



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 25 OF 2016**

**SOKOTA INVESTMENTS LIMITED.....PLAINTIFF**

**VERSUS**

**KENYA REVENUE AUTHORITY.....1<sup>ST</sup> DEFENDANT**

**THE DCIO, URBAN POLICE MOMBASA.....2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**LEE WAITITU.....4<sup>TH</sup> DEFENDANT**

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

**The facts**

1. This case revolves around a motor vehicle. Specifically a used white range rover of model year 2010, chassis no. **SALLMAM23AA320706** and engine no. **0430352368DT**. On or about 20<sup>th</sup> November 2015, this car arrived in Mombasa from the United Kingdom. According to the bill of lading, it was imported by a Ugandan national by the name **Mugisha Michael**. As such, this vehicle was to be used in Uganda. **Mr. Mugisha** instructed the plaintiff (a registered clearing and forwarding agent) to clear the vehicle and have it transported to Jinja, Uganda as a transit motor vehicle.

2. The plaintiff cleared the vehicle and handed it over to one **Tonny Ahenda**, who apparently was the driver and agent of **Mr. Mugisha** in Uganda. **Mr. Ahenda** was to drive the vehicle to its final destination (Jinja) through Malaba border. At Malaba border point, an officer of the 1<sup>st</sup> defendant would have confirmed that the car had indeed been exported into Uganda. Unfortunately, **Mr. Ahenda** went missing with the said vehicle and the plaintiff's attempts to trace him were futile. The plaintiff had no choice but to report the 'theft' of the car to the 1<sup>st</sup> defendant and the National Police Service.

3. According to **Section 147 of the EAC Customs Management Act (EACCMA)**, a clearing agent is personally liable for any uncustomed goods should the same fail to cross the border. The 1<sup>st</sup> defendant did not hesitate to suspend the plaintiff's access to the KRA Simba system pending sufficient explanation as to the whereabouts of the car and payment of duty on the same. This suspension meant that the plaintiff was unable to carry on its clearing and forwarding business as usual. As such, the plaintiff was forced to scale up its efforts in locating the car. The plaintiff, therefore, contracted a firm of private investigators to trace the vehicle. On or about 20<sup>th</sup> February 2016, the vehicle was found in the possession of the 4<sup>th</sup> defendant, complete with a Kenyan number plate. The logbook reveals that the car is currently registered in the name of **Lee Muchiri Waititu**. The car was impounded and detained pending investigations into its irregular registration in Kenya.

4. As the trial proceeded, it became evident that the plaintiff is neither contesting nor interested in the ownership and/or possession of the car. All the plaintiff wants is to recover the various amounts it had spent to clear the car, trace the car after its 'theft' and the duty and bond fees it had paid to the 1<sup>st</sup> defendant. I will itemise these costs later in this judgement. As a matter of fact, the plaintiff seeks the possession of the car to secure the recovery of the money claimed. The 4<sup>th</sup> defendant on the other hand avers that he bought the car from a friend, one Paul Allan Ofisi and asserts that he does not owe the plaintiff even a single cent.

5. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants play important law enforcement roles in this matter. The 1<sup>st</sup> defendant for one is interested in collecting all taxes and fines applicable for the benefit of the people of Kenya. The 2<sup>nd</sup> defendant on its part is seriously interested in finding out who planned and executed the criminal diversion of the vehicle into Kenya. It may decide to later on pursue criminal proceedings-who knows. All in all, I hope this judgement will be able to get to the bottom of the matter and conclusively resolve all the issues as between the parties.

### The Evidence adduced at trial

6. One witness testified in support of the plaintiff's case, while three witnesses testified in support of the defence. **Joshua Katana Juba**, a director of the plaintiff, testified as PW 1. For the defence, the 4<sup>th</sup> defendant testified as DW 1, **Paul Ofisi Allan** as DW 2, and **Charles Kibet Kemboi** testified as DW 3.

7. PW 1 cleared the vehicle from the Mombasa container terminal. He stated that all along, he was under the impression that he was handling a transit motor vehicle belonging to a **Mr. Mugisha** of Uganda. He had interacted with **Mr. Ahenda** in previous transactions and believed he was **Mr. Mugisha's** agent. It is only after tracing the vehicle that he discovered that the said **Mr. Mugisha** is non-existent. He did not have any documents to show that he communicated with **Mr. Mugisha** directly.

8. **Mr. Juba** conceded that according to **EACCMA**, the vehicle was under his control and therefore **Mr. Ahenda** was deemed to be his agent. Pw 1 continued that after tracing the vehicle, he applied to have it converted to home use. He had to do so because he was the recognised and deemed owner of the motor vehicle. He told the Court that he did not intend to help anyone evade duty. He asked this court to award him his professional fees, the money he spent to trace the vehicle and taxes and duties payable on the car.

9. DW 1 (the 4<sup>th</sup> defendant) told the Court that he bought the car through his friend, **Mr. Ofisi**, who he knew for over 30 years, and was his agent for purposes of importation of the vehicle. He paid **Mr. Ofisi** an all-inclusive sum of Kshs. 6 Million to have the vehicle delivered to him. At some point, there was a shortfall in duty and he was asked to wire a further Kshs. 250,000/=. He conceded that he did not ask for any importation documents from **Mr. Ofisi**, and that were it not for the intervention by the plaintiff, he would not have known that the vehicle was improperly registered in Kenya. Importantly, DW 1 testified that the e-mail address and telephone number presented as **Mr. Mugisha's** in the Bill of lading actually belong to **Mr. Ofisi**. Dw 1 offered to pay all outstanding duties on the car and asked the court to release the vehicle to him.

10. DW 2 (**Paul Allan Ofisi**) began by admitting that he imported the motor vehicle on behalf of the 4<sup>th</sup> defendant. After the vehicle arrived in Mombasa, he approached one **Richard Kanyago** to clear it. He did not pay **Mr. Kanyago** any money towards duty but only engaged him to pay port charges. DW 2 testified that his agreement with the 4<sup>th</sup> defendant only involved purchase of the vehicle from the United Kingdom and its importation to Mombasa. Importantly, **Mr. Ofisi** admitted that the email address linked to **Mr. Mugisha** in the bill of lading was actually his. He told the court that he had imported other vehicles before and in his view, the suit vehicle was irregularly registered in Kenya.

11. DW 3 (**Charles Kibet Kemboi**) works in the customs and border control department of the 1<sup>st</sup> defendant. He told the Court that according to **Section 147 of EACCMA**, the plaintiff as clearing agent was deemed to be the owner of the transit vehicle. Where a transit vehicle is diverted to local use, the clearing agent is liable to pay all the applicable taxes together with a penalty. DW 3 told the court that a transit motor vehicle can only be converted to home use after authorisation by the commissioner. Further, that a transit motor vehicle cannot be registered legally before payment of due duties. He told the court that no duties had been paid on the motor vehicle.

### The parties submissions in support of their respective cases

12. The parties filed written submissions in support of their respective positions. On 3<sup>rd</sup> March 2020, the advocates for the parties attended Court and highlighted their submissions. **Mr. Kenga** submitted for the plaintiff, **Mr. Mwakisha** for the 4<sup>th</sup> defendant, **Mr. Otieno** for the 1<sup>st</sup> defendant and **Mr. Makuto** submitted for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

13. **Mr. Kenga** submitted that the plaintiff was only contracted to clear the suit vehicle from the port of Mombasa. That the 4<sup>th</sup> defendant in collusion with others diverted the vehicle to home use. He submitted that the vehicle should be released to the plaintiff in case the 4<sup>th</sup> defendant is unable to settle the plaintiff's expenses. He prayed for the costs of the suit.

14. **Mr. Otieno** submitted that the plaintiff and the 4<sup>th</sup> defendant should pay all the taxes and fines due on the vehicle. He continued that nothing was availed to show that the 1<sup>st</sup> defendant did anything in relation to the vehicle. As such, the suit should be dismissed with costs to the 1<sup>st</sup> defendant.

15. **Mr. Mwakisha** told the court that it is the plaintiff who was responsible for the safe passage of the motor vehicle to Uganda. The plaintiff gave the vehicle to an agent to deliver. Therefore, it is only the plaintiff who can explain how the vehicle was diverted to home use. **Mr. Mwakisha** requested the Court to dismiss the plaintiff's claim for compensation.

16. **Mr. Makuto** submitted that the suit vehicle was irregularly registered in Kenya. He was of the view that the vehicle should not be released unless and until whoever executed the illegal diversion is found culpable and punished. He argued that it is in the public interest that taxes are paid and tax evaders brought to book.

### Issues for determination

17. This matter involves different monetary claims. The plaintiff seeks, among others, its professional fees and the money it used to trace the vehicle. The first defendant is interested in the taxes, duties and fines payable on the vehicle. Given the facts, I am of the considered view that the following two issues arise for determination:

- a. Whether the plaintiff did clear the suit motor vehicle and became obligated to ensure it transits the Kenya territory?
- b. Whether the plaintiff incurred any costs in tracing the motor vehicle

**c. Is the plaintiff entitled to any of the remedies he seeks?**

**Analysis and Determination**

18. There is no dispute that the plaintiff is a licensed clearing agent and that he did clear the subject vehicle having been approached and instructed by one **Tony Ahenda** an agent of the person named in the bill of lading as the consignee. He then entrusted the same **Ahenda** to drive the vehicle, being a transit good, to its destination in Jinja Uganda. That was not to be as the vehicle did not cross the border that exposing the plaintiff to its statutory obligations as a clearing agent. When the timelines for the vehicle to leave Kenya lapsed without it crossing the border, the law was applied against the plaintiff in that his access to the 1<sup>st</sup> Respondents Simba System was suspended and he became liable to pay the due taxes or his security bond would be cancelled. Investigations however found the vehicle in Kenya, in possession of the 4<sup>th</sup> defendant duly registered but without payment of due taxes. In his evidence the 4<sup>th</sup> defendant asserts having bought the vehicle through DW2 but confirmed that he neither saw the bill of lading nor indeed any import documents, and that duty had not been paid at registration yet his agreement with Dw2 was a sum of 6 million all inclusive. In his evidence, it is only the intervention by PW1 which alerted him of the impropriety with registration and that to trace the motor vehicle, there must have been inevitable related costs. He finally conceded that with the shown impropriety the police were in law entitled to impound the motor vehicle.

19. The evidence by Dw1, DW2 and DW3 have nothing to controvert that by the plaintiff that the vehicle intended for export had remained in Kenya and registered without due duty being paid. That position established that the plaintiff has an outstanding obligation to have the vehicle exit of have the duty paid upon a conversion for home use being granted. I do find that the plaintiff has established that it is the 4<sup>th</sup> defendant who has benefitted from the plaintiff's tribulations being the person in whose benefit the unlawful conversion and registration were effected. On the same note, I do find that the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants cannot be faulted on the legal steps taken against the plaintiff and the motor vehicle. Had I been called upon to determine who crafted the plan to import the vehicle into Kenya disguised as destined for Uganda, I would not have hesitated to find that to be DW2 with or without the Knowledge of the 4<sup>th</sup> defendant. As a consequence, I do find that the plaintiff was the clearing agent for the motor vehicle upon whom legal obligations have fallen upon the vehicle being converted to home use in Kenya without due process.

20. Based on the foregoing findings, it follows that the order for mandatory order of injunction sought against the 2<sup>nd</sup> defendant cannot issue unless and until the due taxes on the motor vehicle are paid in full. But I need to go further and impose obligations and timeline on the basis that taxes run our country and everybody is bound to pay due taxes as and when the same fall due. The taxes on the motor vehicle were due to payment on or before registration, which the documents reveal was effected on 10.12.2015. Now that the Kenyan people have been denied the due taxes for more than four and a half years, I direct that those taxes be assessed if not already determined, and paid within 30 days from today.

21. I further direct that if the 4<sup>th</sup> respondent shall default to so pay the due taxes as ordered above, and noting that the pending taxes remain the obligation of the plaintiff under **Section 147 of the East African Community Customs Management Act**, the plaintiff shall be at liberty after the 31<sup>st</sup> day to pay the taxes then be entitled to have the motor vehicle released to him

22. There was the prayer for the activation of the plaintiff password into the 1st defendant's system. That prayer in my view was granted in the interim basis and at trial, no evidence was led that there had been a dispute on how the plaintiff had conducted his business upon reinstatement. While the 1<sup>st</sup> defendant has submitted extensively on Section 145(3) of the Act and urged the court to find that a clearance agent's license may be revoked in other situations without a judicial finding of guilt, I do find that the leeway given is that even in the event of a conviction, the Commissioner still has a discretion to revoke the license. That leads to the interpretation that a revocation can only be considered as a consequence of conviction or a finding of guilt and not before. With that finding, I do grant to the plaintiff prayer **b** to the effect that the plaintiff's password be reinstated. This is not to say that the 1<sup>st</sup> defendant conducted itself unlawfully in suspending the password. That was lawful as long as the obligation of the plaintiff as a clearing agent remained outstanding.

23. The plaintiff also sought the recovery of the sum of Kshs 2,402, 040 being the sum paid to the 1<sup>st</sup> defendant as commitment fees and sums expended on tracing the vehicle. Indeed, the plaintiff did produce the receipts for such payment and the same were marked in a bundle as **PExh 1**. Against that pleading and evidence no contest was mounted by any of the defendant in fact all agreed that the plaintiff being obligated to have the vehicle transit or pay a penalty of Kshs 1,000,000, and as well as the customs value of the motor vehicle, had the reasons to trace the motor vehicle at a cost. In the words of 4<sup>th</sup> defendant, *'there would be related costs for the plaintiff to trace the motor vehicle'*. Based on that evidence, I do find that the plaintiff is entitled to be paid the sum of Kshs 2,402,040. This sum is adjudged as against the 4<sup>th</sup> defendant whom I have found to have been the sole beneficiary of the conversion and retention of the motor vehicle into the country. Having awarded this sum, I don't consider it deserving to consider an award for general, punitive or exemplary damages because no material was placed before me to prove that the plaintiff suffered any loss or damage over and above the proved financial losses.

24. The foregoing determination effectively determines the counter claim by the 4<sup>th</sup> defendant which was solely founded upon the fact that the vehicle was registered in his name even though it was a transit good for which duty had not been paid.

25. The law as it today is that an imported property for which duty has not been paid is a prohibited good and being in its possession is in fact a criminal offence. Having determined that the duty on the motor vehicle is due for payment, it follows that the vehicle may only be released once the duty is paid as appropriate. However, being the beneficiary to the unlawful diversion of the motor vehicle into the Kenyan home use, I find that to allow the counter-claim as presented would be to reward the unlawful process leading to registration.

26. However there being no other claim over the motor vehicle including by the plaintiff, and subject to payment of the due duties, I direct that the motor vehicle may be released to the 4<sup>th</sup> defendant only upon payment of the taxes due.

27. In summary, judgment is entered for the plaintiff as follows: -

- a) An order that the plaintiff's password be reinstated by the 1<sup>st</sup> defendant.
- b) The 4<sup>th</sup> defendant shall, forthwith and not later than 30 days from today, pay the assessed duty on the suit motor vehicle now registered as KCF 915W and on his default the plaintiff shall be at liberty to pay such duty and have the motor vehicle released to himself.
- c) Kshs 2,402,040/= be paid to the plaintiff by the 4<sup>th</sup> defendant together interest thereon at 14% p.a from the date of the suit till payment in full
- d) Costs of the suit shall be borne by the 4<sup>th</sup> defendant.

**Dated, signed and delivered at Mombasa this 25<sup>th</sup> day of September 2020**

**P.J.O. OTIENO**

**JUDGE**