Commissioner of Customs & Excise v Kaaya Enterprises Limited & 3 others (Civil Appeal 204 of 2020) [2024] KECA 502 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KECA 502 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL 204 OF 2020

SG KAIRU, JW LESSIT & GV ODUNGA, JJA

APRIL 26, 2024

BETWEEN

COMMISSIONER OF CUSTOMS & EXCISE ..... APPELLANT

AND

KAAYA ENTERPRISES LIMITED ..... 1ST RESPONDENT

KENYA PORTS AUTHORITY ..... 2ND RESPONDENT

EVERGREEN SHIPPING LINE ..... 3RD RESPONDENT

UNICOM LIMITED ..... 4TH RESPONDENT

(An appeal against the whole of Judgment of High Court of Kenya at Mombasa (P.J. Otieno, J.) delivered on 29th May 2019 in H.C.C.C No. 193 of 2012.)

JUDGMENT

1. This is an appeal against the judgement of P.J. Otieno, J. delivered on 29th May 2019 in which he entered judgment for the 1st respondent against the appellant in the sum of USD 40,000 as the value of its consignment that was unlawfully sold. The learned Judge condemned the 1st respondent to pay the costs of the suit to the 2nd and 3rd respondents.

2. In the plaint dated 24th October 2012 the 1st respondent, a Ugandan company, challenged the wrongful sale by the appellant of container EMCU 3672428 Serial No. EMCAL59711, as abandoned cargo because of failure to clear the consignment in accordance with the applicable law. The 1st respondent had been contracted vide 3 tenders awarded to it by the Uganda National Roads Authority, to deliver heavy earth moving equipment; that the 1st respondent ordered for the goods after receiving assurance vide letters of credit, that payment would be paid on delivery; that the goods arrived together at Mombasa Port in 2 containers No. EMCU 3672428 Serial No. EMCAL59711 and No. EGHU

3061846 Serial No. EMCALS8851 under bill of lading no. 1421 55275113 in December 2011. That by the time it contracted Maruni Product Limited, its agent to clear the cargo it was confirmed that one container EMCU 3672428 Serial No. EMCAL59711 with 13 pellets 24965, 400kgs 20,000CMB had been sold by the appellant.

3. The 1st respondent informed its client, Uganda National Roads Authority, which raised their concerns with the appellant in the manner in which its goods were suspiciously auctioned, considering that by so doing, Uganda National Roads Authority fell behind schedule in their country-wide project of constructing roads, and which is a matter of public policy, which could affect the cordial and warm relation enjoyed by the two agencies.

4. On the said account, the 1st respondent claimed to have suffered severe loss and damage and held the appellant, 2nd, 3rd and 4th respondents jointly and severally liable. It lodged a complaint with the appellant, then filed suit against the

appellant, the 2nd, 3rd and 4th respondents. The 1st respondent blamed the 3rd respondent for failing to relay in a timely manner the details of the 1st respondent's container to the 2nd respondent thus causing delay that resulted in the eventual auction of the container. The appellant and the 2nd respondents were held liable for the illegal sale of the container for hurriedly selling it at a gross undervalue to the 4th respondent without the due process of the law. The 1st respondent sought judgment against the appellant and the 2nd, 3rd and 4th respondent jointly and severally, seeking:

a. A permanent injunction restraining the 4th respondent by themselves, servants and/or agents or through any person whatsoever or acting on their behalf or behest from using, selling or wasting away the goods described as:-

i. Grader Blades Part No, 5D-9558

ii. Bolts part No. 3F-5108 and

iii. Nut part No. 4K-0367 and any other goods consisting and/or being shipment in Container No. EMCU 3672428.

a. The immediate restitution of the goods specified in prayer (a) above and/or in the alternative the appellant and the 2nd, 3rd and 4th respondents jointly and or severally be ordered to purchase the goods as outlined in prayer (a) above from SG PRODUCTS (F.E) PTE. LTD in SINGAPORE, CHINA and have the same

delivered to the 1st respondent's final destination

point i.e. KAMPALA, UGANDA.

c. Special damages due as provided at the hearing hereof.

d. Costs and interests.

5. The appellant in its defence admitted that the container in issue No. EMCU 3672428 Serial No. EMCAL59711 arrived on 7th December 2011; that it was put under customs control in terms of section 16 of the East African Community Customs Management Act (hereinafter the Act), where it was to be cleared within 21 days; that no such clearance took place resulting in the 2nd respondent transferring the container to the appellant's warehouse at Kilindini on 27th April 2012 with a condition that it be cleared within 30 days. It was pleaded that the 1st respondent failed to clear the said container and therefore the appellant vide gazette notice dated 7th May 2012 gazetted the goods in the container for

auction, with the auction slated for 26th June 2012. The goods in container No. EMCU 3672428 were sold at Kshs.750,000/- to the 4th respondent.

6. The appellant emphasized that there was need for goods to be entered within 21days to avoid the appurtenant consequences in case of default. Secondly, that the auction sale notices must be issued in the Gazettes of the Partner State or newspaper of wide circulation in such state. That according to

the appellant, the phrase Partner State referred to the state where the commissioner is giving the notice.

7. It further pleaded that the 2nd respondent transferred the second container to the appellant's Custom Warehouse when the 1st respondent did not lodge an entry within 21 days after commencement of discharge in compliance with section 34 of the Act. That it was on the verge of placing it for auction when it was informed that the goods belonged to Uganda National Roads Authority, for which reason, the appellant invoked its statutory power under section 42(2) of the Act and extended the time for removal of the goods and that the goods were recovered on 24th August 2012.

8. At this point, it is expedient to demystify a term that appears severally in the submissions of counsel to the parties in this judgment. The term is 'entered'. What 'entered' means or constitutes is expressly stipulated under section 34, whose side note reads 'entry of cargo'. The section provides:

> 34.
>
> (1) Save as otherwise provided in the Customs laws, the whole of the cargo of an aircraft, vehicle or vessel which is unloaded or to be unloaded shall be entered by the owner within twenty one days after the commencement of discharge or in the case of vehicles on arrival or such further period as may be allowed by the proper officer, either for-
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> a. home consumption;
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> b. warehousing;
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> c. transhipment;
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> d. transit; or
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> e. export processing zones.
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> 2. Where any entry is delivered to the proper officer, the owner shall furnish with the entry full particulars supported by documentary evidence of the goods referred to in the entry.
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> 3. Entries for goods to be unloaded may be delivered to the proper officer for checking before the arrival at the port of discharge of the aircraft or vessel in which such goods are imported; and in such case the Commissioner may in his or her discretion permit any goods to be entered before the arrival of such aircraft or vessel or vehicle.
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> 4. Where any goods remain unentered within the period specified under subsection (1) then such goods shall, if the proper officer so requires, be removed by, or at the expense of, the agent of the aircraft or vessel in which such goods were imported to a Customs warehouse."

9. The appellant denied the assertion by the 1st respondent that the goods sold were undervalued and pleaded that the highest bid was accepted.

10. The appellant further denied being served with a demand, and if it was, that it was not in accordance with section 3(2) (a) of *Kenya Revenue Authority Act*. It was averred that the entire suit is fatally defective and bad in law for want of compliance with the mandatory provisions of the *Kenya Revenue Authority Act* and the *Government Proceedings Act*.

11. The 2nd respondent filed its defence and denied every allegation put forth by the 1st respondent. It emphasized that the entire port area is a custom area for which no goods are dispatched without sanction of the appellant. The 2nd

respondent denied being part or having played any part in the auction. It was further pleaded that it is the 2nd respondent's duty under the law to transfer the cargo once no entry was lodged within the prescribed time in compliance to section 34 of the Act, and that by April 2012, the 2nd respondent was only able to trace one container which it transferred. The 2nd respondent admitted that indeed the 1st respondent applied for waiver of storage charges for the two containers which was granted and proceeded to pay the port charges.

12. The 3rd respondent in its defence admitted being the shipping line. However, it stated that it had appointed one Gulf Badr Group (K) Limited as its local country agent to deal with all issues pertaining to the suit. The 3rd respondent averred that it shipped the 1st respondent's consignments and off loaded them to the custody of the 2nd respondent who took custody thereof awaiting the 1st respondent who was the consignee to make clearances. That the 3rd respondent did an electronic manifest which was made accessible to the appellant. The 3rd respondent stated that the contract of carriage by sea is governed by the conditions found at the back of the bill of lading which expressly excludes it from any liability on its part including any alleged failure to notify any party of the bill. The 3rd respondent averred that despite the terms of the contract, it notified the 1st respondent who never responded.

13. On the issue of sale by auction, the 3rd respondent contended that it only came to learn about it from correspondences by the 1st respondent and maintained that it did not play any part in the sale by the appellant and contended that sale is a statutory power vested in the appellant.

14. The 4th respondent in its defence stated that it saw a public auction notice published in the Gazette Notice dated 11th May 2012 indicating sale of goods by public auction of unclaimed goods to take place on 26th June 2017 within the custom warehouse. It was its statement that it was interested and so placed a bid for Kshs.750,000/= which was accepted as the highest bidder and the respondent proceeded to make payments by depositing the sum into a bank account operated by the appellant at National Bank of Kenya. The 4th respondent pleaded that after paying and acquiring the goods, it sold them to a third party before the suit was instituted. It was averred that this was done unintentionally and without knowledge of the claim by the 1st respondent. The 4th respondent claimed that it was an innocent purchaser for value without notice and without any element of fraud or collusion on its part. For those reasons, the 4th respondent prayed for the 1st respondent's suit against it be dismissed with costs.

15. At the hearing of the case before the High Court, the 1st respondent relied on two witnesses one Deborah Kigongo and

one Edward Fredrick Walusimbi. The gist of the 1st respondent's case was that having been awarded a tender by the Uganda Roads Authority proceeded to order construction machinery parts from Singapore which goods were shipped by the 3rd respondent and landed or received at the 2nd

respondent's premises. It was testified that two containers arrived at the same time under one bill, which made it difficult for the 1st respondent to locate the same for clearance.

16. Deborah testified that when she received the bill of lading in Kampala on 25th May 2012, she found her way to Mombasa and directly to the 3rd respondent's office, only to be told that one of the containers had been auctioned by the appellant. It was the testimony of the 1st respondent that the sale was irregular as the same was done without notice. That the 1st respondent contacted the appellant and it was able to stop another auction of the second container which appeared not to have been paid for. The container was cleared and shipped to its destination. It was the 1st respondent testimony that the container was sold at a low price of Kshs.387,500/= while the goods were bought at USD 40,000. That the appellant was also at fault by selling the suit goods as metal bars when the same were specialized equipment properly identified in the goods title of the bill of lading as ground engaging tools.

17. That when follow up was made regarding the auction, it was revealed that there was a notice published on 11th May 2012

in which the suit consignment was advertised for sale. The 1st respondent challenged the notice and testified that the same was a Kenyan Gazette which did not circulate in Uganda and not East African Community Gazette, hence the 1st respondent was unaware of the notice given by the appellant until after the sale.

18. The 1st respondent blamed the appellant for failure to issue a notice in the East African Community Gazettee and for valuing and selling the suit property at a loss. In addition, the appellant was faulted for failing to notify the persons named in the bill of loading.

19. As against the 2nd respondent, the blame was that the 1st respondent's containers having been shipped under one bill of lading, they ought to have been stored together and not separated. That it is because of the separation that one was treated as un-customed and sold, when the rest awaited clearance.

20. The 3rd respondent was blamed for failing to notify the 1st respondent when the goods arrived. And lastly, blame was placed on the 4th respondent for colluding with the 1st respondent to buy goods as metal bars when the same were generalized as heavy machinery parts known as ground engaging tools.

21. On the part of the appellant three witnesses testified; Aquilino Mwithalii, John Kimuge Cherutich, and Davis Kiprop. The gist of their evidence was that the appellant had complied with section 34 and 42 of the Act in so far as issuing of notices was concerned. That the Gazette Notice gave accurate description of the goods marching the other documents and therefore an auction was arranged and sale effected.

22. On issue of valuation of the suit goods, David Kiprop, a supervisor with the Valuation and Tariffs section of the appellant, testified that inspection was done on the goods and a valuation report prepared. That before carrying out the valuation, a physical examination of the cargo was done for purposes of verification and valuation. That the suit container was open but it only had customs seal and not shipper seal. That the price fixed was based on physical examination because the goods had no transaction documents having not been entered by the owner, the 1st respondent as required under the Act. That the said valuation was done in compliance with section 122 and 4th schedule of the Act where deduction method was used and the goods valued as similar items in the market. It was confirmed that the value of the goods arrived at was Kshs.500,000/- whose 90% was Kshs.450,000/= fetching more than the value assigned.

23. One Dzolla Bweni Muadzila, Senior Operations Officer, testified on behalf of the 2nd respondent. He gave an account

in relation to the suit consignment. That a manifest was recalled from Kenya Revenue Authority (KRA) on 29th November 2011 which was reconciled on 3rd December 2011 while the goods were discharged on 11th December 2011, moved to the Customs Warehouse on 25th April 2012 and handed over to KRA on 27th April 2012. He confirmed that when the container was received, it was without seal and argued that an explanation could only be given by KRA. He testified that upon hand over of the suit consignment, the container was taken into the control of the appellant who was to place its security seal on it and that thereafter, the 2nd respondent ceased any relationship with the container.

24. On cross-examination by parties, Mr. Dzolla confirmed that the 2nd respondent could not accept a container without seal of the shipping line. That to transfer a container to customs warehouse, the 2nd respondent used information in the manifest. Further the witness confirmed that the suit containers were transferred having overstayed for more than 21 days and that the two containers were in fact captured in the reconciliation and the inspection and confirmation was done jointly between the 2nd respondent and KRA.

25. For the 3rd respondent Munir Ababakar Masuud, an employee of Gulf Badr Limited and agent of the 3rd respondent testified on it's behalf. He stated that when the cargo safely landed, the 3rd respondent's obligation over the cargo ended, as provided

in the terms at the back of the bill of lading, and in particular clause 25 thereof, that ousts any obligation on the part of the 3rd respondent to notify any party. However, he said that the shipping line had no obligation to inform the owner of the goods on the date of arrival but in this case, but out of benevolence and not obligation, they wrote three letters to the 1st respondent dated 13th February 2012, 3rd March 2012 and 4th April 2012 which were said to have been sent by registered post.

26. On cross-examination, the witness confirmed that KRA did not comply with section 42 of the Act. Secondly, that there was anomaly that the container was transferred to the Customs Warehouse without the shipping line seal and lastly, that the reserve price was not correctly computed. To him, the 3rd respondent did not learn of the auction sale till Maruni Products Company visited them with the news. It was also confirmed that the 3rd respondent received a deposit for the container from the 1st respondent on 29th June 2012 when the cargo had already been sold.

27. One Bashminkumar Rapadia testified on behalf of the 4th respondent. The gist of his testimony was that the 4th respondent responded to an advert for public auction, attended the auction, and emerged the highest bidder for the goods. That the 4th respondent later paid the purchase price and took possession of the goods. Subsequently, it sold the

same to a third party who was not a party to the proceedings. It was testified that the 4th respondent went to the auction without the information in the valuation report regarding the reserved price, thus offering Kshs.750,000/= for the goods with the sole purpose of resell.

28. After hearing the parties evidence and after considering their written submissions and relevant authorities filed, the learned Judge of the High Court found the issues for his determination were seven, which can be summarized as:

    i. Whether the appellant disposed of the goods in compliance with the law;

    ii. Whether the auction sale was lawful;

    iii. Whether the 2nd respondent retained any control over the goods after it transferred them to the appellants warehouse;

iv. Whether after the discharge of the goods with the 2nd respondent the 3rd respondent retained any obligations to the 1st respondent over the goods;

v. Whether the 4th respondent was a bona fide purchaser for value without notice, or whether the sale was vitiated by collusion or fraud;

vi. Whether the 1st respondent was entitled to any of the reliefs sought; and.

vii. What orders should be made as to costs.

29. In a judgment dated 29th May 2019 the learned Judge found, in regard to the interpretation of section 42 of the Act, that the amendment of 2011 'replaced the word gazette with gazettes of the partner state or newspaper of wide circulation'. That the publication of the notice made in the Kenya Gazette on 11th

May 2012 was not the legal notice expected under the Act, which defeated the purpose of notice to the owner of the goods who resided in Uganda and had no access to the Kenya Gazette. The learned Judge found that the auction sale conducted on 26th June 2012 based on the said faulty notice denied the 1st respondent of its right accorded to him by the law and was not validly conducted. The learned Judge found that having found the sale invalid, he was satisfied that it caused the 1st respondent an illegitimate and unlawful deprivation of property for which it should be compensated.

30. The learned Judge found that having moved the goods to the appellant's warehouse, the 2nd respondent ceded control over the goods by operation of the law under section 34 of the Act. He found further that by virtue of that delivery, by operation of the law, the goods are deemed to have been delivered to the consignee. In regard to the obligation the 3rd respondent had to the 1st respondent, the learned Judge found that as per the contract at the back of the bill of lading, the same stood discharged and satisfied upon discharge of the cargo at the Port of Mombasa, pursuant to section 26 of the Act. That the notification by the 3rd respondent to the 1st respondent that the goods had arrived and risked auction if not entered as required under sections 34 the Act thereof, was duly given therefore the 3rd respondent could not be faulted.

31. The learned judge found that the 4th respondent was a bona fide and innocent purchaser for value without any notice as to any challenge of the appellant right to conduct the sale, and that it acquired good title to the goods.

32. The learned judge found that the 1st respondent's claim against the 2nd, 3rd and 4th respondent could not succeed and dismissed the same. He found the 1st respondent's claim against the appellant merited and entered judgment against the appellant in the sum of USD 40,000 with interest thereon from August 2012, being the date the 1st respondent was ready to take possession of the goods, till payment in full.

33. On the claim for special damages, the learned judge found that the same was not specifically pleaded and dismissed it.

34. On costs, the Court held that the 1st respondent should get costs of the suit as against the appellant only. Having failed in its claim as against the 2nd and 3rd respondents, the 1st respondent was condemned to pay their costs.

35. Aggrieved and dissatisfied with the judgment of the learned Judge, the appellant preferred an appeal to this Court faulting the Judge on ten (10) grounds (even though the tenth one is not a ground of appeal) as follows:-

1. "Having found that it was not disputed that the 1st respondent had failed to enter the goods for clearance within the statutory timelines, and the time for the appellant to take steps towards disposal of the un-entered goods having accrued

   by reason of such non-entry, the learned judge erred in fact and law by proceedings to hold that the appellant unlawfully disposed of the 1st respondent's goods.

2. Having found that there was indeed service of three (3) letters to the 1st respondent, notifying it of the delivery of goods at the port of discharge and the consequences of non-entry of the same, the learned judge erred in fact by proceedings to hold that the sale by auction of the 1st respondent's good was illegal for lack of proper notice and/or failed to apportion blame on the 1st respondents for its indolence.

3. In holding that the 1st respondent was entitled to restitution, the learned judge erred in law and in fact in failing to find that the 1st respondent was an author of its own misfortune hence not entitled to such restitution.

   4. The learned judge erred in law and in fact by failing to uphold the well set out legal maxims that; the law does not aid the indolent and ignorance of the law is no defence.

   5. The learned judge erred in law and in fact in proceedings to give a purposeful interpretation to provision of the law which law was clear and did not need such a purposeful interpretation.

6. In giving the purposeful interpretation as it sought to, the court interpreted the Phrase in gazettes of partner state appearing under section 42 of the East Africa Customs Management Act to read, gazettes of partner states hence misdirecting himself as to the provisions of the written law.

7. In giving a purposeful interpretation the learned judge erred by interpreting the phrase, 'in Gazettes of the partner state as appearing at section 42 of the East Africa Community Customs Management Act, (EACCMA) to mean in gazette notice of the country where the owner of goods

   resides and in so doing erred in law by failing to appreciate that said section 42 did not differentiate between good on transit and those for home use.

   8. The learned judge erred in fact by awarding restitution at an amount of USD 40,000.00 yet the value of the goods as had been declared by the 1st respondent for the one consignment that was auctioned was Kshs.2,886,000.00.

   9. The learned judge erred in law and fact by filing to consider any of the appellant's evidence and submissions.

   10. The appellant reserves its right to seek leave and to amend its memorandum of appeal once the certified typed proceedings are availed by the deputy registrar."

36. The appellant proposed to ask this Court to allow its appeal and set aside the judgment delivered on the 29th May 2019 and the consequential decree and that the same be substituted with a judgment dismissing the 1st respondent's suit; and that the costs of this appeal and of the suit before the Superior Court be awarded to the appellant.

37. The appeal was heard virtually whereby learned counsels Mr. Said appeared for the appellant, Mr. Tindi appeared for the 1st respondent, Mr. Kyandih appeared for the 2nd respondent, and Ms. Mtekele appeared for the 3rd respondent. There was no appearance for the 4th respondent though served with a hearing notice.

38. Mr. Said counsel for the appellant gave brief background of the case. He urged that the issue before the Superior Court

was one of restitution. That the 1st respondent claimed for orders of restitution against the appellant, 2nd, 3rd and 4th respondent. Mr. Said submitted on two issues. He contended that the main point of contention in the appeal is the interpretation of the words "notice by publication in the gazettes in the partner state" as founded under section 42(1) of the Act. It was contended that the learned Judge interpreted this provision to mean that the appellant should have served notice by way of publication in all the Gazettes of the partner states being the Republic of Kenya, Uganda, Tanzania, Rwanda, Burundi, South Sudan and Congo. Mr. Said submitted that the learned Judge took a wrong interpretation and that the correct interpretation was that publication ought to be done in the Kenyan Gazette. The learned counsel emphasized that the law provided for the gazette of "partner state" and not "partner states" which would have meant in all the partner states forming the East African Community. Counsel urged that the partner state in this case was the Republic of Kenya.

39. The second issue was whether the restitution of USD 40,000 to the 1st respondent was correctly awarded. Mr. Said, quoting section 2 (2)(a), 43(2) and 42(4) of the Act submitted that the 1st respondent's goods were not entered, no duty charges were paid, and no goods were cleared at the custom's warehouse. It was submitted that the learned Judge failed to take into account the said provisions and arrived at a wrong conclusion.

Counsel further submitted that this Court should take judicial notice that the 1st respondent violated the law. That even if the Court finds that the appellant was wrong in procedure of sale by auction of the 1st respondent's goods, then it is to be noted that two wrongs cannot make it right. That it will be wrongful to restitute the 1st respondent who had violated the law. Counsel urged that for the doctrine of restitution to be effected, four conditions must be met being; there must be a valid contract between the parties; there must be some consideration in the contract; one of the parties to the contract failed to perform the contract; or one of the parties could not execute the contract because of the happening of uncertain events.

40. Mr. Tindi for the 1st respondent relied on his written submissions dated 20th June 2023. He urged that he would respond to the three issues raised by the appellant, the issue of the proper gazette notice, the issue of restitution and the issue of liability. Counsel submitted that first issue was whether the learned Judge erred to find that the appellant violated the law when it disposed of the 1st respondent's goods. Counsel urged that on the issue of the auction, the proper procedure was not followed. That the appellant did not issue the proper gazette notice, which should have been in the East African Gazette and not the Kenyan Gazette. He urged that section 2 of Act provides for definition of a gazette to mean an official gazette of the East African Community which

community comprises of the seven member countries. He urged that the appellant could not therefore delink itself from that provision. Further, that it would not have been practical for the respondent who resides in Uganda to access the Kenyan Gazette.

41. On the issue of restitution, counsel submitted that the appellant was vague on how much taxes and expenses were payable by the 1st respondent; that the auction had already taken place and the 4th respondent had already taken possession and taxes were paid. He submitted that the value of USD

40,000 was proved through evidence in Court as amount spent to procure and ship the goods, which was the 1st respondent's loss when the goods were sold to the 4th respondent. Counsel submitted that the appellant should not be heard to argue that the said taxes and expenses should again be deducted from the amount awarded to the 1st respondent.

42. As to liability Mr. Tindi submitted that the appellant being in possession of the 1st respondent's goods was duty bound to take good care of them by giving a valid notice before the auction, which it failed to do. Counsel urged that section 43 of Act did not exempt the appellant from liability having been found to have acted in violation of the law, thus its actions were illegal acts.

43. Mr. Tindi associated himself with the submissions by the 3rd respondent in respect to grounds 5, 6 and 7 of the memorandum of appeal.

44. Mr. Kyandih for the 2nd respondent relied fully on its written submissions dated 7th June 2023. On the issue whether the 2nd respondent illegally transferred the suit container to the Customs Warehouse, counsel submitted that the transfer of the said container would be deemed illegal if it was as a result of procedural impropriety. Relying on the case of Samuel Njoroge Gitukui & 4 Others vs. Attorney General & Another [2017] eKLR where it was established that impropriety involves failure to adhere to and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision, the 2nd respondent submitted that the transfer of the container was done after the 1st respondent failed to lodge entry and clear the consignment within 21 days as prescribed under section 34(4) of Act after which the 2nd respondent was statute bound to deliver the container to the customs warehouse whose premises, although within the Port of Mombasa area, was under the control and management of the appellant.

45. Placing reliance on the case of Republic vs. Principle Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents Forum CBO

[2019] eKLR counsel urged that any expectation that requires a decision-maker to make an unlawful decision, cannot be a legitimate expectation. An unlawful decision in this case would be a decision that violates the outlined statutory procedure. The 2nd respondent submitted that the transfer of the suit container to customs warehouse was within the provisions of section 34(4) of Act and therefore cannot be deemed to be illegal.

46. On the issue whether the 2nd respondent had any control over the suit container after it was transferred to the customs warehouse, it is submitted that the consignment, including the suit container, was received by the proper officer as prescribed under section 48 of the Act. That the delivery of the consignment constituted transfer of effective control and subsequent liability for the loss or damage of the consignment wholly upon the appellant as outlined under regulations 221 of the East African Harbours Regulations, 1970. Thus, that upon delivery of the suit container to the customs warehouse, it effectively transferred any and all control and corresponding liability of the container to the appellant.

47. On the issue as to whether the 1st respondent's claim under Commercial Suit No. 193 of 2012 against the 2nd respondent is merited, counsel urged that the 2nd respondent was not the proper party. Relying on the case of Apex International Ltd and Anglo-Leasing and Finances LTD vs. Kenya Anti-

Corruption Commission [2012] eKLR, counsel urged that the 2nd respondent followed the transfer when it transferred the container to the Customs Warehouse, after which it had no control over it. Thus, it was urged, the 2nd respondent was not the proper party to be sued in the matter. This issue of not being a proper party was not an issue in this appeal.

48. The 2nd respondent challenged the competence of this appeal urging that the record of appeal did not contain certified copies of proceedings judgment and decree in Commercial Suit No. 193 of 2012 as required by the Court of Appeal Rules it was filed. Relying on the case of Nicholas Kiptoo arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR, Grace Njeri Mbugua vs. Hannah Wanjiku Thong'ote [2019] eKLR and Stephen Mwangi Kimote vs. Murata Sacco [2018] eKLR which noted that Article 159 (2)(d) of *the Constitution* states that justice shall be administered without undue regard to procedural technicalities, the 2nd respondent submits that the procedure in statute is mandatory and cannot be termed as a mere technicality. That following the procedure set under the Act is mandatory, it is not a choice, and that the appellant bluntly disregarded the set out procedure and that this appeal be dismissed with costs to the 2nd respondent. Consequently, counsel urged, the judgement dated 29th May 2019 delivered by P. J. Otieno, J. and the consequential decree dismissing the 1st respondent's claim against the 2nd respondent be upheld.

49. Ms. Mtekele for the 3rd respondent relied on their written submissions dated 8th November 2022. Counsel urged that the learned Judge while admitting there was an amendment of Act in 2011, misdirected himself by stating that the amendment was a replacement of the word gazette instead of an assertion of the words "and Gazettes of the Partner State or a newspaper of wide circulation in the Partner State." Counsel urged that the Act was enacted in 2004 and that at the time, the gazette referred to the official gazette of the EAC, as defined in the EAC Interpretation Act. That the amendment of 2011 added 'gazette of the EAC and the gazette of the partner state', bringing in a 2 pronged test namely, firstly notice in the East African Community Gazette and secondly, notice in the gazettes of the partner states or newspaper of wide circulation in the partner states. It was urged that there was no evidence of a notice in the EAC gazette and therefore no compliance with the law on this issue. That consequently, the 1st respondent had no notice to enable it make entries with the KRA and avoid the auction. In conclusion, Ms. Mtekele urged this Court to dismiss the appeal with costs.

50. This being a first appeal, it behooves this Court to re-evaluate, re-examine, re-assess and re-analyze the evidence on record and then determine whether the conclusions reached by the learned trial Judge should hold. In the case of Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2EA 212 this Court espoused that mandate or duty as follows:-

> " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

51. We have considered the appeal in accordance with our mandate. See Selle vs. Associated Motor Boat Company Ltd [1968] EA 123 and also Abok James Odera t/a A. J. Odera & Associates vs. John Patrick Machira t/a Machira & Co Advocates [2013] eKLR. We are also mindful of the limit of our mandate that we will only depart from the findings by the trial Court if they were not based on the evidence on record; where the said Court is shown to have acted on wrong principles of law as held in Jabane vs. Olenja [1986] KLR 661; or if its discretion was exercised injudiciously as held in Mbogo & Another vs. Shah [1968] E.A.

52. We have carefully considered the rival arguments of counsels to the parties, the evidence adduced before the learned trial Judge as well as the cases and the law relied on. Having done so, we find three issues fall for our determination on the main, which are whether the learned Judge erred in his interpretation

of what constituted a valid notice under section 42(1) of the Act; whether the learned Judge erred to find the 1st respondent deserved to be restituted by the appellant for

the consignment of the goods sold by the latter; and, whether the learned Judge was right in his finding on liability.

53. On the issue of the interpretation of section 42(1) of the Act, the learned Judge in that regard noted that the amendment of the Act of 2011 'replaced the word gazette with gazettes of the partner state or newspaper of wide circulation'. The original Act was the 2004 Act. Section 42(1) read as follows:

> 42 (1) Where any goods which have been deposited in a Customs warehouse are not lawfully removed within thirty days after deposit, then the Commissioner shall give notice by publication in the Gazette that unless such goods are removed within thirty days from the date of notice they shall be deemed to have been abandoned to Customs for sale by public auction and may be sold in such manner as the Commissioner may deem fit: Provided that any such goods which are of a perishable nature, or are animals, may be sold by the proper officer without notice, either by public auction or by private treaty, at any time after deposit in the Customs warehouse." [Emphasis added]

54. That section was amended by The East African Community Customs Management (Amendment) Act, of 2009 by providing that section 42(I) of the principal Act is amended "by inserting immediately after the word 'gazette, appearing in the third line, the words "and Gazettes of the partner State or a newspaper of wide circulation in the partner State." This Act was assented into law on 27th October 2010. That is the applicable provision to this case. With the amendment, section 42(1) reads as follows:

> " 42 (1) Where any goods which have been deposited in a Customs warehouse are not lawfully removed within thirty days after deposit, then the Commissioner shall give notice by publication in the Gazette and Gazettes of the partner State or a newspaper of wide circulation in the partner State that unless such goods are removed within thirty days from the date of notice they shall be deemed to have been abandoned to Customs for sale by public auction and may be sold in such manner as the Commissioner may deem fit: Provided that any such goods which are of a perishable nature, or are animals, may be sold by the proper officer without notice, either by public auction or by private treaty, at any time after deposit in the Customs warehouse." [Emphasis added]

55. In the persuasive case of Apollo Mboya vs. Attorney General & 2 Others [2018] eKLR, Mativo, J., as he then was had the following to say about interpretation of statute:

> " 19. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, statutory instrument, or contract having regard to the context provided by reading the particular provision or provisions in light of the document as a whole and the circumstances attendant upon its coming into existence.
>
> 23. In searching for the purpose of the act, it is legitimate to seek to identify the mischief sought to be remedied by the legislation... Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous".

We are persuaded by this case.

56. The purpose of the East African Community Interpretation Act, 2004, as per the preamble to the Act, is 'An Act of the Community to make provision in regard to the construction and interpretation of any enactment of the Community, and to make certain general provisions with regard to such law and for other like purposes.' Under section 2, the word '"Gazette" means the 'Official Gazette of the East African Community and any supplement to the Official Gazette or any Gazette Extraordinary';

57. The provision "the Commissioner shall give notice by publication in the Gazette and Gazettes of the partner State or a newspaper of wide circulation in the partner State" suggests that there has to be more than one publication of the notice. The first one must be the Official Gazette of the East African Community Gazette. For the second one, the legislation gives the Commissioner discretion to choose to publish the notice either in the Gazette of the partner state, or in a newspaper of wide circulation in the partner states. That option is not in lieu or substitution of the publication in the Official Gazette but is in addition to it. The word 'and' after 'Gazette' means that the words that follow these two words are to be considered as additional to the preceding word. That means then that the Commissioner will not stop at giving notice by publication in the Official Gazette of the East African Community, but in addition must publish

the notice either in a gazette of a member state or in a newspaper of wide circulation in the partner state.

58. What was the mischief intended to be remedied by the amendment under consideration is not difficult to decipher. It must have been intended to cure instances where the notice is carried in publications that are out of reach of the party intended to receive the notification, in terms of circulation of the notice in their state of residence or domicile. So that, in addition to the EAC Gazette, the notice must be carried in the partner state where the party intended to be served with the notice resides.

59. In this case, the publication was carried only in the Kenya Gazette. The 1st respondent, who was the target of the notice, is domiciled in Uganda. The bill of lading and other documents that accompanied the goods clearly indicated that fact. On this issue the learned Judge was of the view that the gazettement in the Kenyan Gazette was not sufficient, and he observed it could not serve the intended purpose. We agree with him. We do not however agree that the publication required to be carried in all the partner states to be valid, as the learned Judge understood the amendment. That misdirection is however minor, did not go to the root of the appeal, and caused no miscarriage of justice to any of the parties to the appeal. As we have espoused in this judgment, apart from the requirement to publish the notice in the Official Gazette of the

EAC, the second notice should have been published where the owner of the goods is domiciled. We do not accept the submission by the appellant that publication meant that the notice be published in the Gazette of the partner state where the goods landed and or where the Commissioner's office is based. That is a skewed interpretation, as it would not serve the purpose of the notice, which is precisely the mischief the amendment to section 42 (1) was carried.

60. The appellant argued further that since the Judge found that the 1st respondent had been served three letters by the 3rd respondent, it had sufficient notice, and the appellant cannot be penalized for not issuing the notice. Section 42 (1) of the Act gives the responsibility to publish the notice, and in the manner we have discussed herein above, to the Commissioner of Customs. That duty cannot be delegated or waived, as the appellant seems to suggest. It cannot absolve the appellant from issuing notice as prescribed under the Act. The Commissioner did not comply with section 42 (1) of the Act on publication of the notice.

61. On the issue of restitution, the appellant's complaint is that the customs duty and other charges should have been deducted from the award of USD 40, 000 granted to the 1st respondent. It also raised another

issue that threshold for the application of the doctrine was not met. The 1st respondent's view is that the appellant was vague and did not specify the

amount it was claiming as taxes and charges. Besides, it already recovered the charges and taxes from the 4th respondent after selling the goods to it.

62. The claim for USD 40, 000 was a special damages claim. It has not been contested that the same was proved in evidence. What we hear the appellant saying is that the 1st respondent must be made to pay taxes and other charges for the sold consignment. There was no counter claim in the appellant's defence claiming for same. The issue was also not raised at the trial. This is clearly a new ground introduced in the final submissions of the party on appeal. The legal position is that a party cannot introduce a new ground of appeal at the appeal. Not only because we lack jurisdiction to consider it as there is no notice of appeal in its regard. Most importantly, an appellate Court cannot consider a ground which was not considered by the superior Court. For that proposition, see Nguruman Ltd vs. Shompole Group Ranch & Another [2014] eKLR. See also Mary Kitsao Ngowa & 36 Others vs. Krystalline Limited [2015] eKLR, where this Court previously dealt with such an issue and declined to entertain it for reason it was not even an issue that was canvassed before the trial court.

63. The issue on restitution is a legal ground also not raised at the trial, even though the term was used liberally by the parties. We do not wish to belabor this issue, except to note that

restitution is not a strange doctrine in our legal system. In 1978, in the case of Chase International Investment Corporation & Another vs. Laxman Keshra and 3 others [1978] eKLR Madan, JA, quoting Lord Wright in Fibrosa Spolka, [1943] AC at page 61): explains the doctrine very well thus:

> " It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution. Goff and Jones in their treatise, Law of Restitution, state (page 11):
>
> Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment. There are many circumstances in which a defendant may find himself in possession of a benefit which, in justice, he should restore to the plaintiff.
>
> The principle of unjust enrichment presupposes three things: first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust to allow him to retain the benefit.
>
> (c) Unjust enrichment or restitution: that the doctrine of restitution, which is based neither on contract nor tort, is firmly, established in the law of Canada is clear from the decisions of the Supreme Court."

64. We say no more but to emphasis that the purpose of the doctrine is to deprive the party that has unfairly taken advantage of the other party to his or its detriment. That doctrine was befitting the circumstances of this case.

65. On the issue of liability, the appellant's complaint is that the 1st respondent failed to enter the consignments as required under section 34 of the Act; and failed to clear them as required under section

42 (1) of the Act and so was the author of his misfortune and should not be seen to benefit from its own mistake.

66. The learned Judge found that the appellant failed to follow due process on two stages. The first was failing to issue valid notice as prescribed under section 42(1) of the Act, to warn the 1st respondent that its goods had landed and the need to clear them within prescribed period to avoid auction. The second, having failed to give proper notice, the other processes it took culminating in the sale of the 1st respondent's goods were all invalid, and deprived the 1st respondent of its property unlawfully.

67. We agree with the learned Judge. Lack of proper notice to the owner of the goods as prescribed under section 42(1) of the Act was un-procedural and had the effect of vitiating the entire process undertaken by the appellant, and smirked of impropriety. We quote from the case of Samuel Njoroge Gitukui & 4 Others vs. Attorney General & Another

(supra), for the proposition that impropriety involves failure to adhere to and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision. The appellant violated the express provisions of the Act on notice, and the subsequent processes leading to the sale of the 1st respondent's consignment to the 4th respondent through auction. Even though this was not raised, we could not fail to note that there was serious discrepancy in regard to the amount of money paid by the 4th respondent for the goods in question. We leave it at that.

68. The 2nd and 3rd respondents urged their respective cases. For instance the issue of the 2nd respondent's liability to the 1st respondent. And the 3rd respondent's obligation to the 1st respondent. We found the learned Judge's finding on both issues sound. There was also no challenge to the conclusion reached by the Judge by either the appellant or the 1st respondent. We find the two issues moot.

69. The other issues urged by the 2nd respondent challenged the competence of the appeal on grounds of procedural laws and on basis of an incomplete record of appeal. Such challenge cannot be raised at the submissions stage of appeal for the first time. See Samuel Njoroge Gitukui & 4 Others Vs. Attorney General & Another (supra). That is ambush and cannot be countenanced. Furthermore, the alleged missing

record is one the 2nd respondent could have taken the liberty to include in the record by way of a supplementary record of appeal, pursuant to Rule 94 of the Court of Appeal Rules.

70. After a careful consideration of this appeal, we have come to the conclusion that the learned Judge's decision is for upholding, being satisfied that it was a sound judgment. Accordingly, we find no merit in this appeal and dismiss it with costs to the respondents.

Dated and delivered at Mombasa this 26th day of April, 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. O. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR