REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO.504 OF 2000

EMMANUEL HATANGIMBABAZI …… PLAINTIFF

Versus

THE COMMISSIONER OF CUSTOMS & EXCISE ….. DEFENDANT

Coram: Before Hon. Justice Mwera
Nyongesa for Plaintiff
Mohamed for Defendant
Court clerk – Sango

JUDGEMENT

The plaintiff sued the Commissioner of Customs & Excise claiming that on 2/9/98 the latter's subordinates wrongfully seized his truck Reg. No. KN 528S when it was at the premises of Auto Marine Garage, Miritini Mombasa. That immediately after the said seizure, the plaintiff notified the defendant of his claim on this truck as per the Customs & Excise Act Cap (472) and asked the defendant to explain the reasons behind the seizure. So he came to court to have the seizure lifted and the truck released to him. It was added that that truck was used in transport business and thus the seizure has caused the plaintiff loss in revenue put at US $14000 p.m. – the same to be paid from the date of seizure to the day the truck is released. The plaintiff therefore sought a declaration that the said seizure was wrongful and unjustified and that the truck should be released. That damages be paid (loss of revenue) as stated above plus any damage/loss occasioned to the said truck during the period of seizure and of course costs and interest.

A defence filed here on 14-11-2000 denied that the plaintiff ever claimed the vehicle in question and that reasons for its seizure were stated in the seizure notice. That thus the seizure was not wrongful and if anything the vehicle was uncustomed and so it was seized on reasonable suspicion. That the plaintiff never suffered any loss, or if he did the plaintiff was not liable. All was subject to strict proof. It was added that notice of intention to sue was never served and that the defendant intended to raise a preliminary objection on points of law in the matter. None were raised at any stage.

The trial opened before Mrs. Tutui Commissioner of Assize as she then was, and later concluded before the undersigned. From the record the plaintiff (PW.1) a Rwandan and refugee in Kenya (Exh. P1) said that he was in transport business using his truck (KN 528 S) ferrying goods from the port of Mombasa to Rwanda. That the defendant issued him with a transit goods certificate (No. D417593) for this motor vehicle on 6.3.96 on due payment (Exh. P2). That in December the same year the truck suffered mechanical problem that saw it taken to Auto Marine Garage, Miritini, and so the plaintiff did not renew his transit goods licence.

That the motor vehicle was still undergoing repairs when it was seized on 2.9.98 and a notice No. 023986 (Ex. P3) was issued. It was issued to the garage owner who in turn called the plaintiff to go and collect. That the notice required him to claim ownership within 30 days of its issuance or the defendant would

assume the ownership of the subject motor vehicle. That on 23.9.98 the plaintiff wrote a letter (Exh.P4) to the defendant's deputy explaining his ownership of the motor vehicle enclosing all due documents adding that he was in the process of paying the garage owner his charges (for the truck). The letter was acknowledged by the defendant's stamp of 24.9.98. The plaintiff also exhibited a logbook issued to him by the Republic of Zaire (now (DRC) – Exh. P5. At that point the plaintiff clarified that the transit licence (Exh. P2) was issued in favour of M/s Airfreight Services Ltd, not himself, a company where he was a director and which used to take export goods from Mombasa to Rwanda. He maintained that this document was in regard to the motor vehicle whose number was therein entered and not in respect to goods in transit. That by that document the truck in question was allowed to be in the country (Kenya). But that between 1996 and 1998 the plaintiff did not have a valid licence for the truck to be in the country because it was undergoing repairs, and that the customs office had informed PW.1 that he did not have to seek a licence in such circumstances. PW.1 told the court that when Exh. P2 was issued for a given motor vehicle there was no requirement for any other type of licence and that his truck was not involved in local transport business. To make the best of the typed proceedings, the record shows that the plaintiff also produced a road licence issued in 1995 in Zaire (Exh. P6). That his letter to the defendant dated 23.9.98 elicited no response and so PW.1 followed it with a reminder (Exh. P7) and another on 28.2.2000 (Exh. P8) which were received. That he personally saw a Mr. Ndungu. Deputy Commissioner of Customs who even as he assured PW.1 that his matter was receiving attention seemed to do nothing at all. So he got a lawyer to write letters to that officer (Exh. P 9, 10) again all to no response. That at about the time the lorry went in for repairs the plaintiff had entered into a contract (Exh. P11) with M/s Transami on 2.10.96 to carry their goods at US $7,200 per trip from Mombasa to Goma (DRC). So he lost that income. One wonders even at this point i.e. 2.10.96 how the plaintiff would have carried Transami's goods when his lorry was still lying at the garage on 2.9.98 when it was seized – whole 2 years gone by. But be that as it may.

In cross examination PW.1 told the court that he had 5 motor vehicles in Kenya and the subject one entered the country in 1988. He acquired a transit licence for it to carry goods from Kenya to Rwanda and return. That either he or his driver paid for the transit licence (Ex. P2) at the defendant's Long Room. It was in respect of the subject motor vehicle and in favour of M/s Air Freight Services Ltd. That being familiar with the transit business a transit licence was issued for a given motor vehicle and not some goods. The plaintiff's case closed.

John Njiru Kamau (Dw.1) took the witness box for the defence. He was the defendant's employee for 23 years and in 1998 he was performing targeting and surveillance duties for his employer. On 2.9.98 he got information that a certain Mercedes truck was lying at Auto Marine Garage. On arriving there he sported subject motor vehicle. On inquiring from the garage owner if the immigration papers of this foreign registered motor vehicle could be availed, the answer was that there were none. DW.1 learned that a Rwandese owner had left the truck at the garage for repairs and had not returned, now 3 months gone. The garage owner then informed DW.1 that storage charges had come to Sh.150,000/- excluding repair costs. So without due import papers furnished DW.1 formed the opinion that this truck was in the country illegally and he proceeded to seize it by issuing due notice. That to get it back, import documents including Form C 44A were to be submitted. That such entry papers only lasted 3 months and if the motor vehicle had not been re-exported fresh documents had to be sought. That when the motor vehicle was seized (Exh. P1) it was left at the garage because it could not move and the garage owner was owed money). That some 2 years later DW.1 met the truck owner whom he knew before; he threatened DW.1 with a suit. That from experience and practice DW.1 knew that a transit goods licence was no legal document to import a motor vehicle. That it only facilitated movement of transit goods through Kenya. So he maintained that the seizure on 2.9.98 was valid and that the plaintiff did not reclaim his motor vehicle or challenge the seizure in statutory time – 30 days.

In cross examination, the court was told that the seizure notice did not specify the reasons for seizure. That procedurally when offences are compounded, the motor vehicle owner can admit them and pay a fine or face court action. That an owner can get explanation/reasons for the seizure if he lodges his claim in 30 days or the defendant proceeds with the condemnation procedure which ends up in seizure itself. That since 1998 DW.1 did not know if seizure processes were gone into. He did his bit and left the rest to his superiors. He was not aware of the plaintiff's letter (Exh. P2) of 23/9/98 which was received on

24.9.98 by his superior. That Form C 44 applied to foreign motor vehicles carrying transit goods. That transit goods licences were issued annually permitting the applicants to use motor vehicles in transiting goods. That DW.1 did not check at their offices to ascertain from the records if the plaintiff's motor vehicle had a transit goods licence or F C44. Only that the garage owner had no documents to give DW.1 on the day of seizure. That the former of these documents was displayed on the motor vehicle's wind screen while for FC44 was produced on demand. DW.1 could not say if PW.1 later availed the due documents. He told the court that such information probably would come from some other of his colleagues who handled the file after PW.1 issued the seizure notice. That closed the defence case and each side submitted.

The plaintiff's submission that he had proved his case was predicated on the pleadings (plaint and defence) the prayers, the evidence and the seven (7) points which this court will revert to presently.

On his part the defendant denied any wrong doing as per the pleadings and the evidence. That the garage owner where the subject motor vehicle was found did not have due documents to show that the motor vehicle was legally in Kenya. That a transit licence was not a legal document for this motor vehicle to be in the country, and that the plaintiff had failed to produce a temporary importation permit. That there was no proof of the loss of revenue put at US $14400 p.m. While the plaintiff cited the Misc. C. Applc. No.561/2004, In the matter of Kenya **Revenue Authority**, Ex part **Rajendra Ratilal Sanghani,** a judicial review application for order of certiorari, mandamus and prohibition, the defence put forth the case of **CHANDARIA INDUSTRIES LTD. VS. COMMISSIONER OF CUSTOMS & EXCISE NRI (MIL) H.C.C.C. 312/1995** This case focused on assessment of damages based on a judgment earlier recorded by consent. It did not seem to give much aid here where liability has to be determined first only to be followed with assessment of damages if that will be.

Now the determination of this matter:

Issue 1

> Whether reasons for seizure were given: Not at all. The notice of seizure DW.1 issued to the garage owner on 2.9.98 stated that the subject motor vehicle had been seized and would be liable to forfeiture under the Customs and Excise Act on the following grounds and DW.1 wrote. "CONTRAVENTION OF CUSTOMS & EXCISE ACT CAP 472 LAWS OF KENYA."

That cannot be a ground or reason for a seizure notice. The seizure notice issued because John Njiru (W.1) to whom the garage owner had not shown any documents regarding this vehicle:

> "------- formed the view that this truck was in Kenya
>
> illegally and so was to be seized."

DW.1 insisted that even as the notice was issued to the garage owner and not the motor vehicle owner (the plaintiff) the former could pass it to the latter. Apparently that is what happened here. But S.200 of the Customs & Excise Act, herein the Act, appears to say that the seizure notice ought to be given to the true (not nominal owner) of the goods and with reasons. The section says in pertinent parts.

> "200. (1) Where a thing has been seized under this Act, then unless the thing was seized in the presence of the owner thereof --- - the officer effecting seizure (should give notice in writing of the seizure and reasons therefore to the owner thereof -----"

The motor vehicle was not seized in the presence of the plaintiff whom Njiru knew. It was seized in the presence of the garage owner. Njiru was obliged by law to give a written notice to the plaintiff about the seizure giving reasons for the same. Even it is accepted that serving the seizure notice on the garage owner was valid, but no reasons were given for the action – not in the notice. Giving reasons, and to the owner of the object, is based on principles whose importance cannot be underestimated. Property ownership is accorded a high place in this country's laws. In order for one to lose possession of it that one

must be told the reasons. That was not done here.

Issue 2:

Owner making claim in 30 days: The seizure notice of 2.9.98 (Exh. P2) did give the plaintiff one calendar month to give notice to the defendant making his claim or the goods would be condemned. This court is satisfied that the plaintiff made such a claim and within time. He wrote to the defendant on 23.9.98 and this was acknowledged by the defendant's stamp of 24.9.98 (Exh. P4). The plaintiff even sent reminders, personally saw the deputy commissioner etc. but there was no response at any one single moment. See S.200 (4) of the Act:

> "(4) Where anything liable to forfeiture under this Act has been seized then subject to proviso (i) to sub section (1) and to subjection (3) (a), the owner thereof may within one month of the date of seizure or the date of notice given under subsection (1) as the case may be by notice in writing to the Commissioner claim the thing."

The plaintiff did just that but even up to 28th February 2000 there was no response as required by the law. S.2002 of the Act:

> ""2002 (1) Where a notice of claim has been given to the Commissioner in accordance with Section 200(4), then the Commissioner may within a period of two months from the receipt of the claim, either –
>
> (a) by notice in writing to the claimant require the claimant to institute proceedings for recovery of the thing within two months of the date of notice; or
>
> (b) himself institute proceedings for the condemnation of the thing."

However (S.202(2)), where the Commissioner fails to comply with S.202(1) then unless the item was prohibited or restricted, it shall be released to the claimant.

Issue 3:

Whether the defendant commenced condemnation proceedings: There is no evidence of that and DW.1 told the court that he did not know if the case went that far. After he did his bit he left the file to others to handle. That those others would come to explain to the court. They did not come. Accordingly the defendant was obliged to release the subject motor vehicle to the plaintiff at the latest in 2 months from 24.9.98. He did not.

Issue 4:

Was the seizure justified: This court does not think so. No reason was given for it and the procedures given by law were not followed. The goods were not prohibited or restricted; the plaintiff was not arrested, questioned or even prosecuted on account of his truck and most of all the defendant has not demonstrated that the transit-goods licence, F C 44 form or even temporary transit authority or such other explanation was not furnished by the plaintiff to cover his motor vehicle. DW.1 did not follow up the matter or check the records of this motor vehicle in the light of the documents that the plaintiff had or furnished to the deputy commissioner of customs. The court in this case cannot therefore assume that the seizure was lawful. It is all on the defendant to show this and he did not do so.

Issue 5:

(i) Loss of User – Definitely by the seizure herein in question the plaintiff's motor vehicle which he testified was used for transport did not earn him anything. But we do not know how much that was. No audited accounts of its operations were tendered and in any case even that could not run from

2.9.98 at all. The truck had been lying at the garage for 2 years or so because the plaintiff had not paid the garage its dues. Indeed the agreement with M/s Transami of 2.10.96 seems of no assistance because since its making the motor vehicle could not and did not do any transporting until it was seized on 2.9.98 while lying at a garage. Nobody can even say that to date the plaintiff has paid the garage owner and that his lorry had been fully repaired at time of seizure. So for the loss of user this court is unable to discern how it can assess that.

(ii) Damage: (Issue 6) This court is however satisfied that the act of seizure was unjustified. All this has been set out above and need not be repeated. As for general damages, in the circumstances the plaintiff is awarded a sum of Sh.200,000/-. This assessment need not await an assessors report as the plaintiff proposed. This is so because, it was not shown that had the defendant not seized this motor vehicle, the garage was as at that time ready to release it to the plaintiff. In any case it had been lying at Auto Marine Garage for about 2 years due to what the plaintiff notified the defendant on 23.9.98 as some financial problems regarding payments to the garage owner which payments he was making by installments. The court was not told if the payment was finished and when. So the motor vehicle's remaining at the garage has more than one hand in it, for whatever it may have suffered. That is how this court gave a portion for Sh.200,000/- to be paid by the defendant for his bit in contributing to the lorry staying at the garage. Indeed the plaintiff was also bound to mitigate his loss anyway and it is not shown that he has or he did anything of the sort. So the defendant should not carry the whole burden. Anyway if the plaintiff sought something bigger should he not avail a valuation report? He did not.

Issue 7: Remedies – The plaintiff is entitled to have the seizure lifted and the motor vehicle released to him. He will also have Sh.200,000/- general damages paid to him plus costs and interest.

Judgement accordingly.

Delivered on 14th May, 2004.

J.W. MWERA

JUDGE