THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: CHEBORION, MADRAMA AND MULYAGONJA, JJA)

CIVIL APPEAL NO 172 OF 2019

1. SWT TANNERS LTD}
2. GENERAL AGENCIES UGANDA LTD}
3. SSUNAD LIMITED}
4. WILLIEX COMMODITIES LTD}
5. AKHCOM LIMITED}
6. JASSANI GENERAL TRADING LIMITED}
7. SONERI LIMITED}
8. SINGA RICE LIMITED}
9. ARMOUR TRADING COMPANY LIMITED}
10. JAM MOHAMMED INVESTMENTS LIMITED}
11. GLORRE INTERNATIONAL LIMITED}
12. IMBA FOODS UGANDA LIMITED}
13. ZEN TRADING LIMITED}
14. MABU COMMODITIES LIMITED} ..... APPELLANTS

VERSUS

COMMISSIONER GENERAL

UGANDA REVENUE AUTHORITY} .....RESPONDENT

(*Appeal against the Judgment of Wangutusi J, Judge of the High Court of Uganda (Commercial Division) in HCCS No. 880 of 2014 delivered at Kampala on 10th February 2016*)

JUDGMENT OF CHRISTOPHER MADRAMA, JA

The Appellants filed an action in the Commercial Division of the High Court in Kampala against the respondent for a declaration that the Practice Note issued by the respondent which was published in the New Vision newspaper

of 19 November 2014 is not binding on them and applied only to rice imports produced locally or processed in Uganda. Secondly that the rice imported by the plaintiffs was not chargeable with VAT of 18% as indicated in the Practice Notice. Thirdly that the imposition of 18% VAT levy on all imported rice is arbitrary and unlawful. Fourthly and in the alternative for a declaration that the value added if any was done outside Uganda and therefore not chargeable to 18% VAT in Uganda or that the value-added does not exceed 5% of the total value of the supply. Fourthly for an order of a permanent injunction to be issued restraining the respondent from imposing 18% VAT on the rice imported by the plaintiffs and lastly for orders of general damages and costs of the suit.

The complaint of the plaintiffs who are now the appellants were that they were importers of rice as a major business and income and that the rice imported by them is subjected to import duty of 75%, infrastructure levy of 1.5% and withholding tax of 6%. At all times, the rice imported by the appellants had not been subject to 18% VAT as it was classified as unprocessed produce. In 2007 the Commissioner General Uganda Revenue Authority by practice notice issued on 13 November 2007 gave a directive that unprocessed rice was an exempt supply that fell within the Second Schedule to the Value-Added Tax Act. However, on 19 November 2014, the Commissioner General issued a Practice Notice imposing VAT of 185 on the imported rice.

The respondent averred that the rice, the subject matter of the suit was subject to VAT of 18% which was lawfully assessed against the plaintiffs and prayed that the suit is dismissed with costs.

The issue as framed by the parties for determination of the suit where that:

1. Whether the suit rice is processed or unprocessed?

2. If it is processed whether the value of the added activities such as drying, hulling, milling, polishing, grading, sorting and packaging

among others exceed 5% of the total value of the supply of rice imported by the plaintiffs?

3. Whether the imported rice is chargeable to 18% VAT in accordance with the VAT Act cap 349?

4. What remedies are available to the parties?

The first issue was answered by the trial judge wherein he found that the rice was processed.

On the second issue of whether the value-added of the activities such as drying, hulling, milling, polishing, sorting, grading and packaging inter alia exceeded 5% of the total value of the supply of rice imported by the plaintiffs, the learned trial judge found in the negative.

On the third issue of whether the imported rice is chargeable to 18% VAT, the learned trial judge held that for the supply to be considered taxable, it should not fall within exempt supplies listed in the Second Schedule of the VAT Act. He further considered section 20 of the VAT Act for the definition of an exempt supply and the question of whether the goods imported were exempt from customs duty according to the Fifth Schedule of the East African Community Customs Management Act. He found that the rice did not fall within the confines of the Second Schedule of the VAT Act and it was neither imported rice listed under those exempted imports set out in the Fifth Schedule of the East African Community Customs Management Act and therefore the suit property was not exempt supply and is chargeable with 18% VAT. The learned trial judge dismissed the claim of the plaintiffs that the 18% VAT levy applied only to rice products not produced locally and processed in Uganda. He found that rice produce within Uganda and outside Uganda that goes through the same process from paddy rice to milled rice ready for consumption attracts VAT.

In conclusion the learned trial judge held that the rice was processed rice and does not fall within exempt supplies in the Second Schedule of the VAT

Act or exempt imports in the Fifth Schedule of the East African Community Customs Management Act and was chargeable with 18% VAT. He accordingly dismissed the suit with costs. The plaintiffs were aggrieved and appealed to this court on seven grounds of appeal that:

1. The learned and honourable trial judge erred in law and fact when he misconstrued and misapplied the VAT Statute (as amended) to the appellants imported rice thus coming to a wrong decision of dismissing the suit.

2. The learned honourable trial judge erred in law and fact when he construed and applied the East African Community Customs Management Act and the VAT Act in disregard of other laws, thus coming to a wrong decision.

3. The learned honourable trial judge erred in law and fact when in his judgment relied on the respondent's calculations of DW1 based on untendered report to show that the imported rice VAT value exceeds 5% thus coming to a wrong decision in favour of the respondents, thus dismissing the suit.

4. The learned honourable trial judge erred in law and fact in holding that the suit imported ready to eat rice was processed rice subject to VAT and, in the process, ignored the law relating to double taxation thus coming to a wrong decision of dismissing the appellant's suit.

5. The learned honourable trial judge erred in law and fact when he failed to address his mind to the dictates of international treaties like the General Agreement on Tariffs and Trade which takes precedence over internal law in circumstances of this case thus coming to a decision that the subject imported rice was chargeable with VAT, whereas not thus wrongly dismissing the suit, to the detriment of the appellants.

6. The learned honourable trial judge erred in law and fact when he ignored and/or omitted to fully address himself to the agreed fact that the suit imported rice was a ready for consumption product requiring no further processing, thus thereby coming to a wrong decision of holding to the contrary that it was subject to VAT whereas not, thus wrongly dismissing the appellant's suit.

7. The learned trial judge erred in law holding that the suit imported rice was subject to VAT of 18% when he relied on information provided by a website which information is outside the realm of the law governing taxes, thus coming to a wrong decision of dismissing the suit.

8. The honourable learned trial judge erred in law and fact when he totality failed to properly weigh and evaluate evidence on record thus coming to a wrong decision, of dismissing the suit.

The appellants prayed that the appeal is allowed and the judgment of the High Court set aside whereupon the court finds in favour of the appellants that the suit imported rice was not subject to VAT. Generally, if any tax payments are made in regard to the subject imported ready to eat rice, the money be refunded to the appellants.

At the hearing of the appeal learned counsel Mr Tom Magezi represented the appellants while learned counsel Mr Mike Bagenda Muzito represented the first appellant. Learned counsel Mr George Okello appearing together with Sam Kwerit and Barnabas Nuwaha represented the respondent. With the leave of court, the court was addressed in written submissions.

Submissions of the appellants' counsel

The appellants' counsel urged the court to take judicial notice of certain matters within the purview of sections 55 and 56 (1) of the Evidence Act in the circumstances of the case. He submitted that under articles 123 (1) and 87 of the Constitution of the Republic of Uganda, the President or a person authorised by the President may make treaties, conventions, agreements

or other arrangements between Uganda and any other country or between Uganda and any international organisation or body in respect of any matter. Further, under article 287, the Constitution preserves all prior international agreements made by Uganda before the coming into force of the Constitution inclusive of the General Agreement on Tariffs and Trade (GATT) to which Uganda became a signatory on the 23rd October 1962 and is the post-independence agreement Uganda made within the import of article 287 (a) of the Constitution.

Counsel submitted that the General Agreement on Tariffs and Trade, 1994 (GATT) to which Uganda is a signatory with effect from 23 October 1962 and that Uganda has been a member of the World Trade Organisation (WTO) since 1 January 1995. The court ought to have taken judicial notice thereof under section 55 and 56 (1) of the Evidence Act. With regard to the claim on arbitrariness and unlawfulness the appellant's counsel submitted that article III (4) of the GATT 1994: "member states shall accordingly import products no less favourable than that accorded to like products of national origin."

He submitted that there is little wonder that section 76 (1) of the VAT Act provides for supremacy of the GATT 1994 which provides that:

> "To the extent that the terms of a treaty or other International Agreement to which Uganda is a party are inconsistent with the provisions of this Act, apart from section 75, the terms of the treaty or international agreement prevail over the provisions of this Act."

The appellants submitted that section 76 (1) of the VAT Act gives no exceptions to rice imports to Uganda with the local rice production in VAT charges. In other words, the proposition of the GATT read together with section 76 (1) of the VAT Act and section 56 (1) of the Evidence Act calls upon the court to take judicial notice of GATT inclusive of section 76 (1) of the VAT Act which makes the GATT take precedence over other VAT provisions in regard to charging or non-charging of rice imports in the circumstances of this case. The appellant's counsel submitted that under section 56 (1) (a) & (b) of the Evidence Act, the court shall take judicial notice of Acts and

Ordinances enacted or to be enacted and Acts of Parliament of the United Kingdom now or before in force in Uganda and Orders – In – Council, laws, statutory instruments or subsidiary legislation. He emphasised that section 56 (i) (a) (b) includes, section 76 (1) of the VAT Act which brings the GATT into play. Further that article III (4) bars discrimination/preference in charging VAT on the same imported products and the same local products and where any Act permits any discrimination as is in the matter before court, the said Act is deemed to be unlawful and arbitrary to GATT 1994 and to section 76 (1) of the VAT Act and would accordingly trickle down to be irresistibly contrary to article 21 (1) the Constitution which bars economic discrimination.

Grounds 1, 2, 4 of appeal.

The appellant's counsel submitted that these grounds deal with the applicability of all laws cited above. Considering the entirety of the lower court judgment, the learned trial judge in dissecting the law and facts of the case made no reference whatsoever to the provisions of the binding laws namely articles 1, 2, 3 (1) and 287 of the Constitution, article 21 (1), (2), (3) and (5) of the Constitution. Section 76 (1) of the VAT Act, sections 55 and 56 (1) (a) & (b) of the Evidence Act and the GATT 1994. He submitted that in the circumstances of the case, when it comes to the charging of VAT on rice or not charging VAT on locally produced rice, the learned trial judge erred in law and fact and omitted to apply the cited laws which led the trial judge to reach the unjust conclusion holding the way he did that the legislature in this country could not have promoted rice production outside the country in preference to local rice producers.

Further the learned trial judge held that "in any case, if there was to be any disparity, then the imported rice would be the one to attract more tax in order to protect the local farmer". The appellant's counsel contends that the holding of the learned trial judge is contrary to and in disregard of the cited laws and invited this court to look into the matter and find for the appellant. Further on the question of legality of the imposition of VAT on import of rice vis-à-vis the national treatment principle, the appellant's counsel

submitted that before the VAT (Amendment) Act No 8 of 2014, there was no VAT charged by the Uganda government on the rice grown and milled in Uganda and imported rice, since it was classified as zero rated for the rice grown and milled in Uganda and exempt for the imported rice under the then existing law.

Article III (1) of the GATT 1994 stipulates the general principles that members must not apply internal taxes or other internal charges, laws, regulations and requirements affecting imported or domestic product so as to afford protection to domestic production. In relation to internal taxes or other internal charges, article III (2) of the GATT 1994 stipulates that the WTO members shall not apply standards higher than those imposed on domestic products between imported and "like" domestic goods, or between imported goods and "a directly competitive or substitutable product". He submitted that it is a principle of international law that a treaty takes precedence over national legislation of a particular state, which is a party to the treaty. Therefore, where national legislation is in conflict with an international treaty, the latter prevails.

The appellants counsel further submitted that the prevalence of international legislation over domestic legislation is recognised under section 76 (1) VAT Act which stipulates that to the extent that the terms of the treaty or other international agreement to which Uganda is a party is inconsistent with any provisions of the VAT Act, the terms of the treaty or international agreement prevail over the provisions of the VAT Act.

Further, since 2015, the government classified rice grown and milled in Uganda as a zero-rated product, the same treatment ought to be applied to all imported rice into Uganda. The continued imposition of 18% VAT on imported rice, contravenes articles 123, and 87 of the 1995 Constitution of the Republic of Uganda and article III 1, 2 and 4 of the GATT 1994 and the VAT Act. The tax imposed by the Uganda government is illegal and cannot be sustained within the meaning of international treaties and under the Constitution of the Republic of Uganda.

The appellant's counsel submitted that it is trite law that a court of law cannot sanction what is illegal and relied on **Makula International Ltd versus His Eminence Cardinal Nsubuga** and **Rev Dr father Kyeyune; SCCA No 4 of 1981** where the Supreme Court of Uganda upheld the holding in **Makula International versus Cardinal Nsubuga**. He contended that the decision in the cited cases applies squarely to the question before the court. The appellant's counsel contended that there is no doubt that the tax in issue was unlawful and therefore illegal and it was the duty of the trial judge to find that the tax in dispute contravened the law and was unenforceable. Having established that the Act and the Practice Notes imposing value-added tax on imported rice were unlawful and illegal, the Court of Appeal should set aside the decision.

Further counsel reiterated submissions that it is undisputed that Uganda is a party to GATT 1994 and bound by its provisions. As a matter of fact, the dispute between the appellants and the respondent involves matters of international trade and as such both domestic law and international law had to be applied in the determination of the dispute. Specifically, counsel submitted that article II (1) of the GATT 1994 prohibits discrimination between imports and like domestic products. That the VAT (Amendment) Act No 2 of 2015 contravenes this article because it discriminates between imported rice by the appellant's by subjecting it to VAT of 18% and zero rating locally grown and milled rice in Uganda contrary to the law.

The appellant's counsel submitted that the illegality is manifested by the fact that section 5 of the VAT (Amendment) 2014, repealed paragraph 1 (f) of Third Schedule of the VAT Act, thereby standardising both local and imported rice. However, section 11 of the VAT (Amendment) Act 2 of 2015, re-enacted the repealed paragraph 1 (f) of the Third Schedule to the Principal Act as paragraph 1 (l), whereby it provided for related supply of cereals grown and milled in Uganda. The later Amendment clearly discriminates imported rice because in effect it makes it standard rated at 18% VAT, which is prohibited by the GATT 2014 (1994).

Further counsel submitted that the GATT 1994 takes precedence over domestic law within the meaning of section 76 (1). Further, he submitted that section VAT (Amendment) Act No 2 of 2015 was effective 1st January 2014 while the learned trial judge delivered his judgment on 10th February 2016 long after the Act that come into force, which the trial judge failed to take into account. He contended that the court in delivering judgment should apply the law at the time of writing the judgment. He submitted that had the learned trial judge appraised himself of the clear provisions of sections 55 and 36 of the Evidence Act, section 76 (1) VAT Act as well as section 11 of the VAT (Amendment) Act No 2 of 2015, he would not have reached the erroneous decision.

The appellants contended that the continued imposition of 18% VAT on imported rice by the appellants and the instruments relied on by the respondents are not only illegal but not overtaken by events. This is because the Practice Note of 2014 was based on the VAT (Amendment) Act of 2014 which has since been replaced with the VAT (Amendment) Act No 2 of 2015. To that extent both the VAT (Amendment) Act of 2014 and the Practice Note of 2014, under which the respondent enforces VAT on imported rice is without legal basis and which this court should not sanction.

Further the appellant's counsel submitted that the rules of statutory interpretation on tax laws require that they are strictly applied (see **Uganda Revenue Authority v Siraje Hassan Kajura SCCA No 09 2015**). Counsel emphasised the supremacy of treaties and agreements (international) as envisaged under section 76 (1) of the VAT Act.

Further and without prejudice, he submitted that the imported rice is charged at 10% VAT, it will still be unjust because of incidences of double taxation with regard to cross-border trade, the initial VAT imposition in country origin of export, and in country of import. He submitted that in such a situation, one jurisdiction may impose VAT rules. If such rules don't apply, double taxation or non-taxation is likely to occur.

Counsel submitted that one of the most important principles in VAT design is whether tax operates on an origin or destination basis. He submitted that this has a significant impact on the avoidance of double taxation and the equal treatment of imports compared with locally produced goods or services. The appellants' contend that origin-based VAT, is imposed in the jurisdiction where the goods or services come from. That means that an exporter pays VAT on the same basis and at the same rate as a local supplier. The principle assumes that imports in the country of destination are not subject to VAT. A destination-based VAT is imposed in the jurisdiction where the goods go. It means that an exporter does not have to levy VAT on his or her supply, because it is assumed that the supply will be subject to VAT in the country of destination. The converse is also true. The destination principles put imports on locally consumed goods on equal footing and achieves neutrality in cross-border trade. That is how VAT operates in cross-border situations and how that may influence trade.

The appellant's counsel submitted that the destination-based VAT is prey to double taxation when it comes to imports. In the premises he submitted that grounds 1, 2, 3 (b) and 5 ought to be resolved in favour of the appellant.

Grounds 5, 6, and 7.

The appellant's counsel submitted that in paragraphs 4 and 6 of the plaint, the fact of importation of rice is admitted by the defendant in paragraph 3 of its defence. In light of that admission, the pleadings in paragraph 4 (c) of the plaint there is an element of multiple taxation to the detriment of imported rice which offends the GATT 1994.

The appellants counsel further submitted that the submissions on grounds 1, 2, and 4 effectively dispose of grounds 3, 5, 6 and 7. For purposes of clarity, he submitted that in terms of ground 7, the learned trial judge failed in his duty to evaluate the law and evidence on record. But the learned trial judge misdirected himself when he found that the suit rice attracts the same tax yet under the VAT (Amendment) Act No 2 of 2015, the locally grown and milled rice is charged at zero tax, not 18% imposed on imported rice.

The appellant's counsel invited the court to reappraise the evidence on record and come to a proper conclusion in accordance with the law. In the premises the appellants prayed that this court allows the appeal and sets aside the judgment of the High Court with costs to the appellants. Further, he prayed that any tax payments made with regard to the subject matter rice be refunded to the appellants. Further counsel submitted that the learned trial judge misdirected himself when he found that the suit rice attracts the same tax yet under the VAT (Amendment) Act Number 2 of 2015 this is not so and the court ought to allow the appeal as prayed for.

Submissions of the respondent's counsel.

The respondent relied on the conferencing notes which contained skeleton arguments. The respondents counsel submitted that the undisputed facts of the case are that the appellants are engaged in the importation of rice from Pakistan and other parts of the world. The rice, the subject matter of the appeal is imported ready for consumption and undergoes no further processing in Uganda.

In November 2007, the respondent issued the Practice Note clarifying that all imported rice is considered to be unprocessed agricultural produce for purposes of the Value Added Tax Act and it therefore falls under the provisions of the Second Schedule which provides for exempt goods. Following the enactment of the VAT (Amendment) Act 2014, which repealed paragraph 1 (f) of the Third Schedule of the VAT Act, which had zero rated the supply of cereals grown, milled or produced in Uganda. The respondent on 19th November 2014 issued Practice Notes URA/VAT/PN 2/14 subjecting the supply of local or imported rice to VAT of 18%.

Pursuant to the Practice Note, the respondents communicated that from research conducted, it had established that the supply of rice, which is ready for human consumption does not fall within the ambit of paragraph 1 (a) of the Second Schedule of the VAT Act (exempt) nor does it fall under the Third Schedule of the same Act (zero rating) and therefore, the supply attracted VAT at the rate of 18%. The respondent further directed that

imported rice was subject to VAT at the rate of 18% and that it revoked the Practice Note of 14 November 2007. On 18th November 2014, the appellants filed HCCS No 880 of 2014 against the respondent seeking declaration that the Practice Notes issued by the respondent is not binding and that the 18% levy applies only to rice products produced locally and processed in Uganda and that 18% VAT is not payable on imported rice. That VAT imposed of 18% on imported rice was arbitrary and unlawful. Secondly, the VAT does not exceed 5% of the total value of the supply. On 10th February 2016 the High Court determine the suit in favour of the respondent.

The respondent objected to the grounds of the appeal for being too general or narrative offending rule 86 (1) of the Judicature (Court of Appeal Rules) Directions and relied on **Attorney General v Florence Baliraine; Court of Appeal Civil Appeal No 79 of 2003** for the holding that "the grounds of appeal must concisely specify the points which are alleged to have been wrongly decided... The general grounds which do not concisely specify the points of objection offend the provisions of rule 86 (1) of the Rules of this court...". In the alternative, the respondents counsel submitted without prejudice that they would argue grounds one, three, five together in the beginning and grounds two and four together secondly and thirdly grounds six and seven.

Grounds are 1, 3 & 5.

The respondents counsel submitted that the learned trial judge rightly found that the rice is processed and does not fall within the exempt supplies in the Second Schedule of the VAT Act nor the exempt imports in the Fifth Schedule of the East African Community Customs Management Act and is therefore chargeable to 18% VAT.

Counsel submitted that section 4 of the VAT Act Cap 349 provides that a tax to be known as a value-added tax shall be charged in accordance with the Act on every taxable supply made by a taxable person and secondly on every import of goods other than an exempt import. They contended that with regard to importation of goods, the VAT Act imposes liability to pay tax on the importer under section 5 of the VAT Act. Counsel further referred to

the definition of the term "import" under section 1 (j) of the VAT Act to mean "to bring, or to cause to be brought, into Uganda from a foreign country or place". The VAT Act provides for exempt supplies and exempt imports. Under section 19 (1) of the Act, it is provided that: "a supply of goods or services is an exempt supply if it is specified in the Second Schedule". Further under section 20 of the VAT Act, it is provided that:

> "an import of goods is an exempt import if the goods;
>
> (a) are exempt from customs duty under the Fifth Schedule of the East African Community Customs Management Act, 2004 except compact fluorescent bulbs with a power connecting cap at the end, and lamps and bulbs made from light emitting diodes technology for domestic and industrial use; or
>
> (b) would be exempt had they been supplied in Uganda.

The respondent's counsel submitted that on the other hand, the Second Schedule to the VAT Act provides for exempt supplies and in paragraph 1 (a) thereof, certain supplies are specified as exempt supplies for purposes of section 19 this include the supply of livestock, unprocessed foodstuffs and unprocessed agricultural products, except wheat grain...". He submitted that based on the provisions of the VAT Act, a supply or import of goods is chargeable to 18% VAT unless it is specifically exempted under the Act or the East African Community Customs Management Act 2004. In the premises the learned trial judge rightly concluded, based on the evidence of DW2 that the suit rice was processed and he held that the suit rice is not imported in Paddy form. He concluded that the rice had been altered from its natural state through a number of processes to make it ready for consumption. It was also an agreed fact that the rice does not undergo any drying, hulling, milling, polishing, sorting, grading and packing in Uganda and these processes are done before importation.

Further under section 22 of the Evidence Act, cap 6 facts which are admitted need not be proved. It was an agreed fact in the scheduling memorandum paragraph A and B that the suit rice is imported into Uganda ready for consumption and does not go through any further processes in Uganda. This

evidence was admitted by PW3. On that basis, the respondent submitted that the appellants admitted the fact that the suit rice is processed and the learned trial judge rightly applied the law to the facts and came to the right holding and conclusion.

Further, the respondent's counsel submitted that the suit rice is a processed product and it cannot qualify to be an exempt supply within the meaning of section 19 (1) and paragraph 1 (a) of the Second Schedule to the VAT Act. The exemption in this regard is limited to unprocessed agricultural products which is not the case with the suit rice. Further the respondents counsel submitted that the Honourable Judge rightly found that the suit rice is not an exempt import within the meaning of section 20 of the VAT Act and the Fifth Schedule to the East African Community Customs Management Act 2004 since it is not listed among the items specified therein and as such it is subject to VAT of 18%.

The respondents counsel also submitted that it was an agreed fact that following the enactment of the VAT (Amendment) Act, 2004, this repealed paragraph 1 (f) of the Third Schedule to the VAT Act, that had zero rated the supply of cereals grown, milled or produced in Uganda, the respondents issued Practice Note URA/VAT/PN 2/14, admitted as exhibit P2 whereby the supply of both local and imported rice was subject to VAT at the standard rate of 18%. The respondent revoked the Practice Note earlier issued in November 2007. In the premises, the respondents counsel prayed that grounds 1, 3 and 5 ought to fail and be dismissed.

Grounds 2 & 4.

The respondent's counsel submitted that the suit rice imported by the appellants was not discriminated upon by the respondent when it imposed 18% VAT. Secondly, the issue of alleged discrimination of the suit goods under the General Agreement on Tariffs and Trade 1994 did not arise in HCCS No 880 of 2014. The appellants cannot therefore raise it in the appeal. He prayed that the court rejects the submissions. Secondly, that **Makula International v Cardinal Emmanuel Nsubuga [1980] HCB 11** was decided on

facts wholly different from the one before court in that it dealt with issues of transactions founded on any illegality whereas in the instant case, the transaction is the imposition of VAT under the VAT (Amendment) Act 2014 which was lawful as rightly held by the learned trial judge.

In the premises, the situation purported by the appellant as being discriminated against was taken out of context. Further the VAT (Amendment) Act No 1 of 2014 which repealed paragraph 1 of the Third Schedule to the VAT Act thereby imposing 18% VAT on imported rice became effective on 1st of July 2014 while section 11 of the VAT (Amendment) Act No 2 of 2015 which imposes VAT on imported rice and zero rated local rice, came into force on 1st January 2015. There was therefore no discrimination or illegality in imposing VAT on local and imported rice for the period 1st July 2014 until 1st January 2015. The imposition of VAT tax was clearly in conformity with the VAT Act and the General Agreement on Tariffs and Trade 1994 and the same is lawful and payable by the appellants for the relevant period.

Grounds and 6 & 7.

The respondent's counsel submitted that the learned trial judge properly evaluated the evidence on record and came to the right conclusion. Counsel further relied on **Kifamunte Henry v Uganda; Supreme Court Criminal Appeal No 10 of 1997** for the proposition that once it is established that there is some competent evidence to support a finding of fact, it is not open on second appeal to go into the sufficiency of the evidence of reasonableness of the finding. Even if the court of first instance has wrongly directed itself on some point, the second appellate court cannot take a different view. He prayed that the court uphold the decision and orders of the High Court, in Civil Suit No 880 of 2014 and dismisses the appeal with costs to the respondent.

Resolution of Appeal

I have carefully considered the written submissions of counsel for the Appellants and the Respondent respectively. I have also considered the

record of appeal, the law and authorities cited by the counsel of the parties and taken them into account. The duty of this court as a first appellate court is to reappraise the evidence on record and draw its own inferences of fact as provided for in Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions, S.I No. 13-10. Further in **Peters v Sunday Post Limited [1958] 1 EA 424** the East African Court of Appeal held that the duty of a first appellate court is to review the evidence in order to determine whether the conclusions drawn by the trial court should stand. In reappraisal of evidence, the first appellate court should caution itself regarding the shortcoming of not having had the advantage of seeing and hearing the witnesses testify.

The appellants commenced an ordinary suit in the High Court under the inherent jurisdiction of the High Court. However, in the tax matters, the statutory jurisdiction of the High Court is an appellate jurisdiction arising from the Value Added Tax Act, cap 349 which deals with objections and objection decisions of the Commissioner General pursuant to assessments. It envisages a person who is dissatisfied with an assessment to Lodge an objection to the Commissioner General within 45 days under section 33B in writing. Upon making an objection decision, where the taxpayer is dissatisfied with the decision, he or she may appeal to the tax appeals Tribunal under section 33C of the VAT Act within 30 days upon being served with the notice of the objection decision of the Commissioner General. Finally, a party dissatisfied with the decision of the Tax Appeals Tribunal may appeal to the High Court on the question of law only under section 33D of the VAT Act.

In this case, it is clear that the appellants filed an original suit in the High Court circumventing the statutory procedures set out in the VAT Act. Article 152 (3) of the Constitution of the Republic of Uganda provides that Parliament shall make laws to establish Tax Tribunals for the purposes of settling tax disputes. Indeed, a Tax Appeals Tribunal was set up under the Tax Appeals Tribunals Act chapter 345 by 1 August 1998.

Further the subject matter of the suit in the High Court as contained in the plaint challenge the Practice Note issued by the defendant/respondent to this appeal. The Practice Note entitled URA/VAT/PN 2/14 states that section 5 of the VAT (Amendment) Act, 2014 repealed paragraph 1 (f) of the Third Schedule to the VAT Act which zero rated the supply of cereals, where the cereals are grown and milled in Uganda. It explains that the implication of the amendment was that the supply of cereals grown and milled in Uganda attracted VAT at the rate of 18% with effect from 1st of July 2014. Secondly it noted that paragraph 1 (a) of the Second Schedule to the VAT Act exempt from VAT the supply of livestock, unprocessed foodstuff and unprocessed agricultural products except wheat grain. Further it noted that paragraph 3 of the same Schedule defined "unprocessed" to include low value-added activities such as sorting, drying, salting, filleting, deboning, freezing, chilling or bulk packaging, where, except in the case of packaging, the value-added does not exceed 5% of the total value of the supply.

Finally, the Practice Note explained that they established in relation to the supply of rice that the value-added activities such as drying, hulling, milling, polishing, grading, sorting and packaging among other things exceeds 5% of the total value of the supply. It implied that the supply of rice which is ready for human consumption does not fall within the provisions of paragraph 1 (a) of the Second Schedule to the VAT Act and does not fall under the Third Schedule of the same Act and therefore the supply attracted VAT at the rate of 18% and that meant that the imported rice is subject to VAT at the rate of 18%.

Further The first Schedule to the East African Community Customs Management Act does not anywhere exempt process rice.

The appellants challenged the Practice Note of the respondent and the interpretation therein. The issues that were agreed for determination by the High Court where:

1. Whether the suit rice is processed or unprocessed?

2. If it is processed, whether the value of the added activities such as drying, hulling, milling, polishing, sorting, grading and packaging among others exceeds 5% of the total value of the supply of rice imported by the plaintiffs?
3. Whether the imported rice is chargeable to 18% VAT in accordance with the VAT Act cap 349?
4. What remedies are available to the parties?

The learned trial judge considered the issues agreed upon by the parties in the joint scheduling memorandum without any amendment. On the first issue of whether the suit rice was processed or unprocessed, the learned trial judge found that the suit rice was polished and ready for consumption in Uganda and was therefore processed.

On the second issue of whether the value-added activities of drying, hulling, milling, polishing, sorting, grading and packaging exceeds 5% of the total value of the supply of rice, the learned trial judge found for the respondent and held that the rice did not fall within paragraph 1 (a) of the Second Schedule of the VAT Act neither did it fall under the Third Schedule of the same Act. The learned trial judge also found that imported rice is not listed under those exempted imports under the Fifth Schedule of the East African Community Customs Management Act and therefore is not an exempt supply and is chargeable with the 18% VAT.

The learned trial judge made a short note on the issue of discrimination between imported rice under processed rice in Uganda when he said:

> The claim by the plaintiffs that the 18% VAT levy applied only to rice products produced locally and processed in Uganda cannot be sustained in as much as the legislature in this country could not have promoted rice production outside the country against the local rice producers. In my view, rice produced both within and outside the country that goes through the same process from paddy to milled rice ready for consumption should therefore attract the same tax.
>
> In any case, if there was to be any disparity, then the imported rice would be the one to attract more tax in order to protect the local farmer.

The crux of the appeal is about failure to evaluate the evidence. Most importantly, the appellant's counsel dealt on all points of the appeal on the issue of whether there was discrimination between Ugandan processed rice and imported rice in terms of exempting Ugandan rice supplies from VAT while subjecting imported rice to 18% VAT. However, in the above holding that they have cited immediately preceding this paragraph, the learned trial judge found that imported rice and locally supplied rice which is processed attracts 18% VAT. His remarks about whether there could have been a disparity was not a holding based on his assessment of the evidence and the law but an observation that legislature may prefer to promote locally grown rice over imported rice. This was purely obiter and not part of the suit. It cannot form the basis of an appeal because it was not a matter in controversy.

I have already set out the grounds of appeal at the commencement of this judgment. In handling the grounds of appeal, the appellant's counsel invited the court to consider sections 55 and 56 (1) of the Evidence Act and the provisions of the Constitution regarding the international treaty obligations, agreements and other arrangements between Uganda and any other country with particular reference to the General Agreement on Tariffs and Trade, 1994 (GATT). He submitted on whether the learned trial judge ought to have taken judicial notice of the GATT under section 76 (1) of the VAT Act so that court would have found that there was discrimination between domestically produce rice and imported rice. In arguing grounds 1, 2, and 4 counsel for the appellant dwelt on obiter remarks of the learned trial judge about any disparity between imported rice and that produced by the local farmer. He submitted that the findings of the trial judge were contrary to the treaty obligations under the GATT. He submitted that under the VAT (Amendment) Act No 8 of 2014, there was no VAT charge by the Uganda government on the rice grown and milled in Uganda since it was classified as zero rated. He submitted that under article III and paragraph 1 of the GATT 1994, there is a general principles that members should not apply the internal taxes or internal charges, laws and regulations and requirements

affecting imported or domestic product so as to afford protection to domestic production.

Clearly, the case revolves around whether the learned trial judge erroneously omitted to apply the provisions of the GATT 1994. It also flows from the proposition that the learned trial judge found that the processed rice in Uganda is not liable to VAT whereas the learned trial judge clearly found that the processed rice in Uganda was liable to 18% VAT.

The appellant's counsel continued with the same submission under all the other grounds of appeal and I would therefore conclude this appeal on the first point as to whether this court can look into the matter afresh. In the first place the learned trial judge found as follows:

> In my view, rice produced both within and outside the country that goes through the same process from paddy to milled rice ready for consumption should therefore attract the same tax.

Discriminatory tax of 18% VAT cannot be argued on the basis of the judgment of the High Court and any ground on discrimination is incompetent. The submissions of the appellant are not based on the judgment but on a fresh understanding or consideration of the law irrespective of the judgment. The jurisdiction of this court is to hear appeals from a decision of the High Court as clearly provided for under article 134 (2) of the Constitution of the Republic of Uganda which provides that:

> (2) An appeal shall lie to the Court of Appeal from such decisions of the High Court as may be prescribed by law.

There was no decision of the High Court to the effect that the VAT chargeable on imported processed rice is different for locally produced rice and imported rice. On that basis the appeal would be incompetent.

Further, the respondent objected to the introduction of a new point based on the GATT 1994 to the effect that the laws of Uganda offended the provisions of the GATT 1994.

The above notwithstanding, in order to understand whether the appellant was introducing a new point contrary to law, I will set out the law and the pleadings so as to come to a just conclusion on the issue of the new point of law which was not argued at the High Court.

Section 4 of the VAT Act provides that a tax, to be known as value added tax, shall be charged in accordance with the Act on:

(a) every taxable supply in Uganda made by a taxable person;
(b) every import of goods other than an exempt import; and
(c) the supply of any imported services by any person.

Further section 5 defines a person liable to Pay Tax as:

> Except as otherwise provided in this Act, the tax payable –
>
> (a) in the case of a taxable supply, is to be paid by the taxable person making the supply;
> (b) in the case of an import of goods, is to be paid by the importer;
> (c) in the case of an import of services, is to be paid by the recipient of the imported service.

Further section 18 (1) of the VAT Act *inter alia* defines taxable supply as "(1) A taxable supply is a supply of goods or services, other than an exempt supply, made by a taxable person for consideration as part of his or her business activities". Under section 19 of the VAT Act an exempt supply means:

> 19 (1) A supply of goods or services is an exempt supply if it is specified in the Second Schedule.

Last but not least section 20 deals with exempt imports and provides that:

> Exempt Import
>
> 20. An import of goods is an exempt import if the goods –
>
> (a) are exempt from customs duty under the Fifth Schedule of the East African Community Customs Management Act, 2004; or
>
> (b) Would be exempt had they been supplied in Uganda.

The relevant provisions of the law include Item 1 (a) of the Second Schedule to the VAT Act which includes among exempt supplies, unprocessed foodstuffs and unprocessed agricultural products and livestock. There is clearly no appeal from the finding of fact of the learned trial judge that the imported rice, the subject matter of the suit was processed and ready for consumption. It follows that processed rice is not exempt supplies from VAT in terms of paragraph 1 (a) of the Second Schedule of the VAT Act.

Further the appellant dwelt in the High Court on the issue of the definition of the word "unprocessed" as used under paragraph 3 of the Second Schedule which provides that:

> For purposes of paragraph 1 (a) of this Schedule, the term "unprocessed" includes low value-added activity such as sorting, drying, salting, filleting, deboning, freezing, chilling, where, except in case of packaging, the value added does not exceed 5% of the total value of the supply.

The above paragraph 3 was amended by the VAT (Amendment) Act 2014 to include "husking". The above definition, notwithstanding the amendment to the Act, does not change the finding of the learned trial judge that the rice was processed or in other words it was not "unprocessed" as defined in paragraph 3 of the Second Schedule to the VAT Act.

Last but not least, the Third Schedule of the VAT Act in paragraph 1 (f) lists among zero rated supplies, "the supply of cereals, where the cereals are grown, milled or processed in Uganda;" in other words cereals which are grown, milled or processed in Uganda are exempt from VAT or are chargeable with 0% VAT. The above notwithstanding, by the VAT (Amendment) Act 2014 paragraph 1 (f) of the Third Schedule to the VAT Act was amended by repealing it. In other words, the preference to Ugandan cereals in terms of whether the cereals are grown, milled or processed in Uganda was repealed. It follows that the finding of the learned trial judge is strongly supported by the law which gives no preference after the 2014 Amendment of the VAT Act between rice that is processed in Uganda and imported processed rice. This means that rice imported before the 2014 amendment of the VAT Act could have been discriminatorily charged but for

the Practice Note of 2007 which treated rice as unprocessed and therefore exempt from VAT.

On that basis I would again find that there is no basis for arguing discrimination based on the GATT 1994.

Finally, I have considered the pleadings of the parties as well as the issue of the GATT 1994 based on the objection that the question cannot be raised for the first time in this appeal.

In the arguments of the appellant's counsel, the appellant introduced a new point about the judgment of the High Court being made without consideration of the provisions of the GATT 1994. The appellant submitted that Uganda is a signatory to the GATT 1994 which takes precedence over domestic legislation on the issue of discrimination. In essence the appellant submitted that the learned trial judge had a duty to take judicial notice of the General Agreement on Tariffs and Trade, 1994 (GATT) which was binding on Uganda according to certain constitutional provisions confirming the continuation in force of treaties and international agreements to which Uganda is a party under article 287 of the Constitution of the Republic of Uganda 1995.

The entire submissions of the appellant in the main, dealt with the issue of whether the charging of 18% VAT on imported rice was discriminatory in that the same 18% VAT was not charged on rice that is grown and milled in Uganda.

The respondent on the other hand maintained that the appellant never did raise the issue of the GATT 1994 provisions in the High Court and is precluded from raising it in this appeal.

I have carefully considered the pleadings of the parties based on the principle that issues arise from pleadings in terms of Order 15 rule 1 of the Civil Procedure Rules which provides *inter alia* that:

> 1. Framing of issues.

(1) Issues arise when a material proposition of law or fact is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute a defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds: issues of law and issues of fact. ...

Rules 1 (1) and (2) of Order 15 of the Civil Procedure Rules are clear that issues arise when a material proposition of law or fact is affirmed by one party and denied by the other. Those material propositions of law or fact affirmed or asserted in the plaint are denied in the written statement of defence. Secondly material propositions are defined as the propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute a defence. It follows that the material propositions must disclose the cause of action of the plaintiff and must also be denied by the defendant so that there is a defence to the relevant material proposition which the plaintiff asserts.

Order 15 of the Civil Procedure Rules has to be read together with the rules on pleadings under Order 7 which give the particulars that have to be contained in a plaint. These particulars include under Order 7 rule 1 (e), the facts constituting the cause of action and when it arose. In addition, in Order 7 rule 1 (g) of the Civil Procedure Rules, the plaintiff has to show the relief which he or she claims.

These rules were considered by the East African Court of Appeal in **Sullivan v Ali Mohammed (1959) E.A 239** where they held that the plaint must allege all the necessary facts that establish the cause of action.

In the pleadings of the plaintiff, the plaint averred certain reliefs alleging the cause of action and the claim in paragraph 3 of the plaint was as follows:

> The Plaintiff's claim is joint and several and is for declaration that: (a) the Practice Note issued by the Defendant and published in the New Vision Newspaper of 19th November, 2014 is not binding on the plaintiffs and applies only to rice imports produced locally and or; processed in Uganda; (b) that the rice imported by the plaintiffs is not chargeable to 18% VAT as indicated in the Practice Note: (c) the imposition of the 18% VAT levy on all imported rice is arbitrary and unlawful; (d) in the alternative but without prejudice to the foregoing, a declaration that the value added (if any) is done outside Uganda and is therefore not chargeable to 18% VAT in Uganda; or that the value-added does not exceed 5% of the total value of the supply (e) an order of a permanent injunction be issued restraining the Defendant from imposing a levy of 18% VAT on the plaintiffs; (f) an order of general damages be issued; and (g) costs of the suit.

After pleading the cause of action as reproduced above, the plaintiffs went ahead to give the facts constituting the cause of action as required by the rules. Particularly in paragraph 5 of the plaint, the action of the plaintiff is based on the fact that they imported the rice when there was no 18% VAT and this is clearly what they asserted namely:

> 5.The plaintiffs shall aver and contend that they imported several containers of rice long before the imposition of the 18% VAT levy and over 600 containers of rice are in transit, others are in Mombasa while others are already in the customs bonded warehouses and all the rice was imported on the understanding that imported rice is exempt from 18% VAT, and so no VAT should would be paid. [Some of the Copies of the Bills of Lading for some of the plaintiffs are attached and marked collectively as "Annexure C" and the copies of the Commercial Invoices are attached and marked collectively as "Annexure D"]

This pleading is clearly based on an understanding of the prevailing state of the law that the imposition of 18% VAT arose from an amendment to the VAT Act and the Practice Note of the respondent as I shall set out below. For purposes of considering the pleadings, the plaintiffs averred in paragraph 7 of the plaint that they shall contend that under section 5 (b) of the VAT Act as amended, the 18% VAT levy is payable by the plaintiffs as importers and as such they have to increase the prices of their products by 114% which in turn makes the rice too expensive and making it impossible for them to recover it from the customers who are ordinary citizens. Last but not least

in paragraph 9 the plaintiffs averred that if the objective of the defendant was to impose 114% taxes on their products, albeit arbitrarily, then the defendant ought to have given them notice for them to plan appropriately and not import rice into the country.

It can be concluded from the pleadings that the issue arose out of an amendment to the VAT Act in 2014. The question of pleading is whether the issue of conflict between the VAT Act and the GATT 1994 arose can be concluded. There was no material proposition of law or fact alleging that the VAT Act was in conflict with GATT 1994. It followed that the defendant in the written statement of defence answered the averments in the plaint and never considered defending any conflict between the VAT Act and the GATT 1994. In the defendant's written statement of defence, the defendant *inter alia* averred that the rice is subject to VAT of 18% and the same was lawfully assessed against the plaintiffs.

Clearly in the written submissions of the appellants, the appellant's counsel does not dispute the fact that the rice was subject to 18% VAT in accordance with the state of the law. In fact, he submitted that rice imported by the appellants had not been subject to 18% VAT levy by the respondent as it was classified as an unprocessed agricultural product which was exempt under the Second Schedule to the VAT Act. This was in accordance with the Practice Note issued by the respondent on 18 November 2007. Secondly, the appellant's counsel submitted that in the 2014 the VAT Act was amended by the VAT (Amendment) Act 2014 because section 5 thereof repealed paragraph 1 (f) in the Third Schedule to the VAT Act which zero rated cereals grown and milled or produced in Uganda. On account of that, the respondent issued afresh Practice Note number URA/VAT/PN 2/14 subjecting both local and imported rice to VAT at a standard rate of 18%. Subsequently the appellants on 18th of December 2014 filed HCCS No 880 of 2014.

Ground 4 of the memorandum of appeal does not arise from the decision of the learned trial judge. Clearly, there was no averment in the plaint or decision of the High Court regarding the International Treaty namely the General Agreement on Tariffs and Trade (GATT). The fact that the treaty

takes precedence in relation to the VAT chargeable was being raised for the very first time in this appeal.

The question of whether the amendment to the VAT Act conflicted with any provision of the GATT 1994 is a new question and is a new material proposition of law that was not pleaded in accordance with the rules of pleading I have set out above. Secondly it was never an issue for consideration by the learned trial judge. Specifically, the issue settled by the learned trial judge were issues contained in a joint scheduling memorandum constituting some form of agreement between the plaintiff and the defendant about the matters for decision by the trial judge. Particularly the joint scheduling memorandum provided in Part 1 which constituted the agreed and undisputed facts as follows:

> (a) The plaintiffs are engaged in general businesses but mainly dealing in the importation of rice from Pakistan and other parts of the world.
>
> b) The rice is imported ready for consumption and undergoes no further processes in Uganda for purposes of value addition. The rice does not undergo any drying, hulling, milling, polishing, sorting, grading and or packaging in Uganda.
>
> c) In 2007, the Commissioner General of the Uganda Revenue Authority issued a Practice Notice that "all imported rice is considered to be unprocessed agricultural produce for purposes of the Value Added Tax Act and is therefore falls under the provisions of the Second Schedule which provides for exempt goods".
>
> d) On the 19th day of November, 2014 the Defendant issued another Practice Notice number URA/VAT/PN 2/14 stating that: "from research conducted, we have established that in relation to supply of rice, the value-added activities such as drying, hurling, milling, polishing, grading, sorting and packaging among others exceeds 5% of the total value of the supply. This implies that the supply of rice which is ready for human consumption does not fall within the provisions of paragraph 1 (a) of the Second Schedule to the VAT Act nor does it fall under the Third Schedule of the same Act and therefore the supply attracts VAT at the rate of 18%. This also means that imported rice is subject to VAT at the rate of 18%. Our Practice Notes issued on 14 November, 2007 on imported rice are hereby revoked.

e) The defendant has not been charging and collecting VAT on imported until sometime in November, 2014 which the plaintiffs have challenged.

In Part 7 of the joint scheduling memorandum, the parties agreed on the following issues:

1. Whether the suit rice is processed or unprocessed?
2. If it is processed whether the value of the added activities such as drying, hulling, milling, polishing, grading, sorting and packaging among others exceeds 5% of the total value of the supply of rice imported by the plaintiffs?
3. Whether the imported rice is chargeable to 18% VAT in accordance with the Value Added Tax Act cap 349?
4. What remedies available to the Parties?

In the judgment of the learned trial judge, the issues that were framed were clearly those contained in the joint scheduling memorandum of the parties referred to above and the learned trial judge went ahead to resolve only those issues.

Further, the contents of the memorandum of appeal under rule 86 (1) of the Judicature (Court of Appeal Rules) Directions clearly provides for appeals against the decision. Decisions arise from the issues which are framed. Rule 86 (1) (supra) provides as follows:

(1) A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongfully decided, and the nature of the order which it is proposed to ask the court to make.

Clearly the learned trial judge did not deal with, and was not addressed on and never considered the GATT 1994 vis-à-vis the VAT Act. The issue was not raised by the parties and was not the subject matter of the decision. The appellant's counsel wants the court to rest its decision on the proposition that the learned trial judge ought to have taken judicial notice of section 76 of the VAT Act which provides inter alia that:

76. (1) To the extent that the terms of the treaty or other international agreement to which Uganda is a party are inconsistent with the provisions of this Act, apart from section 75, the terms of the treaty or international agreement prevail over the provisions of this Act.

(2) In this Section is, "international agreement" means an agreement between Uganda and a foreign government or a public international organisation.

The circumstances when a new point of law may be taken by a first appellate court for the first time were considered in **Tanganyika Farmers Association Ltd v Unyamwezi Development Corporation Ltd [1960] 1 EA 620** by the East African Court of Appeal at Dar Es Salaam. The matter for consideration was that the issue of law was not argued in the trial court. The East African Court of Appeal stated that:

> An appeal court has a discretion to allow a new point to be taken on appeal but it will permit such a course only when it is assured that full justice can be done to the parties. In the Tasmania (1), [1890] 15 A.C. 223 at 225 Lord Herschell said:
>
> > "My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.
> >
> > "It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box."
>
> In Ex parte Firth (2) (1882), 19 Ch. D. 419 at 429 Jessel, M.R. said:
>
> > "It is quite true that there is some evidence about that, but the point was not taken in the County Court, and the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence."

Clearly where evidence was not adduced on the point and the defendant was not given a change to defend it, it would amount to unfair trial of the issue at appellate level without taking evidence.

In **Alwi Abdulrehman Saggaf v Abed Ali Algeredi [1961] 1 EA 767** the East African Court of Appeal considered the circumstances in which a point of law which had not been argued in the court below may be taken on appeal. The East African Court of Appeal considered several precedents including the decision of the Privy Council in **Perkowski v. City of Wellington Corporation [1958] 3 All E.R. 368** which they cited with approval. In that decision of the Privy Council the Court of Appeal of New Zealand decided that, the point not having been taken at the trial, it could not be taken on appeal. On further appeal to the Privy Council the East African Court of Appeal cited the holding that:

> 'But their lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea.'

The East African Court of Appeal agreed with the above statement of law and further noted that issues arise from pleadings of which parties must have sufficient notice as a principle of fair trial.

In conclusion, the VAT (Amendment) Act, repealed paragraph 1 (f) of the Third Schedule to the VAT Act which originally provided that the supply of cereals, where the cereals are grown, milled or produced in Uganda are zero rated supplies. This is the provision which is alleged to have given preference to Ugandan milled rice. Because the provision no longer existed, there is no basis for arguing that the law is contrary to the GATT 1994. Further, notwithstanding this provision prior to 2014, the Practice Note of 2007 treated all imported and locally produced rice as unprocessed foodstuff. Therefore, notwithstanding the wording of the law, imported rice was also exempt from VAT as unprocessed food.

Secondly, the learned trial judge found that the VAT (Amendment) Act 2014 was not discriminatory in that it applied to all processed rice. Last but not least, the issue of the challenge to Ugandan laws on the ground that it conflicts with the GATT 1994 provisions cannot be raised in this appeal because no evidence was led in the trial court as to what the practice of the respondent with regard to processed rice. Secondly the learned trial judge found that there were no discriminatory laws charging 18% VAT on imported rice and not on domestic processed rice. A challenge to the law cannot be made originally on appeal without giving an opportunity to the defendant to address the matter holistically by calling the relevant evidence as well as dealing with the issues of law.

Last but not least, as I noted at the beginning of this judgment, an appeal arises from a decision of the High Court. There was no decision indicating that the processed rice in Uganda can be treated differently and discriminatorily from processed imported rice. There is no right of appeal under article 134 (2) of the Constitution where there is no decision and, in any case, there High Court does not exercise original jurisdiction but only appellate jurisdiction wherever there is an assessment that is objected to on points of law only. In terms of the challenge to the Practice Note of the respondent in 2014 pursuant to the VAT (Amendment) Act 2014, the repealing of paragraph 1 (f) of the Third Schedule to the VAT Act was not the subject matter of the suit and therefore cannot form the basis of an appeal. In any case, the question of fact in the Practice Note dealt with the fact that the value-added in the imported rice exceeded 5% of the total value of the supply based on the research of the respondent. This is a question of fact.

The suit of the plaintiffs was filed on 18th December 2014. Surprisingly in the submissions in grounds 5, 6 and 7 of the appeal as well as in grounds three, the appellant's counsel submitted on the VAT (Amendment) Act No 2 of 2015 which he states provides that locally grown and milled rice is charged at zero tax not 18% imposed on imported rice. The VAT (Amendment) Act number 2/2015 is an Act that came after the filing of the suit and cannot be relied upon to address a suit that was filed on 18th December 2014 under the

law which was in force then. In any case, the court was never addressed as to whether the learned trial judge erred in law to find that the value-added on imported rice exceeded 5% of the total value of the product. This being a question of fact, there is no basis therefore for the court to deal with the rest of the grounds since no submissions were made faulting the judge about the question of fact. The fact that by the VAT (Amendment) Act 2014, Ugandan processed rice and imported rice became chargeable with VAT until January 2015 when the law was amended is not discriminatory and was a matter for legislature to decide on.

In the premises, I would find that the appeal has no merit and I would dismiss it with costs and the injunction issued pending appeal lapses.

Dated at Kampala the 16th day of September 2022

Christopher Madrama

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Cheborion Barishaki, Christopher Madrama & Irene Mulyagonja, JJA)

CIVIL APPEAL NO.172 OF 2019

1. **SWT TANNERS LTD**
2. **GENERAL AGENCIES UGANDA LTD**
3. **SSUNAD LIMITED**
4. **WILLIEX COMMODITIES LTD**
5. **AKHCOM LIMITED**
6. **JASSANI GENERAL TRADING LIMITED**
7. **SONERI LIMITED**
8. **SINGA RICE LIMITED**
9. **ARMOUR TRADING COMPANY LIMITED**
10. **JAM MOHAMMED INVESTMENTS LIMITED**
11. **GLORRE INTERNATIONAL LIMITED**
12. **IMBA FOODS UGANDA LIMITED**
13. **ZEN TRADING LIMITED**
14. **MABU COMMODITIES LIMITED::::::::::::::::::::::::APPELLANTS**

VERSUS

COMMISSIONER GENERAL

UGANDA REVENUE AUTHORITY::RESPONDENT

JUDGMENT OF CHEBORION BARISHAKI, JA

I have had the benefit of reading in draft the judgment of my learned brother Christopher Madrama, JA and I agree with him that this appeal has no merit and should be dismissed with costs.

Since Mulyagonja, JA also agrees, the appeal is dismissed and the injunction issued pending appeal lapses. The respondent shall pay costs of the appeal.

It is so ordered.

Dated at Kampala this ....16th.... day of ....Sept..... 2022

Cheborion Barishaki

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA,
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
(Coram: Cheborion, Madrama and Mulyagonja, JJA)
CIVIL APPEAL NO 172 OF 2019

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11. **GLORRE INTERNATIONAL LIMITED}**
12. **IMBA FOODS UGANDA LIMITED}**
13. **ZEN TRADING LIMITED}**
14. **MABU COMMODITIES LIMITED} ..... APPELLANTS**

VERSUS

COMMISSIONER GENERAL
UGANDA REVENUE AUTHORITY} .....RESPONDENT

(Appeal against the Judgment of Wangutusi J, in (Commercial Division) HCCS No. 880 of 2014 delivered at Kampala on 10th February 2016)

JUDGMENT OF IRENE MULYAGONJA, JA

I have had the benefit of reading in draft the judgment of my brother, Christopher Madrama, JA, I agree with the decision that the appeal fails and should be dismissed with costs.

Dated at Kampala this 16th Day of Sept 2022.

I. Mulyagonja

Irene Mulyagonja
JUSTICE COURT OF APPEAL