confirmed that they were not tax payers and did not exist in the tax-payer's database. One of them was Cooper Motors Corp (Kenya) ltd. That the receipts produced by the Plaintiff from the said company proved inconsistencies when the serial number is compared with the data from the research, mostly the V.A.T Number.

10) On cross examination he conceded that it is not upon a customer to verify the pin and V.A.T No. he also agreed that there was a possibility of having two or more receipt books in one company. That closed the defense case and each side submitted.

11) After the two sides closed their respective cases, both filed written submissions. It is the plaintiff's submission that he had proved his case to the requisite standards and predicated that submission on the pleadings filed, the prayers and the evidence adduced. It is argued that the Plaintiff has proved the case on a balance of probability since the court in H.C.C. JR. MISC. Cause No. 138 of 2003 quashed the seizure notice and held it to have been unlawful. It was submitted that the issue of the legality of the seizure was now res judicata and this court lacks jurisdiction to re-interrogate the same. It is further argued that the said decision was not appealed against and no reason had been laid to interfere with the same.

12) It is the Plaintiff's further case that he is entitled to damages for the loss suffered and reimbursement for the purchase of spare parts having produced receipts for payment thereof up to Kshs. 2,172,380/=. It is argued that the said receipts had revenue stamps as per Section 19 of the Stamp Duty Act and the Defendant did not object to their production before the court. Lastly, in response to the Defendant's plea that the suit was time barred, the plaintiff submitted that the subject motor vehicle was arrested on 22nd August, 2002 and was released back to the Plaintiff 22nd December, 2003. As at the time of arrest the vehicle was yet damaged, the damage was discovered upon release and that the claim herein being for damages upon a continuous tort, the same was not time barred.

13) On the Defendant's side five issue were raised and proposed for determination. The first one is on whether the Plaintiff's suit is time barred. In that regard, the Defendant argued that the issue of limitation ought to have been determined at the preliminary point since it touches the issue of jurisdiction of the court and the court must first deliver itself on this before proceeding for trial. It is submitted that the suit herein was filed on 8th November, 2005 while the act complained on this matter for seizure of the Plaintiff's truck by the Defendant occurred on 1st October 2002. The Defendant argues that the suit herein was filed after a period of more than 3 years form the date of cause of action contrary to Section 3(1) of the Public Authorities Limitation Act which provides that no proceedings founded on tort shall be brought against the government or a local authority after the lapse of 12 months from the date cause of action accrued. It is argued that the Commissioner for Custom Excise is appointed by Kenya Revenue Authority which is covered by Section 3(1) above and that the position according to the Defendant was adopted in the case of ***Jaffer Sharriff Ouma –vs-The Commissioner of Custom Excise Civil case no. 363 of 2000***.

14) In the alternative, it was argued, that even if this court was to adopt section 4 of the Limitation of Actions Act as the applicable provision on limitation, still the Plaintiff's suit could not be cured since the suit was filed beyond the three years' time limit prescribed thereunder.

15) Secondly, on whether the truck was lawfully seized, the defendant argues that it was suspected that the Plaintiff truck conveyed uncustomed goods within the local markets when they were designated to be delivered at Malaba. It was argued that the suspicion was anchored on a report that the Plaintiff's truck had been seen within Likoni when it was supposed to be on transit to Malamba hence that ground was reasonable. It is argued that the Plaintiff did produce a passport to show that its driver indeed travelled to Congo.

16) Thirdly, on whether the Defendant is liable for the damages sought on account of the seizure, it argued that the Plaintiff failed to explain the inconsistencies in the receipts and as such the contents thereof were not proven. The Defendant avers that the receipts were not genuine because they were from companies which do not exist in the data base for tax payers, the pin and the VAT registration numbers indicated in the receipts was inconsistent with the KRA data base and the same showed that it was not issued by KRA.

17) With regard to loss of business, the Defendant submitted that the three contracts produced by the Plaintiff did not show any relation to the subject truck. The Plaintiff therefore did not prove how the seizure of the subject truck hindered the execution of the said contracts. Further that one of the contracts showed that the Plaintiff was paid some money but no receipts have been produced to prove the same. The counsel for the Defendant submits that this court should only award what the Plaintiff has proved and not what is claimed.

18) With regard to the valuation reports, the Defendant submits that the Assessors report by Rally motors dated 24/12/2003 was marked as MFI-1 and one by Value Consult Limited was marked as MFI-2. It is argued that the valuation reports must be disregarded since no witness was called to testify on the same and produce the reports as exhibits before the court and as such they have no evidential value. That when a document is marked for identification is only for purposes of identification but not proof of the contents therein. The Defendant cited to court the decision in **Kenneth Nyanga Mwige-vs-Austine Kiguta & 2 (2015)eklr** on the criteria followed and the threshold to be met before a document is considered as evidence.

19) All in the entire Defendant submits that a claim for special damages must be specifically proved. It is argued that the receipts relied by

the plaintiff can only be admitted if they were produced by the maker or the suppliers. Further that the Valuation reports cannot salvage the situation since they don't form part of the court record. Lastly, the Defendant argues that the Plaintiff did not show that it lawfully exported the cargo as envisaged under Section 208 (b) of the Custom and Excise Act. As such, it was concluded, there were reasonable grounds for seizure which could not have been resolved in the J.R Misc. Civil Suit 138 of 2003 which only dealt with procedural followed in the seizure and not the validity thereof. The defendant takes the position that the legality of seizure was not determined and it is thus not res judicata.

**Analysis and Determination**

20) I have now considered the pleadings before this court, the submissions by both Counsel as well as the authorities relied on. I am of the considered view that the substantive issues for determination herein are as follows: -

> **a) Whether the Plaintiff's suit is time barred**
>
> ***b)*** **Whether the issue on the Justification of the seizure is *res judicata***
>
> **c) Has the Plaintiff proved his case on balance of probability to be entitled to the pleaded special and general damages?**

**Whether this suit is time barred.**

21) The Defendant argues that the suit herein when filed on 8th November, 2005 while the act of seizure of the Plaintiff's truck by the Defendant occurred on 1st October 2002, the matter was statute barred. To the defendant the period was more than three (3) years contrary to Section 3(1) of the Public Authorities Limitation Act which provides that no proceedings founded on tort shall be brought against the government or a local authority after the lapse of 12 months from the date cause of action occurred. The Commissioner for Custom Excise was said to be appointed by Kenya Revenue Authority which is subject to the provisions of Section 3(1) of the Public Authorities Limitation Act. It was in addition submitted that even if the court was to consider section 4 Of the Limitation of Actions Act, as the applicable law, the suit would still be time barred since the section limits claims founded on tort to 3 years only. On his part the Plaintiff argued that his claim was based upon a continuous tort against him and can only be extinguished once if the damages are paid. The question which seeks answers therefore is when the limitation clock started ticking against the Plaintiff.

22) The plaintiff answer to the challenge on jurisdiction is not the applicability of the law relied upon, but the contention that his claim is grounded on a continuing tort. The doctrine of continuing tort is founded on the repetition of a wrong over time so as to constitute an inseparable series of violation. In such situation, the statute of limitation kicks in when the violation stops rather than when it begins. In the circumstances of this suit, there is no separation committed against the plaintiff between the date of seizure and the date of release. Best example of this kind of tort is detinue and conversion. For the plaintiff here, it was a set of inseparable wrong for the entire duration of detainer and therefore the period of limitation started to run on the 30/12/2003 when the truck was released and handed over to him. That is the day the injury was and could be ascertained and not before. The reason is that the plaintiff could only establish the damage and its extent only once the truck had been released and the wrong stopped. Accordingly, I don't agree with the defendant's position that the cause of action accrued on the date of seizure.in my finding, the course of action could only arise upon the court in judicial review proceeding declared the seizure wrongful and not before but the exact injury pleaded and remedy pleaded here could only ascertain upon release.

23) Having found that limitation clock started counting upon the decision in the judicial review proceeding but crystalised on 30/12/2003 with the release the next issue for is determination is if the suit having been filed on 8th November, 2005 was time barred. That question shall beg the answer to a further question, which of the two cited statutes governed the dispute between the parties on matters limitation. The Public Authorities Limitation Act is clearly a statute which provides for limitation of proceedings against the Government and the now defunct Local authorities. Section 3 of the Public Authority limitations Act, which the defendant relies upon provides as follows:

> **"(1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.**

24) The question that follows, however, is whether this suit is a suit against the government. That question is best answered by seeking to establish if the defendant is government or a local authority for the Act to come to its aid. The office of the commissioner of customs and excise must be seen as one to be filled by the board pursuant to section 13, Kenya Revenue Authority Act. Therefore, the commissioner works and operates as a delegate of the board of the authority and the authority is a body corporate separate and distinct from the government. The commissioner and his office is certainly not a local authority as defined under the Act. As an employee of KRA, he derives his authority from the Kenya Revenue Authority Act and any suits against him is in that capacity as an officer of KRA and the are indeed suits against the KRA. That is what Section 2 of the Kenya Revenue Authority Act provides -any legal proceedings against the Authority arising out of performance of its functions or performance of functions under Section 5 shall be deemed to be legal proceedings against the Government within the meaning of the Governments Proceedings Act. However, this court[1] and others including the court of appeal[2] have held that by virtue of being a body corporate, with right to sue and be sued, KRA is not part or department of government. In **Kenya Revenue Authority vs Habimana Sued Hemed [2015] eKLR,** the court of appeal did settle the issue in the following terms:

> **"...it is nonetheless an autonomous, cooperate, statutory body specifically with powers to sue and be sued. The appellant cannot hide behind the clock of the Attorney General when it is accused of breaking the law or otherwise violating people's rights purely in Order to take advantage of the 30 days' statutory notice".**

25) That decision binds upon this court, has been followed by this court and nothing has happened new to change the court's position. I do find that Public Authority Limitations Act is not applicable to the defendant and does not make the suit statute barred.

26) That determination leads me to the conclusion that it is section 4 of the limitation of Actions Act that govern the suit between the parties

when it comes to the issues of computation of time and limitation of actions. Using the provisions of that statute to compute time, when file, three years had not lapsed and therefore the same was not time barred but filed within time. In the end I find and determine that the suit is not time barred and that the objection grounded on limitation was out of misconception of the applicable law and when the to start reckoning time for purposes of limitation.

**Whether the issue on the Justification of the**

**seizure is resjudicata**

27) The Plaintiff's position is that that he initiated Judicial Review proceedings challenging the validity seizure Notice. In a ruling delivered on the 14th August, 2003 this court found the seizure to be unjustified and quashed the same. The decision was not appealed against and the Plaintiff now argues and maintains, correctly so, that there is no reason for the court to re-interrogate on the validity of the seizure since it lacks the jurisdiction to do so. The Defendant in response contended that the judicial review proceeding only dealt with the procedures followed in the seizure and not its validity.

28) In my view to argue that the validity of the seizure notice has not been determined by a competent court and on the merits can only be viewed as ingenious, uncandid or just pedantic. A reading of the court's decision dated 14.8.2003 reveals that the decision to seize was quashed on the basis that it was done without bona fides and amounted to exceeding the statutory mandate. The court said:

> **"On a balance of probabilities, the applicant has shown that the respondent acted beyond its statutory powers by seizing the applicant's truck and trailer without good reason based on credible evidence that the same were used to discharge uncustomed goods into the local market".**

29) It must be noted that in that judicial review, the seizure notice was quashing and a prohibition issued to stop adverse actions against the property including forfeiture. That decision in my learning and understanding of the issue then in court, settled the fact that the seizure was not lawful but wrongful. I cannot in these proceeding seek to re-interrogate the same issue without appearing to sit on appeal over a decision by a court of concurrent jurisdiction. I am prohibited by section 7 of the Civil Procedure Act which provides:

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

30) The same provision has further explanations on the application of these requirements, and the main objective of the doctrine of *res judicata* as can be seen from these explanations is to have issues in a suit litigated with finality. I do find that the question of the validity or legality of the seizure was finally determined and is not available for consideration before this court. In coming to this determination it matters not that some documents were struck out or expunged. I am not competent to decide if the striking out was right or wrong. That must be left to an appellate court. The defendant had the right to challenge that decision on appeal but opted to forgo that right. He must be content with the decision to forbear and just let the matter rest where it was so left.

**Has the Plaintiff proved his case on balance of probability to be entitled to the pleaded special and general damages?**

31) In this suit the plaintiff seeks both general as well as special damages. The special damages have been specified in the sum of Kshs 16,394,484 and disclosed as cost of repairs and assessors fees. General damages on the other hand is pleaded to be the loss of revenue that would have been earned from the use of the motor vehicle had it not been unlawfully seized and kept away from the plaintiff's use.

**Special damages**

32) These kind of damages are by law dictated to be incapable of award unless the claimant has specifically pleaded same and provided strict proof. In this matter, the plaintiff cannot be faulted on his style and quality of pleading. That I find to have been sufficiently done. Only the level of proof is subject to my review and determination. In an attempt to prove the loss suffered in repairing the truck and its trailer, the plaintiff filed a bundle it **Called List and Copies of Documents** on the 8.5.2012 and **A Further List Of Documents** on 15.6.2019. the two lists contained some six receipts said to have been issued by four different spare part dealers, transport agreement between the plaintiff and 3rd parties as well as and two different documents document called **Assessor's report by Rally Motors Assessors** and another headed A**nalysis/capitalization by, value consult ltd**. I wish to point out that both documents are of no evidentiary value because even though marked for identification neither was produced as an exhibit. I would thus place no evidentiary premium upon them because even though the court granted an adjournment for the makers to attend court and produce same, the maker never attended and the plaintiff opted to leave them as marked without being produced.

33) The six receipts were however produced by consent and plaintiff deeply cross examined over them. The sum total of the receipts aggregated kshs, 2,142,180. That sum I what the plaintiff identified as costs of repairs. While I note that at trial the defendant questioned the authenticity or genuineness of the receipts on the basis that the entities issuing them were not in the KRA's database, no document was produced to prove that fact and no attempt was made to have the possible fraud of forgery investigated by the police. I however find that even in such fierce cross-examination, the plaintiff remained firm and was never shaken. I find that on a balance of probabilities, the plaintiff has proved that he did incur the costs of **Kshs 2,142,180** in repairs of the truck and its trailer. That sum is awarded to the plaintiff.

34) There was also the claim for loss of revenue for 488 day at 12,000 USD per month converted at the exchange rate of Kshs 73 to the dollar to give a sum of Kshs 14, 249,600. The evidence of that loss was sought to be availed in the three transport agreement filed with the list dated15.06.2015. I do consider the agreement with Mr CITOYEN KALOMBO dated 20th July 2003 not to have been intended to be

executed using the subject vehicle because when signed the vehicles was still seizure and to me not available and at the plaintiff's disposal for use in transportation. The other agreement with Transami kenya dated 02.10.1996 was never related to the motor vehicle and nothing was said in evidence to show that it was still in force in the year 2002/2003 as to have been hindered by the seizure. Even the third agreement dated 20.02.2009 was signed when the possession had been handed over to the plaintiff. It could not be effected by the seizure lifted some 6 years before it was conceived. In effect I find that there is no proof that the seizure affected the performance of any of the agreements by the plaintiff. However, the agreements do together with evidence of DW1 demonstrate that the plaintiff was indeed engaged in the transport and haulage of transit cargo from the port of Mombasa at a consideration. I also find that in that engagement the plaintiff did and was expected to earn revenue which was inevitably lost on account of the seizure.

35) That lass has not been proved strictly as a special damage but I find it to lie at large. It is not due for award as special damages but is clearly due as special damages. Considering the hint given by the agreements and the evidence that a motor vehicle could make two trips to DRC for example and make a gross of some 24,000 USD, while taking notice that a motor vehicle is expected to be grounded on account of breakdown, routine repairs or just lack of assignments, together with the fact that this was not a new vehicle while the book life of a motor vehicle, in accounting terms, providing depreciation at 25%pa, is four year, I do award damages for wrongful seizure in the sum of **Kshs 3,000,000.**

36) On the sums awarded, I give interest at court rates to be computed from the date of the plaint till payment in full. I have given interest from the date of the suit even on general damages on the understanding that, if not for the seizure, the plaintiff would have earned the same money as at the date the suit was filed.

37) The costs of the suit are to the plaintiff.

**Dated, signed and delivered at Mombasa this 29th day of May, 2020.**

**P. J O OTIENO**

**JUDGE**

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[1] **Bob Thompson Dickens Ngobi v Kenya Ports Authority & others [2017] eKLR**

[2] ] **Kenya Revenue Authority vs Habimana Sued Hemed [2015] eKLR**