



**Commissioner of Customs & Excise v Hatangimbabazi (Civil Appeal E016 of 2020) [2023] KECA 380 (KLR) (31 March 2023) (Judgment)**

Neutral citation: [2023] KECA 380 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL E016 OF 2020  
SG KAIRU, JW LESSIT & GV ODUNGA, JJA  
MARCH 31, 2023**

**BETWEEN**

**THE COMMISSIONER OF CUSTOMS & EXCISE ..... APPELLANT**

**AND**

**EMMANUEL HATANGIMBABAZI ..... RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at Mombasa (P.J.O. Otieno, J.) delivered on 29th May 2020 in High Court)*

**JUDGMENT**

1. The appellant, Commissioner of Customs & Excise, has appealed against the judgment delivered by the High Court at Mombasa (PJO Otieno, J) on May 29, 2020 in which the respondent, Emmanuel Hatangimbabazi, was awarded Kshs 2,142,180.00 together with interest at the rate of 12% per annum from November 8, 2005 (the date of filing suit) until payment in full, being repair cost to his truck and trailer which the court found to have been wrongfully seized by the appellant. The respondent was also awarded the Kshs 3,000,000.00 as general damages for wrongful seizure of the vehicle with interest also accruing at the rate of 12% per annum from November 8, 2005 (the date of filing suit) until payment in full.
2. In his amended memorandum of appeal, the appellant complains that the learned judge wrongly: disregarded objections regarding the authenticity of the receipts produced by the respondent in support of the claim for repair costs of Kshs 2,142,180.00; concluded that the appellant's liability for the alleged wrongful seizure of the vehicle was determined in earlier judicial review proceedings; awarded general damages of Kshs 3,000,000.00 despite the bar to such claim under section 212 of the *Customs and Excise Act*; failed to uphold the appellant's contention that the respondent's claim was barred by limitation of actions; and awarded interest from the date of filing suit.



3. At the material time, the respondent owned motor vehicle registration KV 7662C-trailer HZ 3689C. It was arrested by the appellant's officer on August 22, 2002 and detained at Kilindini Port on suspicion of having been used in the conveyance of uncustomed goods. On October 1, 2002, the appellant issued the respondent with a notice of seizure in the following terms:

“Take notice that your one truck registration No KV 7662C...make MAN 33-332 together with its trailer bearing registration No HZ3689C has been seized as liable to forfeiture under the Customs and Excise Act on the following grounds: Found to have been used in the conveyance of uncustomed goods as provided under section 197(1) of the Customs and Excise Act cap 472 of the laws of Kenya.

If you claim or intend to claim that the things seized are not liable to forfeiture you should, within one calendar month from the date of this notice, give notice in writing of your claim in accordance with the provisions of the Customs and Excise Act. In default of such notice the things seized will be deemed to have been lawfully condemned and will be liable to be disposed of in such manner as the Commissioner may direct.”

4. A few months later, the respondent initiated judicial review proceedings before the High Court at Mombasa, obtained leave of the High Court on February 28, 2003, and thereafter filed a substantive judicial review application, being Misc Civil Cause No 138 of 2003, and successfully obtained an order of certiorari to quash the said notice of seizure as well as an order of prohibition prohibiting the appellant from forfeiting or disposing of the said vehicle and trailer.
5. In a ruling delivered on August 14, 2003, the High Court (JK Serگون, J) in allowing the respondent's judicial review application held that he had established, on a balance of probabilities, that the appellant

“acted beyond its statutory power by seizing the [respondent's] truck and trailer without good reasons based on credible evidence that the same were used to discharge uncustomed goods in the local market”

and that in doing so, the appellant's act of seizure was

“without bona and good reason”

and

“amounted to acting beyond the statutory authority donated by the Customs and Excise Act.”

The appellant did not appeal or otherwise challenge that ruling.

6. Slightly over two years after that ruling, the respondent by a plaint dated November 8, 2005 filed suit against the appellant before the High Court seeking general damages for the wrongful seizure of the vehicle and special damages of Kshs 16,394,484 particularized as follows:
- Cost of repairs to truck Kshs 987,680.00
  - Cost of repairs to trailer Kshs 1,145,204.00
  - Assessor's fees Kshs 12,000.00
  - Loss of revenue for 488 days at the rate of US 12,000.00 pm - Kshs 14,249,600.00



7. The respondent averred that following the said ruling of the High Court of August 14, 2003 in Misc Civil Cause No 138 of 2003, the appellant released the vehicle on December 22, 2003

“with most parts of the vehicle having rusted and requiring replacement and/ or repair... as a consequence of the long exposure to the adverse weather conditions and saline at the Kilindini Port”;

and that the respondent had suffered loss and damage as a consequence of the waste committed to the vehicle and the loss of revenue that would have accrued from the use of the vehicle during the period of seizure.

8. In its defence, the appellant denied the respondent’s claim asserting that his officers had reasonable grounds for arresting and seizing the vehicle and blaming the respondent for the seizure. The appellant averred that under the law, the appellant was not liable for any subsequent claim for damages resulting from the seizure of goods under the *Customs and Excise Act* or for any loss or damage occasioned to goods deposited in a customs warehouse. The appellant also pleaded that “the entire suit is time barred.”
9. Having heard, during the trial, the testimony of the respondent and that of Phillip Karoki Mwangi and James Wasiro on behalf of the appellant, the High Court delivered the impugned judgment on May 29, 2020 holding that: the respondent’s suit was not time barred; that liability against the appellant was determined in the judicial review proceedings in Misc Civil Cause No 138 of 2003 and the issue of justification for the seizure of the vehicle was therefore *res judicata*; that the claim for special damages for repairs to the vehicle and trailer were proved as having been incurred in the amount of Kshs 2,142,180.00; that the claim for loss of revenue had not been proved but the respondent was entitled to an award for general damages for wrongful seizure in the amount of Kshs 3,000,000.00.
10. We have set out above the grounds on which the appellant has challenged that judgment. Urging the appeal before us, learned counsel for the appellant Miss Odundo submitted that the judge erred in failing to hold that the respondent’s claim is statute barred. It was submitted, on the strength of the case of *Thuranira Karuri v Agnes Nchebe* [1997] eKLR that limitation goes to jurisdiction and the Judge ought to have found that the respondent was non suited; that the motor vehicle was arrested and seizure notice issued on 1<sup>st</sup> October 2002; that the High Court ruling allowing the respondent’s judicial review application was delivered on August 14, 2003; that the respondent filed suit two years later on November 9, 2005; that by dint of section 3(2)(a) of the *Kenya Revenue Authority Act*, the respondent’s suit must be treated as a suit against the Government consistently with the holding by the High Court in *Jaffer Shariff Omar v The Commissioner of Customs & Excise*, Nairobi HCCC No 363 of 2000. Consequently, it was submitted, the *Public Authorities Limitation Act* which in section 3(1) requires suits against the Government to be instituted within 12 months from the date on which the cause of action accrued applies and the judge was wrong in holding that the *Public Authorities Limitation Act* did not apply.
11. According to counsel the decision of this court on which the Judge relied to support that holding, namely the case *Kenya Revenue Authority v Habimana Sued Hemed & another* [2015] eKLR was not concerned with the issue of limitation but with the issue of notice under section 13A of the *Government Proceedings Act*. Moreover, it was submitted, this court in *Kenya Revenue Authority v Habimana Sued Hemed & another* (above)

“got it wrong on the finding that the *Government Proceedings Act* did not apply to the appellant”.



12. With regard to the award for repair costs of Kshs 2,142,180.00, counsel submitted that the respondent did not discharge his obligation to establish that the appellant was liable for the wrongful arrest of his motor vehicle and neither were the awards made proved; that there was no evidence of payment as the invoices submitted to the trial court in support of the claim for repairs were not marked as “paid”. In support, the case of *Great Lakes Transport Co Ltd v Kenya Revenue Authority* [2000] eKLR was cited for argument that invoices in themselves are not proof of payment. It was also submitted that photocopies, as opposed to the original invoices were produced in support of the claim; that the documents were in any event challenged as the companies that allegedly issued them, as well as the PIN and VAT numbers on the receipts did not exist in the data base of Kenya Revenue Authority.
13. As regards the award of general damages of Kshs 3,000,000.00 counsel submitted that the same is based on unexplained reasons and it is not clear how the court arrived at that figure; that judicial discretion of a trial judge in assessing quantum of damages must be exercised judicially as held in *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR; that considering that the appellants officer had reasonable grounds for seizing the vehicle, under section 212(3) of the *Customs and Excise Act* the appellant and his officers are protected against award of damages.
14. As regards the award of interest from the date of filing suit, counsel submitted that interest should not be viewed as a punishment to the losing party but fair recompense to a person who has been deprived of his money or property by another. *Feroz Nuralji Hirji v Housing Finance Company of Kenya Ltd & another* [2015] eKLR was cited in support; that as stated in *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Limited (No 2)* [1970] EA where a liquidated amount is claimed, the plaintiff is entitled to interest from the date of filing suit whereas, where damages have been assessed by the court, interest should only be given from the date of judgment.
15. Opposing the appeal, learned counsel Mrs Nyange submitted that the provisions of the *Public Authorities Limitations Act* do not apply to the appellant as held by this court in *Kenya Revenue Authority v Habimana Sued Hemed & another* (above). Reference was also made to the High Court decisions in *Gurdoba Enterprises Limited v Kenya Revenue Authority* and *Menginya Salim Murgani v Kenya Revenue Authority*, HCCC No 1139 of 2002 to the same effect. It was urged that the High Court decision relied upon by the appellant for the contrary view, being the case of Jaffer Shariff Omar v The Commissioner of Customs & Excise, (above) was decided prior to the Court of Appeal decision in *Kenya Revenue Authority v Habimana Sued Hemed & another* (above) and is not binding on this court.
16. As to the contention that the claim was in any event time barred under the *Limitation of Actions Act*, counsel submitted that the cause of action arose on December 24, 2003 when the motor vehicle was released to the respondent and that the suit was instituted within the three-year timeline for filing tortious actions under the *Limitation of Actions Act*.
17. As for the complaint regarding award of repair costs of Kshs 2,142,180.00, it was submitted that the receipts in support of the claim were produced before the trial court and admitted as evidence without any objection by the appellant; that objection cannot belatedly be taken on appeal; that the respondent established that he incurred those expenses in the repair of the vehicle. It was urged that the argument by the appellant that the original receipts were not produced was never raised and is an afterthought; that the suit was determined on basis of the documents that were admitted and produced by consent; that both parties produced documents as they were filled and the question of secondary evidence was not raised at the trial.
18. It was submitted that the appellant did not produce any evidence to prove that the receipts were not genuine; that DW2 merely stated that the issuer of the receipts did not exist in Kenya Revenue



Authority's customer data base, which in itself did not establish that that company did not exist; that documents that are merely referred to by a witness and not formally produced are not exhibits as held in *Kenneth Nyaga Mwiye v Austin Kiguta & 2 others* [2015] eKLR; that the question as to the validity and legality of the seizure notice was, as rightly determined by the trial court, res judicata having been resolved in the judicial review proceedings.

19. As regards the award of general damages of Kshs 3,000,000.00, it was submitted that there is no basis for interfering with the same; that it is not shown that the judge acted on wrong principle of law, or that the award is manifestly high or an erroneous estimate of the damage to which the respondent is entitled. In support, reference was made to numerous decisions of this court including *Kemfro Africa Limited t/a Meru Express Service v A M Lubia and Olive Lubia* (1982-88)1 KAR 727; *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR; that in this case the Judge gave reasons for the award and there is no reason for interfering.
20. As regards interest, it was submitted that the trial court properly exercised its discretion in making the award in accordance with section 26 of the *Civil Procedure Act* and there is no basis for faulting the exercise of that discretion. Among decisions cited in support is the decision of the court in *Diamond Trust Bank Kenya Ltd v Said Hamad Shamisi & 2 others* [2015] eKLR.
21. The main issues for determination in this appeal are whether the respondent's suit was time barred; and whether the awards of repair costs of Kshs 2,142,180.00 and general damages of Kshs 3,000,000.00, including the awards of interest thereon, were justified.
22. We begin with the question whether respondent's suit was time barred. In that regard, first there is the issue whether the Public Authorities Act applies to the appellant. Secondly, there is the issue whether the respondent's claim was in any event barred under section 4(2) of the *Limitation of Actions Act* which provides that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.
23. As already stated, it was contended for the appellant that to the extent that the KRA is an organ of Government, the *Public Authorities Limitation Act* applies to it; that section 3(1) of that Act, which provides that  

“no proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued”

applies to KRA. The respondent on the other hand, as indicated, is of a contrary view.
24. The appellant has submitted that the learned trial judge was wrong in relying on the decision of this court *Kenya Revenue Authority v Habimana Sued Hemed & another* (above) as the issue in that case was on notice under section 13A of the *Government Proceedings Act* and not an issue of limitation. Moreover, it was submitted, the Court in that case  

“got it wrong on the finding that the *Government Proceedings Act* did not apply to the appellant”

and urged us to relook at the issue and depart from the decision in *Kenya Revenue Authority v Habimana Sued Hemed & another* (above).
25. Kenya Revenue Authority (KRA) is established under section 3 of the *Kenya Revenue Authority Act*. Under section 5, it is responsible for the administration and enforcement of the provisions of the *Customs and Excise Act*, cap 472. Section 3(2) of the *KRA Act* provides that of the Authority shall be



a body corporate with perpetual succession and a common seal and shall subject to the Act be capable in its corporate name capable of suing and being sued,

“...provided that any legal proceedings against the Authority arising from the performance of the functions or the exercise of any of the powers of the Authority under section 5 shall be deemed to be legal proceedings against the Government within the meaning of the Government Proceedings Act”.

26. This court, in the case of Kenya Revenue Authority v Habimana Sued Hemed & another (above) had occasion to consider the import of that provision in the context of whether the requirement under section 13A of the Government Proceedings Act (since declared unconstitutional by the High Court) was applicable to the Authority. Section 13A provided that “no proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing in the prescribed form have been served on the Government in relation to those proceedings”. In concluding that,

“Kenya Revenue Authority is not an organ of the Government as contemplated under the Government Proceedings Act”,

the court in that case expressed that KRA is:

“...an autonomous, corporate, statutory body specifically with power to sue and be sued. The appellant cannot hide behind the cloak of the Attorney General when it is accused of breaching the law or otherwise violating people’s rights purely in order to take advantage of the 30 days statutory notice!”

27. The court (in that case) affirmed a decision of the High Court in the case of Menginya Salim Murgani v Kenya Revenue Authority, HCCC No 1139 of 2002 [2008] eKLR where Ojwang, J (as he then was) stated:

“I am not in agreement that the suit against the defendant herein required prior notice under the Government Proceedings Act (cap 40, laws of Kenya). The Kenya Revenue Authority Act (cap 469, laws of Kenya) sets up the defendant as (s 3(2)):

“...a body corporate with perpetual succession and a common seal and shall, subject to this Act, be capable in its own name of – a suing and being sued...”

I have considered the mandate of the defendant as stated in the long title to the said Act –

“.....a central body for the assessment and collection of revenue, for the administration and enforcement of the laws relating to revenue...”;

and I have come to the conclusion that the body that Parliament intended was a responsible and accountable one, empowered to discharge its legal obligations without resorting to reserved privilege when obligations fall upon it. It is not surprising, in the circumstances, that the defendant has come before this court by its own advocates, rather than through the office of the Attorney-General.”

28. Consistently with the decision of this court in Kenya Revenue Authority v Habimana Sued Hemed & another (above), the learned trial judge was not persuaded, correctly in our view, that the respondent’s suit against the appellant was “a suit against the government” and concluded that the Public Authority Limitations Act is not applicable to the appellant.



29. Counsel for the appellant urged us to depart from its decision in *Kenya Revenue Authority v Habimana Sued Hemed & another* (above). It is established that the Court may depart from its previous decision where circumstances justify. In *Dodhia v National & Grindlays Bank Limited and another* [1970] EA 195 Sir William Duffus, VP of the court stated:

“I entirely agree with my Lord President that this court must, as the ultimate Court of Appeal, have a similar power to that formerly exercised by the Privy Council when it was the final Court of Appeal for Kenya. The duty of this court in Kenya is to decide any case coming before it according to the laws of Kenya and this court may be unable to do so if it is bound to follow a previous decision, which is clearly contrary to law and which this court feels that it would be wrong to follow, and the court must, therefore, as the ultimate Court of Appeal, be able to depart from a previous decision when it appears right to do so.”

30. In *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2013] eKLR, the Supreme Court of Kenya expressed that as a matter of consistent practice, the decisions of the higher courts are to be maintained as precedent; and the foundation laid by such courts is in principle, to be sustained. The Supreme Court went on to say that:

“For the special role of precedent in the certainty and predictability of the law as it plays out in daily transactions, any departure is to be guided by rules well recognized. It is a general rule that the court is not bound to follow its previous decision where such decision was an *obiter dictum* (side-remark), or was given per incuriam (through inattention to vital, applicable instruments or authority).”

31. The appellant has not demonstrated that the decision of this court in *Kenya Revenue Authority v Habimana Sued Hemed & another* (above) on which the learned trial judge hinged his determination is either *obiter dictum* or is *per incuriam*. We do not have any basis for interfering with the decision of the learned judge that, effectively, the limitation period for actions in tort prescribed in *Public Authorities Limitation Act* does not apply to actions against KRA. It is also instructive, we think, that unlike such statutes as the *Kenya Ports Authority Act*, *Kenya Roads Act*, Kenya *Civil Aviation Act*, to mention a few, which specifically provide for limitation periods applicable under those statutes, there is no such provision in the *KRA Act* that prescribes the limitation period.

32. As to whether the respondent’s claim was barred under section 4(2) of the *Limitation of Actions Act*, the evidence was that the motor vehicle was released on December 22, 2003. The respondent’s suit was instituted on November 9, 2005. As the trial judge correctly stated “three years had not lapsed” and the claim was therefore not time barred.

33. With regard to the award for repair costs of Kshs 2,142,180.00 the learned trial Judge found, correctly in our view, that the same were specifically pleaded and that the receipts in support of the claim were “produced by consent” and the respondent “deeply cross examined over them.” The judge noted further that although the appellant questioned the authenticity or genuineness of the receipts on the basis that the entities issuing them were not in KRA’s database,

“no document was produced to prove that fact and no attempt was made to have the possible fraud of forgery investigated by the police.”



The judge concluded that,

“on a balance of probabilities, the [respondent] has proved that he did incur the costs of Kshs 2,142,180 in repairs of the truck and its trailer”

and awarded the same.

34. We are unable to fault the learned judge. The appellant did not present any evidence to impugn the receipts that were produced or to demonstrate, as it claimed, that the same were not genuine. The receipts bore the title “cash sale/invoice” and had revenue stamps and need not have been marked “paid” as claimed by the appellant to be evidence of expenses incurred. The complaint that the receipts that were produced in support of the claim were photocopies rather than originals is a matter that should have been raised before the trial court. No objection was taken in that regard. As the judge noted, they were produced by consent. We do not have a basis for interfering with the award by the trial Judge for repair costs.

35. We turn to the question whether the judge erred in awarding of general damages in the amount of Kshs 3,000,000.00. In *Kenya National Highways Authorities v Daneva Company Limited* [2016] eKLR this court re-stated the principle that an award of damages by a lower court is not to be disturbed:

“...unless it is demonstrated that the judge proceeded on a wrong principle or that he misapprehended the evidence and arrived at a figure that was inordinately too high or too low. See *Jivanji v Sanyo Electrical Company Ltd* [2003] KLR 425.”

36. The appellant has urged that the learned Judge did not indicate or provide a basis for making that award. It is instructive that in his plaint, the respondent, in addition to his claim for special damages for loss of revenue, prayed for “general damages for wrongful seizure” of his vehicle. The learned judge found that the claim for loss of revenue, being a claim for special damages, was not strictly proved but went on to justify the award of general damages as follows:

“Considering the hint given by the agreements and the evidence that a motor vehicle could make two trips to DRC for example and make a gross of some 24,000 USD, while taking notice that a motor vehicle is expected to be grounded on account of breakdown, routine repairs or just lack of assignments, together with the fact that this was not a new vehicle while the book life of a motor vehicle, in accounting terms, providing depreciation at 25% pa, is four year, I do award damages for wrongful seizure in the sum of Kshs 3,000,000.”

37. The circumstances in this case are somewhat similar to those in *Kenya National Highways Authorities v Daneva Company Limited* (above) where this court, re-affirmed an earlier decision of the court in *Great Lakes Transport Co (U) Ltd v Kenya Revenue Authority*, Civil Appeal No 106 of 2006 [2009] eKLR where the court stated:

“The upshot of all the above is that the appellant did not strictly prove special damages as relates to the prayers set out in the plaint. But, in our view that could not be the end of the matter. The learned judge, having found that the special damages were not proved, dismissed the case

“as there was no claim for general damages.”

This court has, in several decisions made it clear that a court has no power to grant a relief a party has not specifically prayed for – see the case of *Malindi Air Services and another v*



Halima A Hassan, Civil Appeal No 69 of 2000. However, in this case the position is to an extent different. General damages was pleaded at paragraph 8 of the amended plaint and specifically denied at paragraph 8A of the amended defence as we have indicated above. It was unfortunately not made one of the prayers, but clearly the appellant in raising evidence on its losses which were special damages was sending in effect one main message which was not disputed at any stage, that his vehicle was in active business...”

38. Unlike in that case, however, where there was no prayer for general damages, in the present case there was, as already stated, a prayer for “general damages for wrongful seizure” of his vehicle which, undoubtedly, is a remedy available for wrongful seizure and detention. See *DT Dobie & Co Ltd v Joseph Muchina & another* [1982] KLR 1.
39. Furthermore, it is an established principle that for this court to disturb an award of damages, the appellant is obliged to demonstrate that the same is so inordinately high or low so as to represent an entirely erroneous estimate or that the trial court proceeded on wrong principles or misapprehended the evidence in some material respect with the consequence that the trial court arrived at an inordinately high or low amount. See *Butt v Khan* [1978] eKLR. The appellant has not done so.
40. As regards the award of interest, although the award of the same involves an exercise of judicial discretion, it is not entirely clear why, the learned Judge departed from the general principle that award interest on general damages runs from the date of judgment as opposed to from the date of filing suit. See *Kenya Power & Lighting Company Limited v Jane Wanjiru Gitau* [2018] eKLR.
41. In conclusion, we allow the appeal only to the extent that we set aside the award of interest on general damages from the date of filing suit and substitute therefor an order that interest on the award of general damages of Kshs 3,000,000.00 will accrue from the date of judgment, viz, May 29, 2020. The appeal otherwise fails and is dismissed.
42. The respondent will have half the costs of the appeal.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 31<sup>ST</sup> DAY OF MARCH, 2023.**

**S. GATEMBU KAIRU, FCIArb**

.....  
**JUDGE OF APPEAL**

**J. LESIIT**

.....  
**JUDGE OF APPEAL**

**G.V. ODUNGA**

.....  
**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

