Adan & another v Commissioner General Kenya Revenue Authority & another (Civil Case E004 of 2021) [2025] KEHC 1383 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1383 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CIVIL CASE E004 OF 2021

WM MUSYOKA, J

FEBRUARY 21, 2025

BETWEEN

BULLE DIIS ADAN ..... 1ST PLAINTIFF

MAQBUUL INDUSTRIES COMPANY LIMITED ..... 2ND PLAINTIFF

AND

COMMISSIONER GENERAL KENYA REVENUE AUTHORITY .... 1ST DEFENDANT

ATTORNEY GENERAL ..... 2ND DEFENDANT

JUDGMENT

1. The suit herein was commenced by the plaintiffs against the 1st defendant, in 2021, with respect to events that had allegedly happened on 3rd April 2020, when a report was made by the 1st defendant, at the Busia Police Station, about the plaintiffs not paying taxes and revenue, on sugar that was aboard 2 motor vehicles, registration marks and numbers KBS 078Q/ZD 8526 and KDR 591N/ZE 0812. The report led to the arrest and unsuccessful prosecution of the 1st plaintiff, in Busia CMCCRC No. 398 of 2019. The other consequence was that the sugar, aboard the 2 motor vehicles, being 1,120 bags in quantity, was impounded. The plaintiffs sought recovery of special damages of Kshs. 50,000,000.00 and general damages for loss and damage, arising from the impoundment of the sugar and the arrest and prosecution of the 1st plaintiff.

2. The 1st defendant entered appearance on 2nd June 2021, vide a memorandum, dated 26th May 2021. It is not clear whether the same was accompanied by a defence statement, for I have not seen a statement of defence to the plaint, dated 6th May 2021, by the 1st defendant.

3. The plaint, dated 6th May 2021, was amended, by that dated 31st August 2021. The amendments essentially added the Attorney General to the suit as a 2nd defendant. It also added several details to the

claim, including that the 1st plaintiff had been arrested on 2nd April 2019, was prosecuted and acquitted on 3rd September 2020; that the court had found the charges against the 1st plaintiff unfounded, the case against him incompetent and his confinement and arraignment illegal; and that 3 other vehicles laden with bags of sugar had also been detained and the sugar impounded, being motor vehicles registration marks and numbers KAZ 790E/ZE 5339, KBM 094V/ZD 6887 and KBS 081Q/ZD 8526. The plaintiffs added a claim for compensation, to the tune of Kshs. 300,000.00, being in respect of legal and filing fees paid to the Advocate for the 1st plaintiff in Busia CMCCRC No. 398 of 2019.

4. I have not come across a statement of defence to the amended plaint, dated 31st August 2021, by the 1st defendant, and I cannot tell whether the 1st defendant filed defence to that amended plaint.

5. The 2nd defendant filed a defence on 7th June 2022, dated 6th June 2022, responding to the case by the plaintiffs as set out in the amended plaint. The defence comprised of denials, with specific averments, with respect to the arrest and prosecution of the 1st plaintiff, that the police acted on a credible report laid against the 1st plaintiff, investigations were conducted, and, based on that, a reasonable and probable cause, that an offence was committed, was revealed, upon which the 1st plaintiff was arrested and prosecuted. It was asserted that the arrest and prosecution was anchored on the *Constitution* of Kenya 2010, the *Penal Code*, Cap 63, Laws of Kenya, the *Criminal Procedure Code*, Cap 75, Laws of Kenya, and the Police Act, Cap 84, Laws of Kenya. It was asserted that the mere acquittal of the 1st plaintiff did not confer on him an automatic right to sue for damages, and, if any expense was incurred because of the prosecution, then the same emanated from a lawful administrative process, and the 2nd defendant was not liable. It was further argued that the case was statute-barred, and the same was in violation of the *Government Proceedings Act*, Cap 40, Laws of Kenya.

6. The plaintiffs thereafter obtained leave of this court, through a ruling that was delivered on 16th February 2024, on an application, dated 26th October 2023, to re-amend their plaint.

7. That re-amended plaint was lodged on 6th March 2024, bearing an even date. The amendments largely introduced particulars to support the allegations made in the plaint, with respect to the malice in the prosecution of the 1st plaintiff in Busia CMCCRC No. 398 of 2019, the special damage that emanated from the impounding of the sugar, negligence of the defendants in the manner they handled the sugar after impounding it leading to its being declared unfit for human consumption, and particulars of loss of business arising from the impounding of that sugar. It is argued that the defendants acted wrongly, maliciously and negligently, in the manner that they impounded the sugar, exposing the plaintiffs to the loss and damage. The amendment led to the claims being revised, to Kshs. 31,852,640.00 special loss and Kshs. 20,000,000.00 general damages.

8. The 1st defendant filed a statement of defence to that re-amended plaint. The defence is dated 26th June 2024. The said defence statement largely denies the allegations made in the re-amended plaint. It is averred that the 1st plaintiff had imported brown sugar from Uganda, loaded on motor vehicles registration marks and numbers KBM 094V/ZD 6887 and KAZ 790E/ZE 5339, and the same were cleared through entries numbers 2019BSA97395 and 2019BSA97401. It is averred that the 1st plaintiff sought to use the entries numbers 2019BSA97395 and 2019BSA97401 to facilitate clearance of another cargo of sugar, on motor vehicles KBS 081Q/ZD8256 and KBR 591N/ZD0812, and once that was detected the defendants swung into action, had the motor vehicles stopped, the sugar impounded, and the 1st plaintiff arrested and prosecuted. It is averred that the actions by the 1st defendant was justified, for the plaintiffs had not proved that they had paid the duties due for the sugar the subject of the suit.

9. The matter proceeded viva voce, founded on witness statements placed on the record by the parties. The oral hearing was conducted on 19th September 2024. The plaintiffs called 1 witness, as PW1, the 1st plaintiff herein; while the 1st defendant called 1 witness, DW1, Abdi Kassim.

10. The 1st plaintiff relied on his affidavit and witness statements on record, filed on 6th May 2021, 24th May 2023 and 14th November 2023, and on bundles of documents that he had filed in court on 6th May 2021 and 26th October 2023. In his witness statement, dated 6th May 2021, he averred to have had been arrested on 3rd April 2020, on a false and malicious complaint from the 1st defendant, which he described as without justification, that he had failed to pay taxes and revenue for sugar aboard KBS 081Q/ZD8256 and KBR 591N/ZD0812. He was charged and prosecuted, in Busia CMCCRC No. 398 of 2019, and was subsequently acquitted, on 3rd September 2020, under section 210 of the *Criminal Procedure Code*. He averred that due to his confinement in police cells during the duration of his criminal case and the impounding of his 1,120 bags of sugar he had suffered loss, and he was holding the defendants jointly and severally liable. He also averred that he was denied his constitutional right to freedom, and claimed irreparable damages and special damages of Kshs. 70,000.00 in legal fees. He filed a further witness statement, dated 24th May 2023, to annex several documents, including export sales invoices, an East African Community certificate of origin, a cargo manifest and the Kenya Bureau of Standards and approval documents. The affidavit, sworn on 26th October 2023, was in support of his application, of even date, for re-amendment of his amended plaint.

11. During examination-in-chief, PW1 testified that he had imported sugar from Lugazi Sugar, Uganda, whose quantity he put at 1,120 bags, valued at USD 33,600. He ferried the sugar on 2 lorries. At the Busia border, he paid the necessary taxes, which he said was Kshs. 600,000.00, the sugar was verified, and he was cleared. He then crossed the border, and the vehicles were taken to the customs yard belonging to the Kenya Revenue Authority for verification. He stated that the sugar was also verified by the Kenya Plant Health Inspectorate Service, who cleared it and issued him with a report. The Kenya Bureau of Standards also verified and cleared the sugar. Thereafter, someone came from ISO and claimed that customs had not been paid for the sugar. Whereupon he was arrested by the police, taken to court and prosecuted. He stated that at the end of it he was acquitted under section 210 of the *Criminal Procedure Code*.

12. PW1 testified that after the sugar was impounded at Busia, it was moved to a warehouse belonging to the Kenya Revenue Authority at Kisumu, and a yard at Forodha House. As the sugar was a perishable commodity, he moved the court, which was trying him of the criminal charges, asking that the sugar be sold, and the money raised from that sale be deposited in court, pending the finalisation of the case. An order for the sale of the sugar was made on 9th September 2019. He said that the Kenya Revenue Authority did not act on the court order of 9th September 2019, instead they wrote to him a letter, dated 21st February 2020, informing him that the sugar had gone bad, and it could not be sold. He obtained another order, made on 10th November 2020, asking that the sugar be released to him, but that order was never acted upon by the Kenya Revenue Authority.

13. He asserted that he was entitled to damages for false imprisonment, given that he had properly imported the sugar, and the same had gone through all the normal processes at the border, and he had gotten all the relevant stamps from the Kenya Bureau of Standards, the Kenya Plant Health Inspectorate Service and the Kenya Revenue Authority, the sugar had been declared clean, and he had paid duty for it, being Kshs. 271,160.00 for each consignment in the 2 lorries. He asserted that the sugar was declared bad after he obtained a court order for its sale. He accused the 1st defendant of causing the sugar to go bad by failing to act fast. He said that the lorries had been hired and were held by the 1st defendant between 3rd April 2019 and 26th April 2019, and he claimed Kshs. 1,380,000.00, for the

expenses relating to the impounding of the lorries, for he was catering for them and their drivers over that period. He also claimed for the value of the sugar, being Kshs. 11,760,000.00. He asserted that he had bought the same for commercial purposes, and he lost business, for 5 years, and he claimed 14% loss, based on the value of Kshs. 11,760,000.00, which brought it to Kshs. 8,232,000.00. He also claimed general damages, for the disruption of his life and business. He said that he was locked up in police cells, got diabetes and his reputation suffered.

14. On cross-examination, he said that he was a director of the 2nd plaintiff. He denied that the sugar in question was on motor vehicles registration marks and numbers KBM 094V/ZD 6887 and KAZ 790E/ZE 5339. He stated that he was paying Kshs. 15,000.00 per vehicle per day, during the period that they were impounded, but he provided no evidence. He further reiterated that he paid Kshs. 271,160.00 as customs duty on the sugar per vehicle, and that he had bank slips from Kenya Commercial Bank to that effect, where he deposited the money. He said that each bag was worth Kshs. 10,200.00, but he had no document to prove the same.

15. DW1 adopted his statement, and produced documents from his list of documents, dated 16th October 2023. In that statement, he stated that the Kenya Revenue Authority learnt of an irregular release of KBM 094V/ZD 6887 and KAZ 790E/ZE 5339, on 28th March 2019, and indications were that the 2 had been released to facilitate the recycling of their entry forms. On 2nd April 2019, he got more intelligence about 2 other trucks being released using the entry forms used for the release of KBM 094V/ZD 6887 and KAZ 790E/ZE 5339. The 2 other trucks were KBS 081Q/ZD8256 and KBR 591N/ZD0812, which were subsequently intercepted, and the 1st plaintiff arrested and charged in Busia CMCCRC No. 398 of 2019, together with another. He stated that the 2 trucks were laden with sugar, 560 bags each, of 50 kilogrammes each bag. He stated that an order was made by the trial court in Busia CMCCRC No. 398 of 2019, on 24th September 2019, for sale of the sugar and deposit of the money in court, but that sale did not take place, as the Kenya Bureau of Standards certified the sugar to b unfit for human consumption, on 18th February 2020, which frustrated compliance with the said court order. He also stated that there was another order, which was never served on the Kenya Revenue Authority, dated 10th November 2020, for release of the sugar to the plaintiffs. He further stated that it was not the mandate of the 1st defendant to initiate criminal proceedings.

16. During examination-in-chief, DW1 testified that the first consignment was on KBM 094V/ZD 6887 and KAZ 790E/ZE 5339, and the 2 vehicles left the border point with it on 28th March 2019. Then on 2nd April 2019, he got information that an attempt was being made to clear another consignment using the entry forms for vehicles that had been cleared on 28th March 2019. He rushed to the border point, and established that that was so, hence the impounding of the sugar on the vehicles that had already been cleared, and of the other 2, and the subsequent arrest and arraignment of the 1st plaintiff in court.

17. On the matter of the sale of the sugar as ordered by the court, he said that the sale could only be carried out subject to approval from other government agencies, such as the Kenya Bureau of Standards. He stated that a report from the Kenya Bureau of Standards, dated 18th February 2020, indicated that the sugar did not comply with their standards, and recommended that the same should not be sold for human consumption, after which the Kenya Revenue Authority communicated that information to the plaintiffs. He said that he was unaware of the order of 10th November 2020, adding that it was probably overtaken by events, upon the sugar being declared unfit for human consumption.

18. During cross-examination, he said that no communication was made to the court that the sugar was bad or unfit. He conceded that the sugar went bad while in the custody of the Kenya Revenue Authority. He said that he did not have a report to show that the warehouse was fit for storing sugar. He said that the C17B Form was a customs declaration of goods, to which they assigned a value to the

goods sought to be cleared, and in the case of the plaintiffs, the value was assessed at Kshs. 1,694,750.00 for 1 truck carrying 560 bags. He stated that they had relied on an invoice provided by the importer. He said that he was aware that the plaintiffs paid Value Added Tax for each truck, and he did not think that the money was repaid by the Kenya Revenue Authority. He said that the Kenya Revenue Authority had the trucks for 2 months, before they got a court order for their release. He said that for that period the sugar was in the trucks in the open with a canvas top.

19. At the close of the oral hearings, the parties filed written submissions.

20. The submissions by the plaintiffs are dated 14th November 2024. They submit on 2 points: the possible reasons for the impounding of the vehicles and the sugar, and the conduct of the Kenya Revenue Authority which led to the sugar going bad.

21. On the first issue, they submit that there was no evidence that the plaintiffs were trying to use the entry documents for their consignment of sugar to have another consignment cleared. They assert that if that were true then the drivers of the vehicles bearing that other consignment would have been arrested and that consignment impounded. They submit on their suspicions why they were arrested, but I note that suspicion is a matter of evidence, being sneaked in through written submissions, for no evidence of that sort was presented at the oral hearing, neither is it in the witness statements and affidavit lodged herein.

22. On the second point, they submit that the sugar went bad or got contaminated because of extreme negligence on the part of the Kenya Revenue Authority. They argue that the Kenya Revenue Authority had 2 options of either selling the sugar and depositing the money in court as had been ordered by the court: or to release the sugar to the plaintiffs upon payment of Value Added Tax as per the court order. They submit that because of the malice and negligence of the Kenya Revenue Authority they suffered bot special and general damage. They cite, in support of their case, Erastus Maina Karanja vs. Machakos County Government [2021] KEHC 4757 (KLR) (Kemei, J).

23. The submissions by the 1st defendant are dated 18th December 2024. The defendants submit on 3 points: whether the defendants had a justifiable cause to report the plaintiffs to the law enforcement agencies; whether the 1st defendant was justified in not selling sugar that was declared unfit for human consumption; and whether the plaintiffs had specifically pleaded and strictly proved the special damages sought. It is submitted, overall, that the plaintiffs had not proved their case to the required standard, and the same ought to be dismissed with costs.

24. On the first issue, the 1st defendant submits that the decision whether to prosecute was made by a different State agency, and, therefore, it cannot be blamed for the prosecution of the 1st plaintiff. It is submitted that there were no customs entries for sugar being imported into the country using KBS 081Q/ZD8256 and KBR 591N/ZD0812, yet they were found with sugar trying to enter the country, and that there were attempts to have the 2 trucks cleared using the clearance or entry forms for KBM 094V/ZD 6887 and KAZ 790E/ZE 5339. It is submitted that there was no evidence that taxes were paid for the sugar sought to be brought in using KBS 081Q/ZD8256 and KBR 591N/ZD0812.

25. It is finally submitted that the plaintiffs had not established that the complaint made against them was false or made with malice or spite. It is asserted that the defendants had established that there was reasonable cause to believe that the plaintiffs had committed an offence. Article 157(6) of the *Constitution*, Bethwel Omondi Okal vs. Attorney General & another [2018] eKLR (Mwita, J), Samson Gwer & 5 others vs. Kenya Medical Research Institute & 3 others [2020] eKLR (Ibrahim, Ojwang, Wanjala, Ndungu & Lenaola, SCJJ), Patrick Nyamuke Etori vs. National Police Service Commission & 2 others [2019] eKLR (Mwita, J), Republic vs. Faith Wangoi [2015] eKLR (Nyakundi, J) and Nzoia Sugar Company Limited vs. Fungututi [1988] eKLR (Platt, Apaloo JJA & Masime Ag. JA) are cited in support.

26. On the second issue, it is submitted that the 1st defendant could not be faulted for failing to sell sugar that had been declared unfit for human consumption, for selling such sugar would have endangered the lives of Kenyan citizens. It is submitted that the claim that the sugar went bad because of poor storage had not been proved and was speculative. Mbuthia Macharia vs. Annah Mutua Ndwiga & another [2017] eKLR (Visram, Karanja & Koome, JJA) is cited.

27. On the third issue, it is submitted that the plaintiffs had been unable to point to a single piece of evidence establishing special damage, in terms of a receipt, or MPesa transaction, or bank transactions. On proof of loss of business, it is submitted that the plaintiffs had not proved how they had come by the value of Kshs. 10,500.00 per bag of the sugar alleged to have had gone bad. Similar submissions are made about the special damage relating to transport costs and purchase of the sugar. It is conceded that the only amount available is that related to purchase of the sugar imported and ferried on KBM 094V/ZD 6887 and KAZ 790E/ZE 5339. It is also submitted that there was no proof that duty was paid on the sugar import on KBS 081Q/ZD8256 and KBR 591N/ZD0812. Kosgei vs. Mutisya [2024] KEHC 156 (KLR) (Wananda, J) and Samson Gwer & 5 others vs. Kenya Medical Research Institute & 3 others [2020] eKLR (Ibrahim, Ojwang, Wanjala, Ndungu & Lenaola, SCJJ) are cited.

28. Having reviewed the pleadings and the other documents filed in support thereof, the oral testimonies of the 2 witnesses presented by the parties, as well as the written submissions lodged herein, I have identified the following issues for determination:

    a. Whether the actions by the defendants of impounding the plaintiffs' goods were justified;

    b. Whether the plaintiffs had proved that they suffered special damage;

    c. Whether the plaintiffs have proved entitlement to general damages; and

    d. Who should pay costs of the suit.

29. On the first issue the allegation is that the actions of the defendants of detaining the sugar laden on KBS 081Q/ZD8256 and KBR 591N/ZD0812 were actuated by malice. The plaintiffs state that the main reason for the impounding of the trucks and the sugar was that they had not paid duty, yet they had, and that was the reason why the charges brought against them, in Busia CMCCRC No. 398 of 2019, of making an application which was false, contrary to section 203(b) of the East African Community Customs Management Act, 2004, floundered.

30. The issue appears to turn around payment of duties on the sugar imports on the 4 vehicles mentioned in the proceedings, namely KBM 094V/ZD 6887, KAZ 790E/ZE 5339, KBS 081Q/ZD8256 and KBR 591N/ZD0812. The case by the defendants is that the duty was paid for sugar imported into the country using KBM 094V/ZD 6887 and KAZ 790E/ZE 5339; however, no duty was paid for the sugar carried in KBS 081Q/ZD8256 and KBR 591N/ZD0812. The plaintiffs argue that duty was in fact paid for the sugar carried in KBS 081Q/ZD8256 and KBR 591N/ZD0812. Both sides rely on the same documents to advance those arguments. The one side, the defence, argues that the documents on KBM 094V/ZD 6887 and KAZ 790E/ZE 5339 show that duty on the sugar on those vehicles had been paid, and that the plaintiffs tried to use the documents relating to those vehicles to evade paying duty for the sugar ferried on KBS 081Q/ZD8256 and KBR 591N/ZD0812. The plaintiffs have not presented their own documents, but rely on those presented by the defence, to argue that those documents show that duty was paid on the sugar laden on KBS 081Q/ZD8256 and KBR 591N/ZD0812.

31. The proceedings, conducted in Busia CMCCRC No. 398 of 2019, pointed to the position that there was allowance for the import clearance forms, C-17B, to be altered, particularly regarding details of the vehicles carrying the goods, in cases where disagreements arise between transporters and owners of the

cargo, to necessitate changing from one transporter to another. My understanding of the proceedings, in Busia CMCCRC No. 398 of 2019, is that the prosecution failed as the defendants were not able to demonstrate that there was no such disagreement that might have led to the plaintiffs, whose goods were initially being transported on KBM 094V/ZD 6887 and KAZ 790E/ZE 5339, and for which they had paid duty on the basis of forms founded on KBM 094V/ZD 6887 and KAZ 790E/ZE 5339, having fallen out with their transporters, forcing them to shift to KBS 081Q/ZD8256 and KBR 591N/ZD0812, in respect of which they did not have to pay duty a second time.

32. I understand, from that record, the trial court to have been of the view that form C-17B might have been altered to replace KBM 094V/ZD 6887 and KAZ 790E/ZE 5339 with KBS 081Q/ZD8256 and KBR 591N/ZD0812, and the trial court appeared to be fortified in that thinking by the fact that, although KBM 094V/ZD 6887 and KAZ 790E/ZE 5339 had been impounded, at about the same time with KBS 081Q/ZD8256 and KBR 591N/ZD0812, on grounds of not having paid customs duty, the 2, KBM 094V/ZD 6887 and KAZ 790E/ZE 5339, were subsequently released under unclear circumstances. It was noted that there was no evidence of what KBM 094V/ZD 6887 and KAZ 790E/ZE 5339 were carrying, when they crossed the border point, and when they were stopped and impounded at Kisumu, before their release.

33. Of course, it would be notable that the plaintiffs, in their case, did not appear to advance the case that came out in Busia CMCCRC No. 398 of 2019, and appeared to suggest, in their oral testimony, that they had nothing to do with KBM 094V/ZD 6887 and KAZ 790E/ZE 5339, while in their written submissions they appear to rely on the same documents as the defence, where the 4 vehicles feature.

34. Whatever the case, the case for the defendants shall stand or fall based on the findings of the court in Busia CMCCRC No. 398 of 2019, which do not appear to have been challenged on appeal. I note that the defendants did not seek to seal, in these proceedings, the gaps identified in Busia CMCCRC No. 398 of 2019, in the prosecution of their defence in this suit, and which gaps were the basis upon which the prosecution case was dismissed, on a no case to answer, by Hon. P. Olengo, Senior Principal Magistrate, on 3rd September 2020.

35. For avoidance of doubt, this is what the trial court noted:

> " It is not in dispute that the two accused persons made an application for alterations. They did so because, as stated in the evidence herein there was a disagreement between the owner of the goods and the transporter. It is also in evidence that such alterations are allowed if there are good reasons for them."

36. The court went on:

> " In this case, the only reason why the same was not allowed and why the two accused persons herein were arrested was because there were motor vehicles KAZ 790E/ZE 5339 and KBM 094V/ZD 6887 which had been impounded in Kisumu carrying uncustomed sugar. He however said the two motor vehicles were released under unclear circumstanced. There was no evidence brought before this court to show that the said motor vehicles were indeed impounded and what goods they were carrying. There was no OB report to show that the motor vehicles were detained in Kisumu. The police officers who detained the motor vehicles was not called to testify whether the said motor vehicles had sugar. Even though PW1 confirmed that the two motor vehicles passed by the customs and were recorded in their register, there is no evidence that they passed there loaded with sugar which belonged to the accused person herein."

37. The trial court added:

> " Even though PW5 stated that one of the vehicles passed the weighbridge loaded, it can't be said whether it was loaded with sugar or not. It cannot be said whether the load belonged to the 1st accused person herein or not or whether the load was loaded in Uganda or in Kenya. The drivers or owners of the said motor vehicles were not traced or called as witnesses to confirm if indeed they had carried sugar and whether the sugar belonged to the 1st accused person herein."

38. It was concluded that:

> " I find that there are gaps in the prosecution case that need to be filled. It is not the duty of the accused person to fill those gaps."

39. The issue is whether the defendants were justified to have the 1st plaintiff arrested and prosecuted on the allegation of making a false claim for alterations of the said entries, by pretending that the form C-17B, filled for KBM 094V/ZD 6887 and KAZ 790E/ZE 5339 was being altered following a disagreement with the owners of the said vehicles, to enable him change the particulars to bring in the new transporters of his sugar. Was there justification for the defendants to suspect that the alleged alteration was not genuine? Of course, the forms being relied on to make the alterations bore the numbers of KBM 094V/ZD 6887 and KAZ 790E/ZE 5339, under which duty had been paid. It was possible that the form could be altered with an intent to evade tax. It would not have been unreasonable for the defendants to believe that a person seeking to alter such a form had no good motives, and was up to no good, and that would provide justification for a report being made to the relevant authorities for the purpose of investigation.

40. The prosecution was founded on section 210(g) of the East African Community Customs Management Act, 2004, which criminalises falsification of documents relating to customs, entry, declarations, among others. The same can be basis for the impounding of goods the subject of the said documentation, to facilitate, no doubt, investigations and possible prosecution.

41. The trial court did not absolve the 1st plaintiff of wrongdoing. All what the court did was to find that there were gaps in the prosecution case, so significant that the 1st plaintiff could not be called upon to answer to the charge against him. The burden was on the prosecution, to establish that which it was alleging, and the standard of proof, the charge being criminal, was beyond reasonable doubt. The trial court was saying, an effort should have been made to establish KBM 094V/ZD 6887 and KAZ 790E/ZE 5339 were intercepted at Kisumu while carrying a cargo of sugar belonging to the plaintiffs, they had paid duty for it and the form that the plaintiffs were trying to alter had been used to clear that sugar into Kenya, and, therefore, it was not available for alteration in the manner that was being proposed by the plaintiffs.

42. There was justification for the 1st defendant to take the action of reporting the matter to the police, but the prosecution of that case failed, not on fault on the part of the 1st defendant, but on account of either poor investigations, by failing to gather evidence to connect all the dots, or poor prosecution, by the failure to call all the witnesses relevant to bring out the entire chain of events. The prosecution relied solely on the C-17B form, which could not bespeak itself. There was need to call witnesses who could adduce evidence on its salient aspects, as indicated above, particularly that relating to KBM 094V/ZD 6887 and KAZ 790E/ZE 5339, and the connection between those vehicles and the plaintiffs, about the said form.

43. I am not clear whether the case herein is also seeking damages for malicious prosecution and illegal confinement, for although these words are used in the body of the re-amended plaint, there is no specific prayer for damages with respect to them. No matter. As I have found that there was justification for the report to the police, and that the case did not founder for lack of justification, but rather on either poor investigations or weak prosecution, there would be no basis for finding that the arrest and confinement of the 1st plaintiff was illegal or unlawful.

44. The tort of malicious prosecution is about a prosecution being driven by more than mere pursuit of justice. Malice, spite or ill will must be brought out, to demonstrate that the prosecution was not ordinary, but it was one driven by ill or ulterior motive. See Black's Law Dictionary, Tenth Edition, Thomas Reuters, 2009, 1101, and 1102; Nzoia Sugar Company Limited vs. Fungututi [1988] KLR 399 (Platt, Apaloo JJA & Masime Ag JA); Gitau vs. Attorney General [1990] KLR 13 (Trainor, J); Standard Chartered Bank Kenya Ltd vs. Intercom Services Ltd & 4 others [2004] eKLR (Gicheru CJ, Githinji & Onyango-Otieno JJA) and Peter Kituku Ngilu vs. Attorney General [2021] eKLR (Riechi, J). The 1st plaintiff, in his presentation orally in court, and in his documents, has not sought to bring out that.

45. The Kenya Revenue Authority is an entity, not a natural person. It cannot possibly have any malice or ill will or spite against individuals. It is only the individuals behind it, its officers, who can possibly harbour such against other individuals, and who can use the entity to pursue certain intentions and agenda against such other individuals. The 1st plaintiff has not isolated any officer of the Kenya Revenue Authority, be it the 1st defendant himself, or any other person within the organisation, as having been motivated or animated by malice or ill will or spite towards him, so much as to drive the prosecution in Busia CMCCRC No. 398 of 2019 against him, for whatever reason, which the 1st plaintiff should have brought out in his evidence, if at all there was any. The mere fact that a prosecution collapsed, either because it was not properly founded or was not properly handled, would not provide a foundation for a conclusion that the prosecution was malicious.

46. On the issue of the disposal of the sugar by way of sale upon the court order, I note that the 1st plaintiff was arrested on 2nd April 2019, and he was arraigned in court on 15th May 2019. It is not clear when the said sugar was impounded, but it appears that the same must have been done on or about 2nd April 2019. The order to sell the sugar was made on 24th September 2019, and the report from the Kenya Bureau of Standards was received on 18th February 2020. It goes without saying that sugar is perishable foodstuff. Whenever such foodstuffs are subject to a judicial process, which is likely to be lengthy, caution ought to be exercised, to preserve the same pending determination of the dispute. If the foodstuff cannot be preserved in storage, it may be prudent to have it converted to money, which would then be deposited in court. After determination of the dispute, the court would then determine the fate of the money, in terms of to whom it should be given or paid over to.

47. The mere fact that a commodity is under a legal or judicial process does not mean that the person claiming it as owner is divested of it. Neither does the fact that the same is exposed to impounding or forfeiture to the State mean that the ownership claims of the person asserting title to it are diminished or extinguished, so that whoever impounds it would be at liberty to deal with it at will. The constitutional right to the property would still reign supreme, and the second or third party handling it, by way of taking custody of it, becomes ultimately answerable to the owner.

48. The sugar in question was claimed by the plaintiffs, which claim is acknowledged by the defendants. The only dispute around it relates to payment of customs duty on it. The plaintiffs claim that they had paid duty for the sugar. The defendants claim that that duty was not paid, hence the need to impound the sugar, until the same is either paid, or there is a determination on whether it is payable,

with a possibility that the same could be forfeited to the State. The impounding of the sugar did not divest the plaintiffs of ownership. It was still their sugar, and they could regain control of it, once the dispute around payment of the duty was resolved. The impounding of the sugar by the Kenya Revenue Authority did not make the Kenya Revenue Authority the owner of the sugar, with liberties to deal with it as it desired. Once it gained custody of it, it became a trustee, with respect to it, and it incurred a duty to take care of the sugar, on behalf of the plaintiffs, until such time that the dispute was resolved. The Kenya Revenue Authority became a fiduciary, with a duty to account for the sugar, to the plaintiffs, should something untoward happened to it. The expectation would be that the Kenya Revenue Authority would handle it in much the same way that the plaintiffs would have, had the same remained in their possession.

49. The quantity of the sugar is put at 1,120 bags. A large quantity by any measure. The plaintiffs could only have been dealing in such a large quantity of sugar for commercial purposes. It would be safe to presume an intent to sell it and make a profit in the process. Anyone, other than the owner, handling the sugar, in execution or furtherance of a legal or administrative process, would have to bear that in mind, particularly, the fact that should anything happen, to cause damage or loss to the sugar, would expose the owner to economic loss, and the owner would look up to the custodian for recompense. The same principle would apply where the consignment is on transit, and it is lost or destroyed in the process. The owner would look up to the transporter for recompense, for, as custodian in transit, the transporter would assume the position of a trustee, who ought to account to the owner of the property. A transporter would be expected to take out a policy of insurance to protect himself against such risks. An entity, such as the Kenya Revenue Authority, which seizes goods belonging to a person who is liable to pay tax for them, is in much the same shoes as the transporter.

50. There is no dispute that the sugar in question was impounded by the Kenya Revenue Authority. It was initially at a place within Busia, before it was moved to Kisumu. It emerged that it was held in the 2 trucks for a period, which sounded like 2 months or so, before an order came from court, for the release of the trucks or lorries to their owners. It is not immediately clear where the sugar was thereafter stored. The state of the sugar as at when it was impounded has not been documented, but I am alive to the fact that the Kenya Revenue Authority was not raising issue with its quality or state, as at when it impounded it, but on whether duty over it had been paid. The witness for the 1st defendant, DW1, testified that the sugar went bad while in their custody. At the initiation of proceedings in Busia CMCCRC No. 398 of 2019, the issue of the sugar being unfit for human consumption did not arise and was not raised. If it were an issue, then there would have been no prosecution around payment of duty, instead the authorities would have been pushing to have it destroyed.

51. The Kenya Revenue Authority, upon taking custody of the sugar, and upon having criminal proceedings commenced against the owner, ought to have taken steps to secure its preservation. It should have moved the court, to allow it to dispose of the sugar, by converting it to money, which could then be held as a deposit by the court, pending determination of the dispute. That it did not do.

52. I note from the record that the plaintiffs had applied to have the sugar released to them upon payment of duty. The application was dated 9th April 2019. The court referred the matter to the 1st defendant, in the spirit of alternative dispute resolution. Nothing came out of it, for the said application was never argued, nor determined on its merits. On 7th August 2019, the Advocate for the 1st plaintiff, Mr Okeyo, informed the court that the goods in question were perishable, and that the 1st plaintiff was paying for the warehouse where they were being kept, and if the prosecution was not keen on prosecuting, then it should consider terminating the matter under section 87(a) of the *Criminal Procedure Code*. When the court gave the prosecution a last adjournment, the Advocate, Mr. Okeyo, proposed that the goods could be disposed of, and the money deposited in court.

53. A formal application was then lodged, dated 18th September 2019, by the 1st plaintiff, which the defendants did not oppose, and the same was allowed, on 24th September 2019. On the said date, Mr. Okeyo for the 1st plaintiff, emphasised the need for the sale to happen at the soonest, to avoid storage charges. The sale did not happen the soonest possible, contrary to the urgings by Mr. Okeyo, for no steps were taken in the matter until 3rd January 2020, slightly over 3 months thereafter, when the sugar was gazetted for sale on 4th February 2020. Before the sale could happen, the Kenya Bureau of Standards presented a report declaring the sugar unfit for human consumption.

54. Is the Kenya Revenue Authority liable for the sugar going bad? It has been argued that there was no evidence that the sugar deteriorated during the time that it was in the custody of the Kenya Revenue Authority, and that in fact there was no evidence that it was negligence from the Kenya Revenue Authority that had caused the sugar to go bad. As indicated above, the issue of the state of the sugar, on 2nd April 2019, when it was seized, did not arise. If it were an issue, the Kenya Revenue Authority would have been happy to have it declared unfit at that time, and to push for its destruction or safe disposal. DW1 conceded that it went bad during the time it was under the Kenya Revenue Authority custody, given the way it was stored in the trucks in the open for the 2 months before the trucks were released.

55. It suffices that the state or quality of the sugar was not an issue when the same was in the custody of the Kenya Revenue Authority, until the process of disposing of it arose. I reiterate, that the Kenya Revenue Authority took custody of the sugar, and it should have been alert to the possibility of its quality deteriorating whilst in its possession, and it should have, from inception, taken steps to secure it. It did not. It was the 1st plaintiff who had the presence of mind to start raising the issue. Even after the order to sell it, and deposit the money in court, was made, the Kenya Revenue Authority still dragged its feet, for 3 months. Whether there was negligence or not, the position remains that the sugar deteriorated while in the custody of the Kenya Revenue Authority, and liability for that should lie with the Kenya Revenue Authority, which should absorb the losses suffered by the plaintiffs as a result.

56. So, what was the loss suffered by the plaintiffs? I will consider that next.

57. The starting point should be with the question as to who owned the sugar. There appears to be no dispute over the ownership. The plaintiffs claim it. The 1st plaintiff was prosecuted over it. There is no dispute as to who brought the sugar into Kenya. I have also seen the order made on 10th November 2020, directing that the sugar be released to the 1st plaintiff.

58. The next consideration is the amount or volume or quantity of the sugar. The court order of 20th November 2020 talks of release of 1,120 bags of sugar that had been seized during the investigations. The witness statement of DW1 indicates that 2 trucks were intercepted on 2nd April 2019, KBS 081Q/ZD8256 was loaded with 560 bags of 50 kilogramme Lugazi brown sugar, and so was KBR 591N/ZD0812. The ruling of the court, of 26th April 2019, alluded to both trucks being loaded with bags of sugar, the quantity or volume was not indicated, but the order was to off-load the sugar, keep the same at the Kenya Revenue Authority godown at Busia, and then release the trucks to the owners. So, the 2 trucks were loaded with sugar, in the same quantities as KBM 094V/ZD 6887 and KAZ 790E/ZE 5339, from the same source, Sugar Corporation of Uganda, Lugazi, and the 4 vehicles showed up at the borders at more or less the same time. The first 2 on 28th March 2019, and the latter 2 on 2nd April 2019, if one goes by the version of events as narrated by the defendants.

59. According to DW1, the value assigned to the 560 bags in each truck was Kshs. 1,694,750.00, for the consignments on KBM 094V/ZD 6887 and KAZ 790E/ZE 5339. For the 1,120 bags lost in the 2 trucks, KBS 081Q/ZD8256 and KBR 591N/ZD0812, the total should come to Kshs. 3,389,500.00. Customs duty for the 1,120 bags on KBM 094V/ZD 6887 and KAZ 790E/ZE 5339 was charged based

on the said value, and the plaintiffs would have paid an equivalent amount of customs duty for the 1,120 bags on KBS 081Q/ZD8256 and KBR 591N/ZD0812, again based on the same value.

60. On loss of business, the plaintiffs claim that they would have sold a bag at Kshs. 10,500.00, which they claim was the market value at the time the consignment was impounded. They place interest at 14% per annum for 5 years. No evidence was laid out to support this claim. No report of an economist, or by an expert in foreign or cross border trade, or a dealer in commodities such as cereals, was laid before the court. No basis was laid for the figures of Kshs. 10,500.00 per bag, or of the 14% per annum interest within 5 years. As a judicial officer, I can only approach these matters from the perspective of a lawyer, and not as an economist, even if I was one, for I cannot decide matters on what I privately know. The duty is on the parties to present evidence, to support that which they allege. See Capital Fish Kenya Limited vs. The Kenya Power & Lighting Company Limited [2016] eKLR (Makhandia, Ouko & M'Inoti, JJA).

61. No receipts from previous transactions, around that time, were tabled, to assist the court estimate the cost or market value of a 50-kilogramme bag of brown sugar at that time. The other way of working out loss of business would be from examining audited accounts of the businesses conducted by the plaintiffs, about transactions carried out previously, in dealings with brown sugar sold in 50-kilogramme bags. That could go some way in indicating the value of the goods, and the profit margins. See David Irungu Mwangi vs. Attorney General [2018] eKLR [2018] KEHC 4850 (KLR) (Mwita, J). No such audited accounts were produced.

62. The plaintiffs also claim transport costs. It is not clear to me what these costs entail, for no evidence was led on the same. It is not clear whether it is in respect of hiring the trucks to transport the sugar, or whether it is the transport costs incurred by the 1st plaintiff during the criminal trial, or what. Whatever it is, no evidence was adduced. What is pleaded appears to relate to payment of Kshs. 15,000.00 per truck, for 4 trucks, for 23 days. No evidence was tendered of who was paid that amount of money, and when. He who alleges must prove. See Capital Fish Kenya Limited vs. The Kenya Power & Lighting Company Limited [2016] eKLR (Makhandia, Ouko & M'Inoti, JJA).

63. The plaintiffs also seek to recover moneys in respect of customs duty paid for 4 vehicles. From my understanding of this case, the sugar lost amounted to 1,120 bags, loaded in 2, not 4 vehicles, being KBS 081Q/ZD8256 and KBR 591N/ZD0812. If any customs duty were to be recovered, it would only be in relation to the 2 vehicles, not 4. The other 2, KBM 094V/ZD 6887 and KAZ 790E/ZE 5339, were said to have had been impounded, but released, and they went away with whatever cargo they were carrying. The sugar that was damaged was that which was loaded on KBS 081Q/ZD8256 and KBR 591N/ZD0812, if one goes by the court order of 26th April 2019 in in Busia CMCCRC No. 398 of 2019.

64. Was customs duty paid for the sugar that was on KBS 081Q/ZD8256 and KBR 591N/ZD0812? Evidence on payment of duty on this sugar is hazy. There is evidence that customs duty might have been paid on the sugar that was on KBM 094V/ZD 6887 and KAZ 790E/ZE 5339, if one goes by the narrative from the defendants. However, the narrative by the plaintiffs is confused. In one breath, they say that the sugar on KBM 094V/ZD 6887 and KAZ 790E/ZE 5339 is the same as sugar that was loaded on KBS 081Q/ZD8256 and KBR 591N/ZD0812, which would then mean that they would be entitled to recover the customs duty paid on the sugar that was loaded on the 4 trucks at different times, totalling 1,120 bags, given that the sugar was destroyed while in the hands of the Kenya Revenue Authority, to whom they had paid the duty. Then again, the plaintiffs appear to argue that they know nothing about KBM 094V/ZD 6887 and KAZ 790E/ZE 5339. Then again, they appear to say all the sugar in KBM 094V/ZD 6887, KAZ 790E/ZE 5339, KBS 081Q/ZD8256 and KBR 591N/ZD0812

was destroyed, yet they had paid duty for it, hence the claim for refund of duty for sugar carried in the 4 lorries.

65. The trial court, in Busia CMCCRC No. 398 of 2019, did not find one way or the other. It neither believed the narrative by the plaintiffs, nor the story by the defendants. None of the parties presented evidence at trial, in this suit, which shed more light on the matter beyond the case presented in Busia CMCCRC No. 398 of 2019. I shall take it that no customs duty was paid for the sugar that was on KBS 081Q/ZD8256 and KBR 591N/ZD0812, hence there would be nothing recoverable under this heading.

66. The last claim is for recovery of the moneys that the 1st plaintiff paid as legal fees to his Advocate, Mr. Okeyo, for the purposes of the criminal proceedings in Busia CMCCRC No. 398 of 2019. The claim under this head is for Kshs. 300,000.00. To support the same, he produced a fee note, from Mr. Okeyo, Advocate. The 1st plaintiff would be entitled to the amount claimed if he in fact paid the same to Mr. Okeyo. I have not seen a receipt issued by Mr. Okeyo, Advocate, to acknowledge payment of the sum of Kshs. 300,000.00 by his client. A fee note is nothing more than an invoice from an Advocate to client. In the absence of an official receipt from Mr. Okeyo, there would be no proof that the fee note was settled, to justify an order being made for recovery of the amount from the defendants. See Total (Kenya) Limited Formerly Caltex Oil (Kenya) Limited vs. Janevams Limited [2015] eKLR (Warsame, M'Inoti & Murgor, JJA) and Kenya Revenue Authority vs. Doshi Iron Mongers Ltd & another [2024] KECA 176 (KLR) (Murgor, Laibuta & Odunga, JJA).

67. In any event, I have already concluded, above, that the initiation of the complaint against the 1st plaintiff was justified, and so were the arrest, confinement and prosecution that followed. If there was justification, and as the prosecution has not been established to have been malicious, there would be no basis to recover the legal fees incurred, and paid, if at all, in the circumstances.

68. The other consideration would be the claim for general damages. General damages are assessed by the court, and they are supposed to be unliquidated. I see that the plaintiffs have liquidated them at Kshs. 20,000,000.00, yet no basis has been laid for coming up with that figure. According to Jogoo Kimakia Bus Services Limited vs. Electrocom International Limited [1992] KLR 177 [1992] eKLR (Gicheru, Cockar & Muli, JJA), general damages would be awarded in respect of such loss or damage as the law presumes to result from the infringement of a legal right or duty. It was emphasised that damage must be proved, but the claimant need not quantify exactly any items in it.

69. In the instant case, the plaintiffs claim under 2 bands. The first is the unlawful arrest, illegal confinement and malicious prosecution of the 1st plaintiff. They claim Kshs. 2,000,000.00 under this band. I have already ruled that there was justification for the complaint, and the actions that were taken thereafter; and that there was nothing to establish malice, spite or ill will on the part of the 1st defendant. Nothing, is, therefore, awardable under this band.

70. The second band is with connection to the impounding of the 2 trucks and the subsequent loss of the 1,120 bags of sugar. The impounding of the sugar is tied up with what I have decided above; that there was justification for the complaint, which led to that impounding, and the criminal proceedings that followed. Therefore, no general damages are available for the act of the impounding of the trucks and the cargo. It was done within the law.

71. The problem lay with the manner of the handling of the sugar, after it was lawfully impounded, which handling led up to the loss of the entire 1,120 bags. The manner the sugar was dealt with by the 1st defendant, leading to its damage, could be termed as negligent, highhanded, oppressive and arbitrary.

See Kenya Revenue Authority vs. Doshi Iron Mongers Ltd & another [2024] KECA 176 (KLR) (Murgor, Laibuta & Odunga, JJA).

72. Having taken hold of the sugar, and acquired possession and custody over it, and the plaintiffs having lost possession, custody and control of the sugar to the 1st defendant, the burden or responsibility of taking care of the sugar shifted from the plaintiffs to the 1st defendant. Since the sugar still remained the property of the plaintiffs, the 1st defendant owed a duty of care to the plaintiffs over the sugar, to ensure that the same was properly stored and handled, generally, to prevent it from being either contaminated or exposed to conditions that could lead to its diminution in standard and value, and to take all steps available to prevent or avoid such loss. The power to impound goods, which is conferred by the law, is not a licence for the impounded goods to be exposed to damage, by the impounder, except in cases where the law sanctions destruction.

73. It has been argued, for the 1st defendant, that the plaintiffs have not proved that the sugar went bad during the period it was under the custody of the Kenya Revenue Authority. When the sugar was taken away from the plaintiffs to the custody and control of the Kenya Revenue Authority, the issue of it being unfit for human consumption did not arise. It was not impounded because it was substandard, making it worthless from the start. If it were unfit from the beginning, the issue of payment of duty would not have arisen, for the sugar would have been condemned at that point, and seized for the purpose of being destroyed. The authorities at the Busia border point allowed it into Kenya, on or about 2nd April 2019, after it had been inspected by all the relevant agencies, including the Kenya Plant Health Inspectorate Service and the Kenya Bureau of Standards, which deal with quality of foodstuffs and standards of goods, respectively, and the issue of the sugar being unfit did not arise until February 2020. The cargo did not enter Kenya through the back door or panya routes. It was not impounded because of that. It entered the country properly, through the official gates, and if there was anything untoward about its quality or standards, that would have been detected there.

74. It would appear that it was the handling of the sugar, between 2nd April 2019 and February 2020, that affected it. The same was in the custody and under the control of the Kenya Revenue Authority during that period, and the burden, of explaining or accounting for what happened to the sugar within that period, did not lie with the plaintiffs, but with the Kenya Revenue Authority. That burden could not be placed on, or shifted to, the plaintiffs, as they had no custody and control over the sugar during that period. The Kenya Revenue Authority incurred a duty to account to the plaintiffs, for what had happened to their sugar, once the same was declared bad.

75. The way the sugar was handled by the Kenya Revenue Authority, and the general attitude that it adopted, with respect to the state of the sugar while under its custody and control, displayed scant respect for private property, and the right or entitlement to it. The right to own property is constitutional, and, that being so, all persons and entities are obliged to give the highest consideration to that right, whatever the circumstances. The attitude by the Kenya Revenue Authority, regarding the possibility of the sugar perishing while under its custody, displays lack of care as to whatever happened to it, and lack of care to whatever loss that the owner was exposed to, should the goods perish.

76. The criminal trial record reflects that Mr. Okeyo urged the defendants, on many occasions, very early on in the criminal matter, that the commodity in question was perishable, and something needed to be done to preserve it. He proposed that the 1st plaintiff could pay the customs duty due. The matter was referred to the 1st defendant for resolution, based on that proposal, but no heed was paid, by the 1st defendant, to that suggestion by Mr. Okeyo and the approach adopted by the trial court. Mr. Okeyo then proposed that, as the matter was dragging, and the goods were perishable, the defendants should consider withdrawal of the prosecution. The 1st defendant ignored that proposal. Next, he proposed

disposal of the sugar, and deposit of the sale proceeds in court. The defendants did not take cue from any of those suggestions and proposals. That issue was only resolved when a formal application was filed, by the 1st plaintiff, which the prosecution then conceded to. Even after the order was made, on 24th September 2019, the 1st defendant still dillydallied until January 2020, when the Kenya Revenue Authority began to make moves, towards selling the property, but it was then too late, for the sugar had gone bad.

77. The criminal prosecution could also have been fast-tracked, given that its subject-matter was perishable, to obviate the possibility of the goods perishing during the course of the prosecution, if the defendants were not keen on accepting payment of the customs duty due, or the sale of the sugar and deposit of the sales money in court. No effort was made to fast-track the prosecution. The criminal matter was first placed before the court on 3rd April 2019, and, as the subject-matter of the prosecution were perishable goods, there was need to fast-track the case, yet no prosecution witness was presented until 17th September 2019, when the first witness testified, and the next witness, the second, did not testify until 18th February 2020. After that the next and last witnesses testified on 14th July 2020.

78. The property could have been salvaged, if the 1st defendant had taken the steps proposed by Mr. Okeyo, or serious efforts were made by the defendants to speed up or fast-track the criminal matter. The whole dispute turned on payment of customs duty. The Kenya Revenue Authority is a public entity, tasked with collection of taxes. Its interest in the impounded property should have been nothing more than collecting the tax or taxes due with respect to it. After impounding the trucks and the sugar, and charging the 1st plaintiff in court, and once it got to the point where the taxpayer was ready to pay the customs duty due, to save his property, the Kenya Revenue Authority should have heeded, collected the taxes or duties due, and released the sugar.

79. The Kenya Revenue Authority exists for public good. It should facilitate citizens in business, not hinder or obstruct them. The plaintiffs were in business. They had imported a commodity. The only interest of the Kenya Revenue Authority should have been to collect tax due from that import. Holding it in a yard and later at a warehouse, for an extended period, till the commodity went bad, despite warnings, was not in the best interests of the Kenya Revenue Authority, nor of the public. The Kenya Revenue Authority lost the revenue it would have collected. That was not to the good of the public and the economy of the country. It exposed taxpayers, the plaintiffs herein, to loss, for they lost their sugar, and the profit that they had hoped to make from the sale of the sugar, and they also lost on the expenses incurred, attendant upon the whole affair of arranging for the acquisition of the sugar in Uganda and its transfer to Kenya. Whichever way one looks at it, the conduct by the Kenya Revenue Authority was not in the best interests of the country. There were losses everywhere, for everybody, including the Kenya Revenue Authority itself.

80. One way of the Kenya Revenue Authority handling the dispute, should have been to dispose of the sugar, after obtaining leave of the court to sell it, recover whatever customs duty was due, and release or handover the balance of the sale proceeds to the plaintiffs, if it felt strongly that the plaintiffs did not deserve to have the sugar back, for whatever justifiable reason. If it felt strongly that a crime or offence had been committed, for which the 1st plaintiff ought to have been subjected to penal consequences, for general deterrence, nothing would have prevented the Kenya Revenue Authority from pressing the criminal charges or continuing the criminal proceedings, while at the same time preserving the property, after converting it into money, to obviate the sort of loss that happened in the end.

81. There was damage of a general nature suffered by the plaintiffs, over and above the value of their sugar import. They were exposed to the pain and agony of seeing property that they had incurred expenses on, in time, money and effort, to acquire from Uganda, going to waste. They suffered the

pain of watching helplessly as the 1st defendant did nothing to preserve and protect the commodity. Something could surely have been done, but was not done, to salvage the situation. It looks like either sabotage of local businesses and the national economy, or indifference to the plight of citizens, or plain malice towards ordinary people struggling to eke a living one way or the other, or ignorance of the core responsibility of the State agency by its officers or employees.

82. Where infringements happen, of the kind alleged in Busia CMCCRC No. 398 of 2019, the State should punish for the same, usually by way of imposing a fine or a penalty of the financial kind, without necessarily killing the initiative or drive of the individuals involved. Kenya needs more courageous, innovative and self-driven individuals to indulge in business and trade, even across borders, to raise revenue for the Kenya Revenue Authority to collect taxes from, to create opportunities for other businesses which service and support them to thrive, and to promote employment for all who provide labour and services to these businesses and trades. State entities should operate in ways that assist, educate, encourage, enlighten, guide, motivate, promote and uplift such individuals. They should not tend towards frustrating them and killing their spirits.

83. Who should bear the costs of the suit? It is trite that costs follow the event. I have found for the plaintiffs, as against the 1st defendant, on 2 heads.

84. Although the 2nd defendant filed a defence, it dropped out of the matter, at some stage, and did not participate in the actual trial. It simply abandoned the proceedings, as if to leave its fate to the court.

85. In view of everything said above, I will, as I hereby do, dispose of the matter herein as follows:

    a. That the case founded on unlawful arrest, false imprisonment and malicious prosecution is hereby dismissed;

    b. That I award Kshs. 3,389,500.00, to the plaintiffs as against the 1st defendant, for the loss of the 1,120 bags of sugar, that were on KBS 081Q/ZD8256 and KBR 591N/ZD0812;

    c. That I award Kshs. 500,000.00, general damages, in favour of the plaintiffs and against the 1st defendant; and

    d. That the plaintiffs shall have the costs of the suit, against the 1st defendant.

86. Orders accordingly.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 21ST DAY OF FEBRUARY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

Mr. Ashioya, instructed by Ashioya & Company, Advocates for the plaintiffs.

Mr. Leparan Lemiso, Advocate for the 1st defendant.

Mr. Juma, instructed by the Attorney General, for the 2nd defendant.