IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CIVIL APPEAL NO. 2 OF 2014

BETWEEN

KENYA REVENUE AUTHORITY …….....…….…… APPELLANT

AND

ALNOOR AL MUSTAQEEN GENERAL TRADERS LTD…….. 1ST RESPONDENT

OCS GARBATULLA POLICE STATION…….....……. 2ND RESPONDENT

ATTORNEY GENERAL …….....……...… 3RD RESPONDENT

MUMIAS SUGAR COMPANY …….....……...…… 4TH RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (Lesiit, J.)

dated 13th June, 2013

in

H.C Petition No. 1 of 2012)

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JUDGMENT OF THE COURT

1. The 1st respondent is a distributor of the 4th respondent. On 16th November, 2011, the 1st respondent purchased 560 bags of sugar each weighing 50 Kg at a consideration of Kshs. 8,462.50/= per bag inclusive of transport. The 1st respondent intended to distribute the sugar in Habaswein. By the time the 1st respondent's agents arrived at Habaswein the price of sugar had gone down to Kshs. 5,000/= per bag . In an effort to cut losses, the 1st respondent's agents obtained authority from the OCS of Habaswein to

transport 400 bags of sugar to neighboring areas where the sale price was projected to be Kshs. 6,400/= per bag. The sugar was loaded into motor vehicle registration number KBH 245K. On 3rd January, 2012, the 2nd respondent detained both the sugar and the vehicle at Garbatulla; he suspected that the sugar had been smuggled into the country from Brazil through Somalia. This was because the authorization documents which were produced by the 1st respondent's agents had alterations. The 2nd respondent informed the appellant about the said detention.

2. The 2nd respondent asked the 4th respondent to verify whether the sugar belonged to the 4th respondent company. The 4th respondent sent one of its officers to collect a sample of the sugar for verification. According to the 1st respondent's agents, the said officer asked for a bribe of Kshs. 100,000 in exchange of a favourable report. The 4th respondent's agents refused to give the bribe and consequently, the initial report dated 9th January, 2012 indicated that the sugar did not originate from the 4th respondent. The 1st respondent's Managing Director vide a letter dated 16th January, 2012 addressed to the 4th respondent protested against the said report. The 4th respondent conducted further tests and consultations. Through a second report dated 20th January, 2012, the 4th respondent confirmed that the detained sugar was indeed from the company and requested the 2nd respondent to release the sugar to the 1st respondent.

3. Despite the aforementioned confirmation by the 4th respondent, the appellant and the 2nd respondent refused to release the sugar and vehicle. This instigated the 1st respondent to file a Constitutional Petition seeking *inter alia:-*

- ***Release of 400 bags of sugar and motor vehicle registration number KBH 245K;***
- ***Compensation for the loss of earning from the expected sugar sale and the motor vehicle transport business;***
- ***Alternatively, if the sugar and motor vehicle are disposed before hearing of the suit, the petitioner (1st respondent) be compensated for the full value of the sugar and motor vehicle registration number KBH 245K and the loss of user and earning thereof.***

Ultimately the sugar and vehicle were released to the 1st respondent on 24th February, 2012 following a consent order recorded at the trial court. It was the 1st respondent's case that the detention of the sugar and vehicle was unfair, arbitrary and in contravention of its constitutional right to property as enshrined under ***Article 10*** of the ***Constitution.***

4. The 2nd respondent admitted that the 1st respondent's sugar and vehicle were detained due to suspicion that the goods might have been smuggled into the country. The suspicion arose after the 4th respondent issued the initial report which indicated that the sugar did not originate from the company. The 2nd respondent maintained that the said detention was lawful under the ***East African Community Customs Management Act, 2004*** (***EACCM Act)*** to pave way for investigations. Under ***Section 42*** of the Act, the 2nd respondent was obligated not to release the sugar until he was satisfied that all duties, expenses, rent, freight and other charges that were due had been paid.

5. The appellant also maintained that it was justified to seize the sugar and detain the vehicle for purposes of carrying out investigations to verify if the sugar was from the 4th respondent. According to the appellant, the need to verify the source of the sugar was because firstly, the 1st respondent alleged that it changed the destination of the sugar from Habaswein to Garbatula due to flooding of the commodity in Habaswein; secondly, the lapse of time from the date the sugar was purchased from the 4th respondent to the date of detention; thirdly, the authorization documents which the 4th respondent had were full of material alterations.

6. The 4th respondent confirmed that the 1st respondent had purchased 560 bags of sugar each weighing

50 Kg on 16th November, 2011. On 3rd January, 2012 the company received information from the 2nd respondent that a lorry registration number KBH 245K containing 400 bags of Mumias branded sugar had been detained. The 4th respondent was requested to verify if the said sugar was from the company. An officer of the 4th respondent collected samples of the sugar which were tested. Thereafter, a preliminary report was prepared which indicated that the sugar had not originated from the 4th respondent. After further investigations the 4th respondent's security department prepared another report dated 20th January, 2012 confirming that the seized sugar was from the company and advised the 2nd respondent to release the same to the 1st respondent. The 4th respondent denied any liability for any loss that the 1st respondent might have suffered on account of the detention.

7. The matter proceeded by way of written submissions which were highlighted by the parties' counsel. After taking into consideration the evidence on record, the trial court (Lesiit, J.) on 13th June, 2013 entered judgment in favour of the 1st respondent. The learned Judge awarded the 1st respondent damages of Kshs. 1,000,000/= as against the appellant, 2nd and 3rd respondents. It is that decision that has instigated an appeal by the appellant and cross appeal by the 1st respondent. The appeal is based on the following grounds:-

- ***The learned Judge erred in law and in fact by failing to find that the letter by the 4th respondent dated 9th January, 2012 gave the appellant reasonable cause to detain the 1st respondent's 400 bags of sugar and motor vehicle registration number KBH 245K pending the outcome of the investigations.***

- ***The learned Judge erred in law and in fact by holding that the phrase 'the sugar may be mumias sugar' in the letter dated 23rd January, 2012 sent to the 2nd respondent by the 4th respondent was sufficient to warrant the appellant and the 2nd respondent to release the sugar before the investigations were concluded.***

- ***The learned Judge erred in law and in fact by disregarding the letter dated 20th February, 2012 sent to the appellant by the 4th respondent which sought to clarify the contentious issues in the investigations.***

- ***The learned Judge erred in law and in fact by failing to find that the appellant and the 2nd respondent were acting within their statutory mandate under the provisions of the East African Community Customs Act, 2004.***

- ***The learned Judge erred in law and in fact by failing to accord the appellant reasonable time to conduct investigations despite finding that the documents in the 1st respondent's possession had major alterations warranting thorough investigations.***

- ***The learned Judge erred in law and in fact by failing to find that the powers conferred by the East African Community Customs Act to seize goods on reasonable grounds were rationally connected to securing and collecting of taxes and the appellant's actions were justified.***

- ***The learned Judge erred in law and in fact by awarding damages against the appellant , 2nd and 3rd respondents who were legally and procedurally executing their statutory functions.***

The cross- appeal is based on the following grounds:-

- ***The learned Judge erred in law and in fact in awarding general damages which in the circumstances of the case were inordinately low.***

- ***The learned Judge erred in law and in fact in denying the 1st respondent's claim of loss of***

earning and user of motor vehicle, loss of profit of the goods and the compensation sought.

- ***The learned Judge erred in law and in fact in denying the 1st respondent costs of the suit.***

8. The appeal and cross-appeal proceeded by way of written submissions which were orally highlighted by the parties' counsel. Mr. Pius Nyaga appeared for the appellant, Mr. Charles Kariuki appeared for the 1st respondent, Mr. Cliff Menge appeared for the 2nd and 3rd respondents while Mr. Mathew Okoth appeared for the 4th respondent.

9. The appellant submitted that it was a statutory body tasked with the duty to collect duty and revenue on behalf of the Government. Pursuant to its duties, the appellant was required to administer and enforce all provisions of the ***EACCM Act*** for purposes of assessing, collecting and accounting for all revenues under the Act. Based on the suspicion that arose as to whether the sugar in the 1st respondent's vehicle was smuggled into the country, the appellant was justified under ***Sections 153 & 213*** of the ***EACCM Act*** to detain the sugar and vehicle pending further investigations. It was the appellant's contention that by virtue of ***Section 223*** of the ***EACCM Act*** the onus lay with the 1st respondent to prove that all duties in respect of the sugar had been paid; the 1st respondent failed to prove the same because the documents produced were full of material alterations.

10. According to the appellant, the learned Judge (Lesiit, J.) erroneously based her decision on the memo dated 20th January, 2012 which was from the 4th respondent's director of sales and distribution addressed to the 4th respondent's security manager. The memo indicated that the detained sugar was from the 4th respondent. It was argued that the appellant was not privy to the contents of the memo. It was submitted that even if it was assumed that the memo was addressed to the appellant and the 2nd respondent, it was not sufficient to terminate the appellant's investigations and would only have served to persuade the appellant to find in favour of the 1st respondent. Since the appellant still had doubts it was well within its mandate to continue with its investigation.

11. It was submitted that on 23rd January, 2012 the 4th respondent's security services manager wrote to the appellant and the 2nd appellant informing them that the detained sugar might be from its company and requested the release of the same to the 1st respondent. The appellant argued that the letter was ambiguous and did not persuade it to release the consignment of sugar. Therefore, in light of the prevailing circumstances and the fact that the 4th respondent had in its initial report indicated that the sugar was not from the company, the appellant required a reasonable period to carry out investigations to determine the origin of the sugar.

12. The appellant maintained that it did not violate the 1st respondent's right to property but was merely enforcing the provisions of ***EACCM Act*** in detaining the consignment of sugar. The detention was necessary to determine whether the full taxes had been paid and/or whether the sugar had been smuggled into the country.

13. According to the appellant, the learned Judge erred in holding that the 1st respondent had been deprived of its motor vehicle and 400 bags of sugar for a period of 33 days and awarding the 1st respondent Kshs. 1,000,000/= as damages. It was submitted that the origin of the sugar was clearly established by the 4th respondent's letter dated 20th February, 2012. The learned Judge ought to have used the letter dated 20th February, 2012 to determine whether the appellant and the 2nd respondent had unreasonably deprived the 1st respondent its consignment of sugar and vehicle. Mr. Nyaga urged us to allow the appeal.

14. The 1st respondent contended that the detention of the sugar and vehicle was arbitrary and unfair. It was argued that the learned Judge ought to have even found the 4th respondent liable. This is because the 4th respondent's officer aggravated the issue when in his initial report he indicated that the sugar did not

belong to the 4th respondent and then later in his second report dated 20th January, 2011 indicated that the sugar originated from the 4th respondent. According to the 1st respondent, the conduct of the 4th respondent's officer proved the fact that the officer had solicited a bribe from the 1st respondent's agents. The 1st respondent maintained that there was no justification for the appellant and the 2nd respondent to detain the sugar and vehicle because he had produced the requisite authorization documents and further the 4th respondent had confirmed that the sugar belonged to the company.

15. It was submitted that the learned Judge erred in declining to award damages for loss of user and profit. This is because by the time the judgment was delivered on 13th June, 2013, a period of 1 ½ years had lapsed since the detention of the goods and the vehicle. According to the 1st respondent co According to the 1st respondent, the award of Kshs. 1,000,000/= was inordinately low. It was also submitted that the learned Judge erred in not awarding the 1st respondent costs of the suit. Mr. Kariuki urged us to dismiss the appeal and allow the cross- appeal.

16. The 2nd and 3rd respondents did not file written submissions. Mr. Menge supported the appeal and associated himself with the submissions made on behalf of the appellant.

17. The 4th respondent submitted that it sold 560 bags of its sugar to the 1st respondent; on 3rd January, 2012 the 4th respondent was informed that the sugar had been detained by the 2nd respondent. The 4th respondent argued that upon purchase, the sugar had been loaded in motor vehicle registration number KAJ 811N; after the detention the authorization documents indicated that the sugar had been transferred into three different vehicles to wit, motor vehicle registration numbers KAD 620, KBD 417P and KBH 245K. Further, only 400 bags of sugar were found in the vehicle. The foregoing raised doubt as to whether the sugar belonged to the 4th respondent. After conducting preliminary lab tests on the samples of the sugar, the results indicated that the sugar did not originate from the 4th respondent. The 4th respondent informed the 2nd respondent about the results. After further investigations and consultations, the 4th respondent informed the appellant and the 2nd respondent that the sugar was from the company and requested the release of the sugar to the 1st respondent. Thereafter, on 16th February, 2012 the appellant and the 2nd respondent wrote to the 4th respondent to confirm if the sugar belonged to the company. The 4th respondent reiterated its findings in the second report.

18. According to the 4th respondent, the detention of the sugar occurred before its involvement; the 4th respondent was not privy to the decision of the appellant and 2nd respondent to detain and/or release the sugar. It was argued that the 4th respondent carried out it investigations with due diligence and informed the appellant and the 2nd respondent of its results. It was maintained that the 1st respondent had not proved the alleged bribery allegations against the 4th respondent's officer. Therefore, the 4th respondent could not be held liable for any losses, if any, incurred by the 1st respondent. Mr. Okoth urged us to dismiss both the appeal and cross-appeal.

19. We have considered the record of appeal, rival submissions by parties and the law. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in ***Selle -vs- Associated Motor Boat Co. [1968] EA 123***, thus:

> ***"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must 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 this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."***

We shall first deal with the appeal which in our view raises the following issues for determination:-

- ***Were the appellant and 2nd respondent justified in detaining the 1st respondent's consignment of sugar and vehicle?***

- ***Did the learned Judge err in awarding damages to the 1st respondent as against the appellant, 2nd and 3rd respondent?***

20. It is not in dispute that the 1st respondent's consignment of sugar and vehicle were detained by the 2nd respondent on 3rd January, 2012 based on suspicion that the sugar might have been smuggled into the country. The 2nd respondent did inform the appellant of the said detention and the appellant commenced investigations. It is also not in dispute that the 4th respondent in its initial report which was availed on 9th January informed the appellant that the sugar did not originate from the company. ***Section 153(1)*** of the ***EAMCC Act*** provides:-

> "***An officer may, if he or she has reasonable grounds to believe that any vehicle is conveying any unaccustomed goods whether or not in transit, or being transferred from one partner state to another, stop and search any such vehicle; and for the purpose of that search that officer may require any goods in that vehicle to be unloaded at the expense of the owner of the vehicle."***
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> ***Section 213(1)*** of the Act provides:-
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> ***" 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, animal or other thing may be seized and detained regardless of the fact that any prosecution for an offence under the Act which renders the thing liable to forfeiture has been, or is about to be instituted."***

Goods liable for forfeiture are defined under ***Section 210*** of the Act to include unaccustomed goods. ***Section 2*** of the Act defines unaccustomed goods to include:-

> ***"Dutiable goods on which the full duties due have not been paid, and any goods, whether dutiable or not which are imported. Exported or transferred or in any way dealt with contrary to the provisions of the customs laws."***

21. Based on the aforementioned suspicion that the consignment of sugar had been smuggled, the appellant and the 2nd respondent were acting within their mandate by stopping and detaining the vehicle containing the sugar. We concur with the following findings by the trial court:-

> ***" It is not disputed that the initial results of the investigations of the 1st and 2nd respondents (1st respondent and appellant respectively) was that the documents produced by the petitioner (1st respondent herein) to prove that duty had been paid for the sugar in the consignment in question had major alterations. The major alterations included the destination of the sugar which was Habaswein, a town that was 132 Km from Garbatula where the sugar was detained. The other alteration was the registration number of the lorry in which the sugar consignment was supposed to be carried, the name of the driver and the number of bags of sugar. Given those major alterations I do find that the 1st and subsequently the 2nd respondent had reasonable grounds to believe the sugar in question was unaccustomed, and therefore their action to stop and subsequently detain the vehicle was reasonable."***

22. The issue that fall for consideration was whether the continued detention of the sugar and vehicle up to 24th February, 2012 when they were released was justified. According to the appellant, the origin of the sugar was clarified with certainty by the 4th respondent's letter dated 23rd February, 2012; hence the

learned Judge ought to have taken into account the said date in determining whether the detention was unreasonable. It is clear that the initial report by the 4th respondent indicated that the sugar did not belong to the 4th respondent. On record there is a Memo dated 20th January, 2012 written by the 4th respondent's director of sales and distribution to the 4th respondent's chief security manager and copied to the 1st respondent's director. The memo indicated that after further investigations it was established that the detained sugar originated from the 4th respondent and recommended the release of the same to the 1st respondent. According to the 1st respondent, the said memo was availed to the 2nd respondent on the same day; however, the 2nd respondent refused to release the sugar on the grounds that the same had been detained by the appellant. This position is confirmed by the second report dated 20th January, 2012 prepared by the 4th respondent which confirmed that after receiving the memo, the 2nd respondent called the 4th respondent's security services manager to confirm its authenticity. Subsequently, vide a letter dated 23rd January, 2012 the 4th respondent wrote to the 2nd respondent reiterating that the detained sugar may have originated from the company and recommended its release. We are of the considered view that the issue of the origin of the sugar was clarified by the memo dated 20th January, 2012 which was brought the 2nd respondent's attention on the same day. We therefore agree with the following observations made by the trial court:-

> ***"The 4th respondent's letter confirming that the petitioner's allegation that the sugar was from them may be true, and that the sugar should be released, ought to have been treated as the final results of investigations carried out by the 1st and 2nd respondents. There was no possibility, and there were no reasonable grounds to believe that they would have been able to obtain a different report concerning the sugar other than the one received from the 4th respondent. The 1st and 2nd respondents ought therefore, to have acted on the 4th respondent's communication by releasing the sugar within a reasonable time from the date of receipt of the letter dated 20th January, 2012…It is very clear to me that the 1st and 2nd respondents action to continue the detention of the motor vehicle and sugar after 20th Janaury, 2012 was unjustified, unreasonable, capricious and arbitrary."***

23. Consequently, having found that the detention of the sugar and vehicle from 21st January, 2012 up to 24th February when the same were released was unreasonable, the learned Judge was correct in awarding damages against the appellant, 2nd and 3rd respondents. See ***Article 23(3)(e)*** of the ***Constitution***.

24. Turning to the cross-appeal , the issues which fall for determination are as follows:-

- ***Was the 4th respondent culpable for any loss suffered by the 1st respondent on account of the detention of the sugar consignment and vehicle?***
- ***Did the learn Judge err by failing to award the other damages sought by the 1st respondent?***
- ***Were the damages awarded to the 1st respondent inordinately low?***
- ***Did the learned Judge err in denying the 1st respondent costs of the petition?***

25. On whether the 4th respondent was liable for the unreasonable detention of the sugar and vehicle, we can do no better than agree with the following finding by the trial court:-

> ***" I find that the 4th respondent's initial report dated 9th January, 2012 and the subsequent one dated 20th January, 2012 was not motivated by ulterior motive but were the result of laboratory analysis and consultations. In any event after the 2nd report dated 20th January, 2012 in which the 4th respondent recommended the release of the consignment and the vehicle to the petitioner, the 4th respondent exonerated itself from act and/or omissions of the 1st and 2nd respondents***

thereafter. I find that the 4th respondent was not a party to the further detention of the vehicle and the consignment after 20th January, 2012 and that it had no control over the acts and omission of the 1st and 2nd respondents."

26. We are of the considered view that the other heads of damages apart from general damages for breach of the 1st respondent's fundamental right to property could not be properly granted in the constitutional petition. This is because the damages were of a tortious nature. The 1st respondent argued that the damages awarded were inordinately low. Assessment of damages is purely discretionary and before this Court can interfere with the exercise of the learned Judge's discretion it must be satisfied that she misdirected herself. In ***Butt –vs- Khan [1981] KLR 349,*** Law J.A at page 356 held,

"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low."

We see no reason to interfere with the trial court's assessment of damages.

27. Lastly, whether or not to award costs of a suit to a party is discretionary. In this case, the learned Judge ordered each party to bear its own costs. In ***Mbogo & Another- vs- Shah (1968) E.A. 93 at page 95***, Sir Charles Newbold P. held,

"…..a Court of Appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjuctice…."

We see no reason to interfere with the learned Judge's orders as to costs.

28. The upshot of the foregoing is that we disallow both the appeal and cross-appeal with no order as to costs.

Dated and delivered at Meru this 22nd day of May, 2014.

ALNASHIR VISRAM

……

JUDGE OF APPEAL

MARTHA KOOME

……

JUDGE OF APPEAL

J. OTIENO-ODEK

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR