



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. 169 OF 2018

MARTIN OTIENO

KENYA REVENUE AUTHORITY.....APPELLANTS

-VERSUS-

THOMAS MWITA MARWA.....RESPONDENT

TRANS MARA SUGAR CO. LTD.....RESPONDENT

(Being an appeal from the ruling and order of Hon. J. Alambo , Senior Resident Magistrate

in Kehancha Resident Magistrate's Civil Suit No. 7 of 2018 delivered on 25/10/2018)

JUDGMENT

1. **Thomas Mwita Marwa**, the Respondent herein, is a Kenyan national and owns motor vehicle registration number **T747 DKR** (hereinafter referred to as '**the vehicle**') which is the subject of this matter. The vehicle was registered in the Republic of Tanzania. Arising from the detention of the vehicle by the Appellants at the Kenya/Tanzania border at Isebania/Sirare border station the Respondent instituted **Kehancha Senior Resident Magistrates Court Civil Suit No. 7 of 2018** against the Appellants (hereinafter referred to as '**the suit**') sometimes in April 2018 where the Respondent sought *inter alia* the unconditional release of the vehicle and General Damages for illegal retention of the vehicle.

2. The suit was fully heard and judgment in favour of the Respondent as against the Appellants rendered on 25/10/2018 in which the Appellants were ordered to unconditionally release the vehicle and pay Kshs. 2,500,000/= General Damages. It is that judgment (hereinafter referred to as '**the impugned judgment**') which prompted the filing of the appeal subject of this decision.

3. The Appellants preferred the following 17 grounds of appeal in their Memorandum of Appeal dated 21/11/2018. Directions were taken, and the appeal was disposed of by way of written submissions where both parties duly complied. The Appellants consolidated the 17 grounds into 5 clusters. They are **one**; whether the learned trial magistrate erred in law and in fact by making a finding that the Respondent did not contravene the **East African Community Customs Management Act, 2004**, **two**; whether the learned trial magistrate correctly applied the principles of equity in view of the fact that the Respondent had not produced all documents and had a pending criminal case, **three**; whether the learned trial magistrate appreciated the Appellants' mandate under the **East African Community Customs Management Act, 2004**, **four**; whether the learned trial magistrate erred in law and in fact by entering judgment for the Respondent for Kshs. 2,500,000/= and **five**; whether in awarding the damages to the Respondent, and ordering the release of the vehicle, the learned trial magistrate addressed her mind to the correct principles of law.

4. On whether the learned trial magistrate erred in law and in fact by making a finding that the Respondent did not contravene the **East African Community Customs Management Act, 2004**, (hereinafter referred to as '**the EACCM Act**') Appellants relied on **Section 83(1)** of the **EACCM Act** in contending that it has the mandate of fighting cross-border theft and smuggling of uncustomed goods and since the vehicle had been involved in acts of tax evasion through **Messrs. Malva Coach Builders Limited** in Kenya (hereinafter referred to as '**Malva**'), the Appellants had a duty to seize and forfeit the vehicle. As to whether the learned trial magistrate correctly applied the principles of equity in view of the fact that the Respondent had not produced all documents and had a pending criminal case, the Appellants contend that the Respondent deliberately concealed crucial information from the Appellants and as such the Respondent was not entitled to any damages. The decision in **Great Lakes Transport Company Uganda Ltd vs. Kenya Revenue Authority (2009) eKLR** as used by the trial court was distinguished and submitted not to be in consonance with this matter. The Appellants relied on the twin decisions of **Satwant Singh Dhanjal & 2 Others t/a Paramount Hauliers vs. Kenya Revenue Authority (2017) eKLR** and **Shelly Beach Hotel & Another vs. Kenya Revenue Authority (2019) eKLR** in buttressing their submissions.

5. On the ground as to whether the learned trial magistrate appreciated the Appellants' mandate under the **EACCM Act** the Appellants laid emphasis on **Sections 5, 210, 211, 213 and 214** of the **EACCM Act** in contending that the court erred in ordering the release of the vehicle. On whether the learned trial magistrate erred in law and in fact by entering judgment for the Respondent for Kshs. 2,500,000/= the Appellants submits that there was no basis in law for such a decision and that the award was erroneous. The Appellants prayed that the appeal be allowed and the judgment be set-aside.

6. The Respondent opposed the appeal. He supports the decision of the trial court and submits that he was unlawfully denied crucial information and access to his property contrary to **Articles 35, 40, 46, 48 and 165(3)(d)** of the **Constitution** and that the Appellants in such realization voluntarily released the vehicle to him hence the Appellants' now position in holding on to the appeal defeats logic. He further submits that the evidence of DW1 and DW2 was not in support of the defence and ought to be disregarded. The Respondent further contends that the position that the Respondent presented false documents with a view to evade payment of taxes ought to have been contained in a Counter-Claim and since that did not happen the allegations cannot hold. The Respondent prayed that the appeal be dismissed with costs.

7. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni -versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga -versus- Kiruga & Another (1988) KLR 348**).

8. I have certainly perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties.

9. This matter hinges on whether the Appellants lawfully detained the Respondent's vehicle at the Isebania/Sirare border point (hereinafter referred to as '**the border point**'). The brief background of the matter is that the Respondent moved his vehicle from Tanzania to Kenya through the border point where it was fabricated from a truck to a passengers' bus. On return the Respondent presented some documents to the Appellants for purposes of customs clearance for the movement of the vehicle from Kenya to Tanzania. The Appellants suspected the documents to be concealing material facts on the vehicle and they detained the vehicle as they carried out investigations. In the course of investigations, the Appellants obtained other documents from Malva which disclosed that the value of the works undertaken on the bus were greatly reduced in the documents tendered to the Appellants in an attempt to evade paying of the correct amount of taxes both in Kenya and at the Tanzanian border point. The Appellants then seized the vehicle. The Respondent sued the Appellants in the suit which yielded the impugned judgment.

10. The Second Appellant herein, **Kenya Revenue Authority** (hereinafter referred to as '**the KRA**'), is a creation of the **Kenya Revenue Authority Act, No. 2 of 1995** (hereinafter referred to as '**the KRA Act**'). The **KRA Act** is an Act of Parliament to establish a central body for the assessment and collection of revenue, for the administration and enforcement of the laws relating to revenue and to provide for connected purposes. The body contemplated therein is the KRA. **Section 3** of the **KRA Act** creates KRA as a body corporate with perpetual succession and a common seal. The laws relating to revenue which KRA is to administer and enforce are in the **First Schedule** of the **KRA Act** and include the **Tax Procedures Act No. 29 of 2015**, the **Customs and Excise Act, Cap. 472** of the Laws of Kenya, **Value Added Act, Cap. 2013**, the **EACCM Act** and **The Annexes to the Protocol on the Establishment of the East African Community Customs Union**.

11. In a bid to understand the genesis of the involvement of KRA in matters involving goods from Tanzania we need to look at the history on how the countries have all along dealt. The three countries forming the East Africa being the Republic of Kenya, the Republic of Tanzania and the Republic of Uganda (hereinafter referred to as '**the Partner States**') have for so long been desiring of coming up with a common union. Sometimes in 1967 the Partner States came up with the East African Community which was dissolved in 1977. Due to the increased need for such a union the Partner States revived the **East African Community** in 1999 (hereinafter referred to as '**the Community**'). That was through the signing of **The Treaty for the Establishment of the East African Community** (hereinafter referred to as '**the Treaty**'). The main objective of the Community is contained in **Article 5** of the **Treaty** being the development of policies and programmes aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs for their mutual benefit. In pursuance of the main objective the Partner States undertook to immediately establish among themselves a Customs Union and a Common Market and subsequently a Monetary Union and ultimately a Political Federation.

12. Pursuant to the provisions of **Article 75** of the **Treaty** the Community established a **Protocol on the Establishment of the East African Customs Union** (hereinafter referred to as '**the Customs Protocol**'). The **Customs Protocol** provides for 16 areas of co-operation including, rules of origin, customs co-operation, re-exportation of goods and security. **Article 9** of the **Customs Protocol** provides that the Partner States must co-operate in the prevention, investigation and suppression of customs offences within their territories and to that end each of the Partner States shall afford each other mutual assistance with a view of preventing, repressing and investigating customs offences and to also exchange information on goods known to be the subject of illicit traffic and to maintain surveillance over the movement of all goods.

13. Towards the attainment of the **Customs Protocol** Kenya enacted the **EACCM Act** which **Act** pursuant to **Section 1(2)** thereof applies to the Partner States. The **EACCM Act** was assented to by the President of the Republic of Kenya on 31/12/2004 and commenced operation on 01/01/2005. **Part XVII** of the **EACCM Act** provides for **Offences, Penalties, Forfeitures and Seizures**.

14. The foregone being the prevailing legal background, a look at what exactly happened at the border point in respect of this matter is paramount. It is undisputed that the Respondent is the owner of the vehicle which was initially a truck and who intended to carry out some works on it in Nairobi Kenya with the aim of transforming it to a passengers' bus. To that end the Respondent approached the **Tanzania Revenue Authority** (hereinafter referred to as '**TRA**') and indicated that he wanted to carry out some **repairs** on the vehicle in Nairobi Kenya and he was issued with a **Form P. 45 Re-Importation Permit** S/No. TZSR/P45/06/08/17 on 15/06/2017 which was produced as the Respondent's Exhibit 1. On 17/06/2017 the Respondent availed the vehicle at the Kenyan border point at Isebania and a **Cargo Manifest** (East African Community Customs Form C.2) was duly issued confirming that the vehicle was an Empty Truck. The vehicle details were

entered in the KRA's Empty Trucks Register on the said 17/06/2017 and upon payment of the requisite customs charges vide ESLIP NUMBER: 2017ISB148788F the vehicle was released and proceeded to Nairobi.

15. On 27/02/2018, around 8 months later, as the vehicle was driven back to Tanzania it first had get the customs clearance from KRA and as it awaited that process it was parked at the customs yard. The Respondent lodged the documents on the vehicle for purposes of clearance. The documents were the **Re-Importation Permit**, an **Invoice** No. 20180227-1 from Malva dated 27/02/2018 and a **Delivery Note** No. 0480 dated 27/02/2018 from Malva with Invoice 0459 dated 18/12/2017 written thereon as well. The Appellants carefully perused the said documents and referred to the Empty Truck Records which indicated that the vehicle crossed into Kenya as a truck. However, it was noted that the vehicle was returning to Tanzania as a bus having been totally transformed at the cost of Kshs. 472,000/= inclusive of taxes. The Appellants were not convinced of the genuinity of the documents presented and asked the Respondent to present the Invoice No. 0459 dated 18/12/2017 which number appeared on the Delivery Note dated 27/02/2018. The Invoice was instead not produced by the Respondent or at all. In view of the failure to produce the documents and given that there were alterations on some of the documents tendered the Appellants made a decision to and detained the vehicle as it carried out investigations and issued the Respondent with **Form 89 Notice of Goods Deposited in Customs Warehouse**.

16. The Appellants then invoked the provisions of the **Tax Procedures Act** and obtained more documents from Malva. The new documents from Malva were an **Invoice No. 0459** dated 18/12/2017 for a total of Kshs. 2,900,000/=-, **Delivery Note No. 0480** dated 18/12/2017 and **Order/Specification** dated **19/06/2017**. The Delivery Note bore Invoice No. 0459 dated 18/12/2017 thereon.

17. The Appellants scrutinized the two sets of documents; the ones tendered by the Respondent and the ones it obtained from Malva and it was clear that the correct cost of the works undertaken by Malva on the vehicle being Kshs. 2,900,000/= was not disclosed and instead a false Invoice for Kshs. 472,000/= was issued. As the vehicle was so held the Appellants revealed the commission of several offences and further the Respondent interfered with the vehicle a result of which **Form C. 53 Notice of Seizure** was issued on account of the interference.

18. On the foregone background, I will now deal with all the grounds of appeal together. **Section 2 of EACCM Act** defines '**uncustomed goods**' as follows: -

Includes dutiable goods on which full duties due have not been paid, and any goods, whether dutiable or not, which are imported or transferred or in any way dealt with contrary to the provisions of the Customs laws.

19. I have closely scrutinized the two sets of documents which were all produced as exhibits in the suit. I am convinced that the documents reveal that the Respondent was engaged in tax evasion. On the part of Kenya, the Respondent paid a paltry Kshs. 65,103/45 instead of Kshs. 464,000/= on account of the 16% **Value Added Tax** chargeable on the works undertaken and on the part of Tanzania the Respondent intended to lodge the documents with false disclosure on the value of the repair works undertaken thereby leading to an underpayment of duty as well. I am hence satisfied that the vehicle fits the description of an uncustomed goods for two reasons; first that full **Value Added Tax** for the repair works undertaken by Malva was not paid in Kenya and second; the Respondent was engaged in unlawful and deliberate steps towards payment of less duty in Tanzania. That being the case, the vehicle was *inter alia* liable to forfeiture under **Section 210(c)** of the **EACCM Act** which states as follows: -

In addition to any other circumstances in which goods are liable to forfeiture under this Act, the following goods shall be liable to forfeiture –

a. any prohibited goods;

b. any restricted goods which are dealt with contrary to any condition regulating their importation, exportation or carriage coastwise;

c. any uncustomed goods;

20. Further, the vehicle was also liable for seizure and forfeiture under **Part XII of the Value Added Act, Cap. 476** of the Laws of Kenya and under **Part XV of the Customs and Excise Act, Cap. 472** of the Laws of Kenya among other Laws of Kenya.

21. The power of seizure of goods liable to forfeiture is variously provided for in the foregone laws. For instance, the **EACCM Act** provides as follows in **Section 213(1)**: -

An officer or a police officer or an authorized public officer may seize and detain any aircraft, vessel, vehicle, goods, animal or other thing liable to forfeiture under this Act or which he or she has reasonable ground to believe is liable to forfeiture; and that aircraft, vessel, vehicle, goods animals or other thing may be seized and detained regardless of the fact that any prosecution for an offence under this Act which renders that thing liable to forfeiture has been, or is about to be instituted.

22. It is therefore open that the moment the Appellants confirmed that the Respondent was engaged in activities towards tax evasion both in Kenya and Tanzania on the vehicle then the vehicle became an uncustomed good and was liable to seizure and forfeiture under various laws. The Appellants were hence within the confines of the law in exercising the right of seizure. The seizure cannot therefore be described as irrational or unfounded since it was firmly based on the law unlike in the decision of **Republic vs. The Institute of Certified Public Accountants of Kenya ex parte Vipichandra Bhatt t/a Bhatt and Company (Nairobi HCMA No. 285 of 2006)** referred to by the trial court in the impugned judgment.

23. Further to the seizure, it must be clear that the Respondent was liable to prosecution on several offences *inter alia* under **Part XVII of the EACCM Act, the Tax Procedures Act, the Value Added Tax Act, the Customs and Excise Act, Penal Code** among other Laws of Kenya.

24. Having found that the Respondent was right in seizing the vehicle then all the other issues fall by the wayside. For avoidance of doubt, the Respondent was not entitled to any general damages or to the unconditional release of the vehicle. However, the law permits the Appellants to release the vehicle to the Respondent with or without conditions, but such release in the circumstances of this case should not be construed as an admission of liability on the part of the Appellants.

25. On the issue as to whether the Appellants were to file a counter-claim in pleading acts of tax evasion by the Respondent, I must state that the argument is misconceived. That is because the Appellants extensively so raised the issue in the Statement of Defence dated 25/04/2018 and also in the filed Witness Statements and since that was the Appellants' only defence then by holding that the Appellants were to file a counter-claim effectively means that the Appellants did not have a defence to the Respondent's claim against it. That cannot be the position as the Appellants' defence to the Respondent claim has all along been the aspect of tax evasion on the part of the Respondent.

26. A counter-claim is only raised when a Defendant has a claim against the Plaintiff in the same suit and in this case since the Appellants had already exercised the right of seizure on the vehicle then there was no need of a counter-claim as the law is clear on how the Appellants are to deal with the vehicle in such a case.

27. The trial court in the impugned judgment rightly so addressed its legal mind to the contents of the Notice of Seizure dated 09/04/2018 and noted that the reason for the seizure was interference of the vehicle while under customs control contrary to **Section 210(f)** of the **EACCM Act**. There were however several other developments that surrounded the seizure. For instance, on 06/03/2018 the Appellants had seized the vehicle from the Respondent who is the owner and placed it in its warehouse and issued **Form 89 Notice of Goods Deposited in Customs Warehouse** and the Appellants gave the reason of the detention as '*pending customs clearance*'. That was a move taken by the Appellants to accord them time to investigate the matter further. The Notice of Seizure was issued **one month later** on allegations of interference with the vehicle while in customs control. There was also the result of the investigation undertaken by the Appellants which disclosed tax evasion on the part of the Respondent. That effectively made the vehicle an '*uncustomed good*' under **Section 2** of **EACCM Act** and the vehicle was liable to forfeiture under **Section 210(c)** of the **EACCM Act**.

28. With tremendous respect to the Learned Trial Magistrate, had the court further addressed its legal mind to the investigation which revealed that the Respondent had contravened various laws of the land and that the vehicle was an uncustomed good under **Section 2** of the **EACCM Act** and liable to forfeiture under **Section 210(c)** of the **EACCM Act** and that **Section 214** of the **EACCM Act** does not require the issuance of the seizure notice if the goods in issue are seized in the presence of the owner, it is my unreserved belief that the court would have arrived at a different finding on the matter altogether. The reason why the Appellants did not issue a Notice of Seizure on 06/03/2018 is that the seizure was done in the presence of the Respondent and **Section 214** of the **EACCM Act** came into play unlike the events of 09/04/2018 where it is alleged that the Respondent instead sent some people to interfere with the vehicle which was then in customs control. The latter case definitely called for the issuance of the notice. Therefore, to accord the Respondent an opportunity to unconditionally repossess the vehicle on top of an award of damages will be tantamount to closing our legal eyes to the various contraventions of the different laws of our land. Whereas the Appellants under the Treaty are called upon to ensure that there is unrestricted movement of goods within the Partner states, the very Treaty only sanctions such unrestricted movement of goods to only those goods which fully comply with the various laws of the Partner states and the Community. In this case the vehicle fell short of being among those goods to be accorded such unrestricted movement within the Partner states.

29. Having so said and found, I now come to the following final findings, that: -

a. The appeal is hereby allowed.

b. The award of general damages of Kshs. 2,500,000/= together with interest at court rates from judgment is hereby set-aside and vacated.

c. The order on the unconditional release of the vehicle number T747 DKR to the Respondent, Thomas Mwita Marwa, is hereby set-aside and vacated.

d. The suit Kehancha Senior Resident Magistrates Court Civil Suit No. 7 of 2018 is hereby dismissed accordingly.

e. The Respondent to bear the costs of the suit and the appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 19th day of September 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open court and in the presence of: -

Mr. Rodgers K. Koima Counsel instructed by the Appellants.

Mr. Agure Odero Counsel instructed by the firm of Messrs. Agure Odero & Associates Advocates for the Respondent.

