IN THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION

HCT-00-CC-CS-0361-2004

LUMU TONNY ……PLAINTIFF

VERSUS

THE COMMISSIONER GENERAL UGANDA REVENUE AUTHORITY ……DEFENDANT

BEFORE JUSTICE LAMECK N. MUKASA

JUDGMENT:

The plaintiff, Lumu Tonny, filed this suit against the defendant, the Commissioner-General Uganda Revenue Authority, for an order that the defendant makes an account of money payable by the plaintiff as taxes in respect of 1548 cartons of Big G and 121 Cartons of Orbit, a refund of the balance from sale proceeds and Shs27,778,976/= paid by the plaintiff to the defendant on account of taxes, an Order that the defendant's retention of the purchase price and the value in excess of the taxes paid by the plaintiff amounts to injust enrichment, interest and costs.

The plaintiff was represented by Mr. Mohamed Mbabazi. The defendant was represented by Mr. Habib Arike. At the Scheduling Conference held of 25th October 2006 counsel for both parties agreed to adopt their Joint Scheduling Memorandum filed on 28th September 2006 as the scheduling proceedings and it was so adopted.

The plaintiff's case is that he imported goods in Uganda to wit Big G and Orbit chewing gum. The goods were dully declared on form C63. The plaintiff alleges that the consignment was of 1548 cartons of Big G and 121 cartons of Orbit. On or about the 6th and 7th February 2004, the defendant seized the plaintiff's said goods allegedly for

having been imported in contravention of Section 146 of the Customs Management Act, and issued the Seizure Notes Exhibit P2 (a) and P2(b). Upon seizure, on 24th March 2004, the defendant by letter tendered as exhibit P3 directed the plaintiff to settle his tax liability in respect of the consignment assessed at Shs126,404,462/= The letter stated:-

> "It has been assessed that the whole consignment contained 3,790 cartons of assorted chewing gums, of two main types:
>
> | | |
> |---|---|
> | 1,382 Cartons Big G valued at | USD 26,410 CIF |
> | 2,408 Cartons Orbit, valued at | USD 80,466 CIF |
> | Total CIF | Ushs201,523,305/= |
> | Import Duty | 12,091,398/= |
> | VAT (17%) | 36,314,499/= |
> | Domestic VAT | 5,447,175/= |
> | Withholding Tax | 8,060,932/= |
> | Import Commission | 4,030,466/= |
> | Total Tax | 65,944,470/= |
> | Add Penalty/ Fine as per sec. and 146 and 148 (30% CIF) | 60,465,992/= |
> | Total Amount due | 126,401,462/= |
>
> Please collect a Bank Payment Advice Form (BPAF) from Principal Revenue Officer – Kampala longroom and settle your tax liability"

There is yet another letter also dated 24th March 2004, exhibit D5 which stated:-

> "It has been assessed, that the whole consignment contained 1,508 cartons of assorted chewing gums, of two main types:-

166 cartons Big G, valued at	USD 5,547 CIF
1382 Cartons Orbit, valued at	USD 26,396 CIF
Total CIF,	Ugshs 60,231,149/=
Import Duty	3,613,888/=
VAT (17%)	10,853,708/=
Domestic VAT	1,628,056/=
Withholding Tax	2,409,258/=
Import Commission	1,204,629/=
Total Tax	19,709,473/=
Add Penalty/Fine as per sec 146	
and 148 (30%) CIF)	18,069,473/=
Total amount due	37,778,976/=
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Please collect a Bank Payment Advise Form (BPAF) from Principal Revenue Officer – Kampala Longroom and settle your tax liability."

This was the letter annexed to the plaint and marked "LET". In paragraph 4(c) of the Amended Plaint the plaintiff states that on 14th May 2004 he proceeded to settle his tax liability as per the Advice Form Pay in Slip and the Receipt tendered as Exhibits P4 and P5 respectively. Both are each in the sum of Shs37,778,976/= ."

The goods were not released to the plaintiff. Due to their perishable nature as they were bound to expire, the defendant sold the goods on or about 30th October 2004 at Shs90,443,000/=.

In paragraph 4(g) of the Plaint the plaintiff contends that the above sum of Shs90,443,000/= plus Shs37,778,976/= earlier paid by him amount to a total of Shs128,221,976/= received by the defendant. The plaintiff claims that his liability in respect of the goods was only Shs21,706,234/= and not Shs37,778,976/=. He breaks down the liability as follows:

"Big G – CIF US$ 14.36

Orbit Chewing Gum CIF US$ 17.02

(i) 121 Cartons of Orbit CIF @ 17,02 x121= US$ 2,059.42

(ii) 1548 Cartons Big G CIF @ 14.36 x 1458= US$ 22,229.28

Total CIF US$ 4,288.70

Total CIF – US$ 24.288.70 x (exchange rate 1885.58) = Ugshs45,798,286/=

ID 6%	=	2,747,897/=
EXD 10%	=	4,854,618/=
VAT 17%	=	9,078,136/=
WT 6%	=	2,747,879/=
L/C 2%	=	915,966/=
Domestic VAT	=	1,361,720/=
Total		21,706,234/=

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The plaintiff therefore claims a refund of the excess of Ugshs16,072,742/= which is the difference between the shs21,706,234/= and Shs37,778,976/= he paid on account of taxes plus payment of Shs90,443,000/= as the money the defendant got out of the sale of the plaintiff's goods. The two figures make a total claim of shs106,515,742/=

The plaintiff further contends that in the defendant's Seizure Notices, Exhibit P2, the defendant purported to have impounded 1548 Cartons of Big G and 130 cartons of Orbit yet in the defendant's letter to the successful bidder, exhibit P6, only 1548 carton of Big G chewing gum and 121 cartons of Orbit chewing gum were sold. Further that there is a discrepancy on the quantity of goods the subject of taxation. Whereas he declared his goods as 1570 cartons of Big G and 130 Cartons of Orbit as per form C 63; in the

defendant's seizure notes, Exhibit P2, the items were stated as 1548 cartons of Big G and 14 Cartons of Orbit Chewing gum. In the defendant's demand letter the goods were stated to be 1382 cartons of Big G and 2,408 cartons of Orbit, Exhibit P3.

The plaintiff therefore argued that the tax as assessed and demanded by the defendant was neither in respect of goods imported nor under seizure. He contends that his liability is only in respect of the seized goods.

The plaintiff further contends that the defendant's act of applying different tax rates to the plaintiff than those usually used, inflating the number of cartons imported by the plaintiff, refusing to released the goods even after the plaintiff had fully paid the required taxes amounts to an abuse of office, to discrimination and violation of the cardinal principals of taxation and was done in bad faith. Further that the plaintiff has been denied use of his money and the defendant's retention of the sale proceeds amount to appropriation and / or unjust enrichment to the detriment of the plaintiff.

In the defendant's Written Statement of Defence it is stated that the goods claimed in the plaint were consigned to Pascal Lumu trading as Job Distributors and there is no known transfer of ownership of the goods. So the defendant contends that the defendant has never seized goods belonging to the plaintiff.

In paragraph 7 of the defendants Written Statement of Defence the defendant states that 4,000 cartons of chewing gum were imported to Uganda consigned as follows:-

> "Pascal Lumu (plaintiff) 1000 cartons, Kilumba Richard 1500 cartons, Kasule Edmond 1500 cartons."

The defendant therefore contends that the plaintiff has no justification to claim for the said consignment.

The defendant also contends that the goods seized were part of a smuggled consignment liable for forfeiture to the Government of Uganda as per the provisions of the Customs Management Act.

The defendant disputes the plaintiff's computation of tax liability. Further the defendant contends that the plaintiff cannot claim any balance from the sales where the taxes are still due and owing. The defendant counter-claimed for Ushs112,752,124/= and penalties of shs77,791,380/= all totaling to shs190,543,504/= computed as follows:-

1382 cartons of Big G chewing gum
US$ 21,04 per carton = 28,077.28
2616 cartons Orbit chewing gum
US$ 40.38 per carton = US$ 105,636.30

FOB US$134,713.5
Freight US$ 774
CIF = US$135,487.50
15% Insurance US$ 2,032.31
CIF US$137,519.81

Exchange rate = 1888.58

CIF = Ugshs259,304,603/=
Import duty = (15%x 259,304,603/=)
= 38,895.690.5
VAT = (17%x 298,200,293/=)
= 50,694,049,82
Domestic VAT = (15% x 50,694,049.87)
= 7,604,107.48
WHT = (4% x 259,304,603/=)
10,372,184.12
ILG = (2% x 259,304,603)

= 5,186,092.06

Penalties and fines as per section 146 and 148

(30% CIF) = 77,791,380.90

Total tax payable + penalties/ fines Shs190,543,505/="

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The defendant counter-claimed the total sum of shs190,543,505/=

Further the defendant claims that the letter used as a basis to pay the Shs37,778,976/= was a forgery and did not originate from URA.

In his reply to the Written statement of Defence and Counter-claim the plaintiff denies that the goods seized by the defendant were smuggled goods. He also denies the defendant's counter-claim.

At the Scheduling Conference the following facts were recorded as agreed:-

- The plaintiff imported a consignment of Orbit / Chewing gum
- The plaintiff's consignment was seized by URA on or about 6th and 7th February 2004.
- The plaintiff by way of admission, concedes and hereby declares that his consignment which was seized by URA is 1000 cartons of Big G as appears on Form C63 and accordingly shall only claim for 1000 cartons of Big G as the seized consignment.
- On the basis of a purported forged letter dated 24th March 2004, whose origin is disputed, the plaintiff paid Ushs37,778,976/= on the 24th May 2004, which amount was duly received by the defendant.
- The defendant as of 24th March 2004 assessed taxes due on the consignment as Shs126,401,462/= on 1,382 cartons of Big G and 2,408 cartons of orbit.

- URA sold 121 cartons of orbit and 1548 of Big G at Shs90,443,000/= and accordingly this amount comprises part of the sale proceeds for the cartons of Big G and chewing gum claimed by the plaintiff.
- The plaintiff accepts the figure of 1000 cartons of Big G as his total consignment and shall accordingly claim for only that consignment.

The following issues were agreed upon:-

1. The effect of the forged letter on the payment and receipt of taxes in respect of the consignment.
2. How much tax is payable by the plaintiff on the 1000 cartons of Big G.
3. Whether the plaintiff's consignment is liable for forfeiture under the Customs Management Act.
4. Reliefs available to the parties.

Both counsel agreed not to call oral evidence but rely on documentary evidence. By their consent the following documents were received as exhibits:-

Plaintiff's exhibits:-

- Stationery declaration by Paskal Lumu in proof of ownership of the imported goods dated 15th March, 2004 – Exhibit P1.
- The Notices of Seizure – Exh P2.
- Letter dated 24th March 2004 from the defendant to the plaintiff directing the plaintiff to settle his tax liability – Exh P3
- Bank Payment Advice Form & Pay in slip Exh P4
- Receipt issued to the plaintiff by Uganda Revenue Authority – Exh P5
- Letter in proof of receipt of purchase price by the defendant - Exh P6
- Letter dated 29/10/2004 to Rashid Mugwanya, the successful bidder for purchase of the plaintiff's seized consignment – Exh P7

- Set of documents in evidence of overtaxing the plaintiff than other importers of similar goods – Exh P8

Defendant's exhibits:-

- Consignment Note dated 28 /01/2004 - Exh D1
- Certified declaration Forms from Kenya Revenue Authority dated 28/01/2004 - Exh D2
- Declaration Form from Tororo Railways Goodshed dated 3/02/2004–Exh D3
- Joint Verification Report – Exh D4
- Forged assessment dated 24 / 03/2004 Exh - D5
- URA assessment dated 24/03/2004 - Exh D6
- Seizure Notice dated 6/02/2004 and 7/02/2004 respectively – Exh D7
- Letter from the plaintiffs lawyer dated 24th March 2004 - Exh D8
- Letter from plaintiff's lawyers dated 27th March 2004 - Exh D9
- Letter from plaintiffs lawyer dated 31st May 2004 – Exh D10
- Handwriting experts report dated 9/7/04 – Exh D11
- Receipts – Exh D12
- Bank Advise Slips - Exh D13
- Statutory Declaration by Pascal Lumu dated 15th March 2004 – Exh D14
- Receipts of the sale of goods - Exh D 15
- Cargo Receipt dated 6/2/2004 - Exh D16

Issue No 1. ***The effect of the forged letter on the payment and receipt of taxes in respect of the goods.***

The letter Exhibit D5 put the plaintiff's tax liability at Shs37,778,976/=. The plaintiff claims to have paid the above sum on the basis of that letter and the Bank Advise Form and Pay-in-Slips, which payment was acknowledged by URA. The Bank Payment Advise Form and Pay-in-Slip was received as Exh P4 and the Receipt as Exh P5. It is an agreed fact that the letter exhibit D5 was forged. It was further agreed that a sum of

shs37,778,979/= was paid by the plaintiff on the basis of that letter and received by the defendant. In paragraph 16 of the defendant's Written Statement of Defence and Counter-claim the defendant states that the payment of Shs37,778,976/= was based on a fraudulent letter and contends that the fraud vitiates the claim of the plaintiff.

As to what happens to the sum of Shs37,7778,976/= so paid by the plaintiff, Mr. Mbabazi, for the plaintiff submitted that the sum should be set off from the sum of Shs126,401,462/= which was demanded by the defendant vide the letter exhibit P13. Thereby reducing the plaintiff's tax liability from Shs.126,401,462/= to Shs88,672,468/=

In his submission Mr Arike argued:-

> "—the inescapable admission by the plaintiff about the forged assessment (exhibit D5), speaks volumes against the plaintiff's claim for a refund of Shs37,778,976/= and raises fundamental issues to wit:-
>
> (i) Why would the plaintiff pay for goods that did not belong to him?
> (ii) Or pay for goods that were in excess or do not tally with what he imported.
>
> The above listed acts of the plaintiff only go to show that plaintiff was fraudulent and is not entitled to a refund. The plaintiff or his agents forged the assessment evidently for reasons of his own fraudulent designs. He therefore has not approached court with clean hands and cannot lay claim on what did not belong to him."

Counsel relied on *Parkinson Vs College of Ambulance Ltd and Harrison (1925) 2 KBI* and submitted that the gains and losses remain where they have accrued or fallen. That the plaintiff's involvement in the fraudulent acts vitiates his claim for Shs37,778,976/= .

On the other hand Mr. Mbabazi argued that the defendant's proposition that the forgery vitiates the plaintiff's claim is not supported by any law. Further that the defendant did

not adduce evidence to prove that the forgery was by the plaintiff. That what the plaintiff did was to pay against forged assessments. Counsel submitted that since payment had been received and admitted, the defendant can only offset what was paid against what is due, otherwise the defendant would be guilty of unjust enrichment. He cited *Teddy Sentongo Birungi Vs Wilberforce Sekubwa CA Civil Appeal No: 32 of 1999* which decision was upheld by the Supreme Court in Supreme Court Civil Appeal No: 3 of 2001. Counsel argued that the plaintiff had not founded his claim on the forgery. The plaintiff's claim was that his tax liability had not been properly assessed. In paragraph 5 of his Amended Plaint it is stated:

> "5 The plaintiff shall aver and contend that his tax liability in respect of the goods the subject matter in this suit was only shs21,706,234/= and not shs37,778,976/= as shown hereunder: --"

By his pleadings the plaintiff is challenging the assessment in exhibit D5

In the *Parkinson Case* (above) the secretary of College of Ambulance Ltd. which was a charity, fraudulently represented to Parkinson that he and the Charity was in a position to undertake that Parkinson would receive a knighthood if he made a large donation to the funds of the Charity and undertook that the title would be conferred if the donation was made. Parkinson made large donation to the Charity and receipt acknowledged by the Charity. Parkinson was not knighted. He brought an action against the Charity and its secretary to recover back the money he had paid as money had and received. Lush J. found that a contract to guarantee or undertake that an honour will be conferred by the Sovereign if a certain contribution is made to a public charity; or if some other service is rendered, is against public policy and therefore an unlawful contract to make. He held that the contract was an illegal and improper contract to enter into. He therefore held that the plaintiff was precluded by the illegality of the contract from receiving the money as money had and received by the college.

In the above case the plaintiff was found to be party to the illegality. The issue in the instant case is whether the plaintiff was party to the generation of the fraudulent assessment. The letter exhibit P3 (which is also exhibit D6) which conveyed an assessment of shs126,401,462/= was signed by V Tinkumanya for Commissioner Customs & Excise. It must be noted that the name of the signatory in the letter exhibit D5, did not have a letter "n" between the letters "i" and "k" of the name. In the Laboratory Report exhibit D11, the handwriting expert A. M. Ntarirwa came to the conclusion that the signature on the letter exhibit D5 was written by some other writer otherthan the one who wrote the specimen signature of the letter exhibit P3 and the other specimen signatures supplied to him. The specimen signatures were of Mwogezi Alexandra Nabirye who was an Ag Deputy Commissioner Customs & Excise . In her Statement to the Police, attached to the Report; Mwogeza Alexandra Nabirye states that V Tinkamanya was also a Deputy Commissioner Customs & Excise. That while V Tinkamanya was out she had signed the letter which demanded for Shs126,401,642/=. She denied having signed the letter which damand for shs37,778.976/=.

The above evidence shows that the signatory to the letter exhibit D5 which put the assessment at shs37,778,976/= is not the signatory to the letter exhibit P3 which put the assessment at shs126,401,462/= It is an agree fact that the letter exhibit D5 was forged. The question is by who?

In his submission Mr. Arike for the defendant, argued that the plaintiff or his agents forged the assessment evidently for reasons of his own fraudulent designs. There was no direct evidence adduced to support the defendant's contention. The plaintiff's handwriting was not subjected to any expert examination. To support the defendant's contention that the plaintiff was party to the fraudulent authorship of the letter exhibit D5, Mr. Arike pointed out the following:-

(i) Under paragraph 4(b) of the amended plaint the plaintiff contends that he was the importer and owner of the goods that were impounded vide Road Customs Transit Declaration Form C63.

This fact is averred to on oath in Pascal Lumu's Statutory Declaration Exh. P1. The Transit Declaration Form C3, Exh D3' shows that the consignment comprised of 1000 cartons. It is this number of cartons which was recorded as an admitted consignment at the scheduling conference.

(ii) Under paragraph 4(c) of the same plaint that his goods to wit 1548 cartons of Big G and 121 cartons of Orbit Chewing Gum were seized.

This gives a variation in the quantities declared on Form C63 and the quantities of the same assignment seized. There is a further variation in the plaintiff's lawyer's letter dated 24th March 2004, exhibit D8, where it is claimed that the plaintiff's goods declared as per Form 63 were 1570 cartons Big G and 130 cartons of Orbit.

(iii) The plaintiff on the basis of the forged letter, exhibit D5, paid tax of shs37,778,970/= for 166 cartons of Big G and 1382 cartons of Orbit.

(iv) The joint verification, exhibit D4, shows that the consignment consisted of 1382 cartons of Big G, 36 cartons of Orbit (Red), 69 Cartons of Orbit (Green), 16 cartons of Wringles PK Menthol chewing gum.

All the above shows variations in the quantities declared, the quantities seized and the quantities for which tax was paid.

On the basis of the above the defendant's counsel submitted that the letter exhibit D5 was forged by the plaintiff and or his agents. That the above acts of the plaintiff go to show that he was fraudulent and not entitled to refund. Apparently counsel was relying on the maximum ex turpi causa non oritur actio (from an immoral consideration an action does not arise). In his dictum in *Beresford Vs Royal Insurance (1937) 2 KB* at page 220 Lord Wright said:-

> "In these days there are many statutory offences which are the subject of the criminal law and in that sense crimes, but which would, it seems, afford no moral justification for a court to apply the maximum."

In the *Teddy Sentongo Birungi* case (above) the 1st Respondent had successful sued the Appellant, the 2nd and 3rd and 4th Respondents for damages caused to his car in a collision between it and the Appellant's motor vehicle. The cause of action was founded in negligence on the part of the 3rd Respondent when driving the Appellant's motor vehicle in the course of his employment as her servant or agent. At the time of the accident the1st Respondent's car was bearing a garage number plate No. U170 D1/ UPF 922. The 1st Respondent following the accident was prosecuted and convicted for driving an unregistered vehicle with a garage number plate at 10:00 p.m. It was argued for the Appellant up to the Supreme Court that the 1st Respondent's cause of action was founded and based on illegality and contrary to the principle of ex turpi causa non oritur actio. It was held by the Court of Appeal and upheld by the Supreme Court that the maximum was not applicable to the facts of the case. In its judgment the Supreme Court stated:

> " The 1st Respondent did not have to rely, on the fact that his car had dealer's number plate, in order to successfully prove that the appellant's driver owed him a duty of care. His case was based on the fact that his car was damaged by a breach of that duty of care, not because he was on the road in a car with a dealers number plate. His case was based on negligence by the 3rd Respondent' for which the Appellant was vicariously liable. The 3rd Respondent's negligent act was independent of the 1st Respondent's being on the road in his car bearing a garage number plate at the material time."

In the instant case the plaintiff's claim is against his tax liability assessment which he contends was excessive, discriminative and in violation of the cardinal principals of taxation. The variations in the quantities declared, and the quantities seized could be evidence of under declaration of the qualities imported. It is not evidence which can be

relied upon to prove that the plaintiff was party to the forgery of the letter – exhibit D5, on the basis of which he had paid the taxes. The plaintiff's claim is that his tax liability was by his computation only shs21,706,234/= and not Shs37,778,976/= Therefore even if the plaintiff had paid Shs126,406,452/= on the basis of the assessment on Exh P3 (also D6) his claim that his tax liability was only Shs21,706,234/= would still stand. Further, payment was made against Exhibit P4 (also exhibit D13) which is a Bank Payment Advice Form & Pay –in-Slip which directed the plaintiff as a taxpayer to pay shs37,778,976/= The plaintiff did as directed and paid the said sum which was acknowledged by the defendant as per the defendant's receipt – exhibit P5. A Bank-in-slip-payment Advice Form & Pay-in-Slip is a document issued by the defendant. It was never the contention of the defendant that exhibit P4 (D13) was forged. The defendant did not at any stage disown the document.

In the circumstances I agree with Counsel for the plaintiff and hold that whereas the letter on the basis of which the sum shs37,778,976/= was paid may have been forged and therefore a crime committed by whoever was responsible for its authorship, the payment received and acknowledged by defendant should constitute an offset from the actual tax liability amount due and owing from the plaintiff.

Issue No. 2. How much tax is payable by the plaintiff on the 1000 cartons of Big G.

At the Scheduling Conference it was recorded as an agreed fact that the plaintiff accept 1000 cartons of Big-G as his consignment seized by the defendant. The effect of that admission is that the plaintiff is liable to pay taxes on only 1000 cartons of Big-G. In his submissions Counsel for the plaintiff calculated the plaintiff's tax liability on the 1000 cartons of Big –G as follows:-

"1000 cartons of Big-G @ 14.36 x 1000

= 14.360 x 1885.58

= 17.068,600/=

ID 6%	=	1,624,116/=
ExD 10%	=	2,706,860/=
VAT 17%	=	4,601,662/=
I/C 2%	=	541,372/=
W/T	=	1,624,116/=
	=11,098,126/=	
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Counsel submitted that accordingly the due tax payable on the 1000 cartons declared on Form C63 and seized by the defendant is Shs11,098,126/=

The defendant's Counsel submitted that the defendant has no dispute with the plaintiff's computation. The defendant conceded that the total value of 1000 cartons of Big G is Shs. 27,068.600/= and tax payable is shs11,098,126/=. The above sum is a concession from the tax liability of Shs126,401,452/= that was imposed by the letter exhibit P3 and also from that on the forged letter exhibit D5 on the basis of which the sum of shs37,778,976/= was paid by the plaintiff. I accordingly find that the tax payable by the plaintiff on the 1000 cartons of Big G is shs11,098,126/=

Issue No.3 whether the plaintiff's consignment is liable to forfeiture under the Customs Management Act

The defendant under paragraph 6 contend that the goods seized were part of a smuggled consignment liable for forfeiture to the Government of Uganda as per the provisions of the Customs Management Act. It is an admitted fact that the plaintiff's consignment was seized by URA on or about 6th and 7th February 2004. It is an agreed fact the URA sold 121 cartons of orbit and 1548 of Big G at Shs90,443,000/= and that this amount comprises part of the sale proceeds for the cartons of Big G and Chewing gum claimed by the plaintiff. It is further agreed that the plaintiff's total consignment and seized contained 1000 cartons of Big G.

First and foremost there is need to determine when goods may be liable for forfeiture. Mr Mbabazi submitted that the following must happen.:-

(a) The goods should have been smuggled into Uganda.
(b) There has to be a conviction in respect of the goods of either the transporter, importer or perpetrator of the smuggling
(c) Upon a conviction in respect of the goods then the goods may be forfeited to the Government as penalty.

Counsel argued that in the instant case the plaintiff's consignment of 1000 cartons had been declared vide the Customs Entry Form C63. He therefore submitted that goods declared on Form C63 cannot be smuggled goods. Secondly Counsel argued that forfeiture is not automatic but a result of a process which includes prosecution, conviction and sentencing.

He submitted that in the instant case after the seizure there was prosecution of anybody resulting in a conviction and subsequent sentence including a forfeiture order. Counsel therefore concluded that it cannot be said that the consignment was forfeited to the Government of Uganda.

I must point out that the issue is not whether the plaintiff's consignment was forfeited to the Government but whether the plaintiff's consignment is liable to forfeiture.

As at the time of this judgment the law relating to the management and administration of customs is the East African Community Customs Management Act, 2004 which commenced on 1st January 2005. Section 252 (7) of the Act provides:

"(7) Unless a contrary intention appears, the commencement of this Act shall not –

(d) affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law of a Partner State inforce at

the commencement, or

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment and any such investigation, legal proceeding or remedy may be instituted, contained or enforced, and any such penalty, forfeiture or punishment may be imposed as if this Act had been passed."

The plaintiff's consignment was seized on or about 6th and 7th February 2004 and sold by the defendant on 30th October2004. The law in force then was the Customs Management Act. Thus the law applicable to the instant case.

Forfeitures and seizures are provided for by Part XIII of the Customs Management Act. Section 155 of the Act provides for goods liable for forfeiture. It states:-

"155(I) In addition to any other circumstances in which goods are liable to forfeiture under this Act, the following goods shall be liable to forfeiture-

(a) any prohibited goods.
(b) any restricted goods which are dealt with contrary to any condition regulating their importation, exportation or carriage coastwise;
(c) any uncustomed goods;
(d) any goods which are imported, exported or transferred concealed in any manner, or packed in any package (whether with or without other goods) in a manner appearing to be intended to deceive any officer;
(e) any goods which are imported, exported or transferred contained in any package of which the entry, application for shipment or application to unload does not correspond with such goods;
(f) any goods subject to Customs Control which are moved, altered, or in any way interfered with, except with the authority of any officer;
(g) any goods in respect of which in any matter relating to the Customs,

any entry, declaration, certificate, application or other document, answer, statement or representation, which is knowingly false, or knowingly incorrect in any particular has been delivered, made or produced; and

(h) any goods in respect of which any drawback, rebate, remission or refund or duty has been unlawfully obtained."

Other than as provided in the above section, goods may be liable for forfeiture under the Act where on search of a vehicle, as in section 132, (4) or of any person as in section 134 (4), goods are found in relation of which any offence under the Act has been committed. There are offences under the Act created in sections 140 to 153 of the Act. If any of the said offences is found to have been committed, and the goods discovered under section 132 or section 134, are in relation to such offence, then such goods are liable to forfeiture under section 132 (4) where found on a vehicle or section 134(4) where found on a person.

Examples of such offences are:-

(1) importing or carrying coastwise any uncustomed goods (section 146(a) (iii))

(2) acquiring, having in possession, keeping or concealing or procuring to be kept or concealed any goods which the person knows or ought reasonably to have known to be uncustomed goods (section 146 (d) (iii))

(3) importation or exportation of concealed goods (section 147)

(4)making false or incorrect entries, (section 148).

For the goods discovered in the above circumstances to be liable to forfeiture the defendant must have adduced evidence sufficient to show that any of the offences created in sections 140 to 153 had been committed.

For the defendant to raise the presumption that the plaintiff's consignment is or was liable to forfeiture she must adduce sufficient evidence to show that the plaintiff had

either committed any of the acts provided for in section 155 or any of the offences created by any of sections 140 to 153 of the Act.
In the defendant's pleadings the plaintiff's goods are stated to be "part of a smuggled consignment liable for forfeiture"

According to section 2 of the Act "smuggling" with its grammatical variations and cognate expressions means the importation, exportation or carriage coastwise or the transfer or removal between any of the neighbouring States, of goods with intent to defraud the customs revenue or to evade any prohibition of, restriction on, regulation or condition as to, such importation, exportation, carriage coastwise, transfer or removal, of any goods.

The general rule as to burden of proof is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When that party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof. Then his allegation is presumed to be true unless his opponent adduces evidence to rebut the presumption. See Sections 101 – 103 Evidence Act. In the instant case the defendant has the burden to prove that the plaintiff's goods were part of a smuggled consignment. That is that they were delt with in any of the manner provided in section 2 above. Mr. Arike submitted that the defendant has proved to court that there were uncustomed goods belonging to the plaintiff intercepted being loaded on to a truck before being entered. That the plaintiff had dealt with his consignment in a manner intended to defraud customs revenue, hence rendering them liable to forfeiture under the Act.

Section 2 of the Act defines "uncustomed goods" to include dutiable goods on which full duties 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.

The defendant's submission is that the plaintiff's goods were dealt with in a manner contrary to the provisions of the customs laws. The defendant contends that:-

(1) The plaintiff's goods did not have a Customs Bill of Entry (a document signifying final declaration for payment of taxes).

(2) The consignment had not yet been entered for home consumption and yet it was being loaded on a truck.

(3) The plaintiff claim is solely based on the Road Customs Transit Declaration form C63; Exhibit D3; which is a transit clearance document.

The defendant's counsel submitted that no entry had been made and passed on to the proper officer and BPAF (Bank Payment Advance Form) issued as required by law. Counsel argued that the plaintiff has in no instance led evidence to the effect that an entry was made and passed to the proper officer which he argued would determine whether the plaintiff had delivered his goods for payment of Customs Duty.

Section 2(2) of the Act states:-

"(2) For the purposes of this Act __

(a) Goods shall be deemed to be entered:-

(i) In case of goods going directly into home consumption, when the entry is made and signed by the owner in the prescribed manner and is lodged, processed and passed by the proper officer and a BPAF is issued.

(ii) In case of bonded goods, when the bond allocation is effected"

It is a general rule of pleading that a party is bound by his pleadings. In *Nairobi City Council V/S, Thabit Enterprise Ltd (1995-1998) 2 EA 231* it was held that a Judge has no power or jurisdiction to decide an issue which had not been pleaded unless the pleadings were suitably amended. Also *in Galax Paint Co Ltd V/S Falcon Goods Ltd*

(2000) 2 EA 385 it was held that the issue for determination in a suit generally flowed from the pleadings and a trial court could only pronounce judgement on the issue arising from the pleadings or such issues as the parties framed for the court's determination. That unless pleadings were amended parties were confined to their pleadings.

In the instant case the defendant does not in its Written Statement of defense plead that the plaintiff's goods had not been entered in compliance with the provisions of the Act or in the prescribed manner. The defendant did not call any witness and no evidence was adduced as to what amounts to the prescribed manner of entry, and who is a proper officer. The evidence availed shows that a BPAF had been issued. It is exhibit P4(also exhibit D13). Mr. Arike's submission in this regard was not supported by any evidence.

There was no evidence adduced to show the circumstances under which the plaintiff's goods were seized. The defendant's counsel argued that the consignment had not yet been entered for home consumption and yet it was being loaded on a truck. There is no evidence adduced to prove that the plaintiff's consignment was being loaded on a truck. The only evidence availed is defence exhibits D4 and D16 where it is commented;

> "The quantity in m/v 107 UEG not established"

There is no evidence to show that what was contained in the motor vehicle 107 UEG was part of the plaintiffs' consignment. Exhibit D9, a letter by the Commissioner Customs Excise dated 27th April 2004 and addressed to plaintiff's lawyer referenced'

"Seized Assorted Chewing Gum from Jinja Customs station", states in part:-

> "In our earlier letter, even reference dated 2nd March,2004, addressed to your client, Tonny Lumu, we demand among other things, that your client declares the quantity of chewing gum, loaded from the same wagon and taken by two other trucks, one of which was identified as 991 UDN. Your

client denies this. However, the following shows that your client's denial should not be trusted:-

(i) The documents retrieved in the operation and purported to relate to the consignment are contradictory, namely what is declared on the C63 and on an invoice and cash sale receipt, both purported to be from the same supplier.

(ii) The quantity on spot, verified and witnessed by Tonny Lumu exceeds the quantity declared on C63 and does not tally with the invoice and cash sale receipt.

(iii) The declared weight by the transporter, and duty paid for by the importer is 36000 kg. This is far higher than the quantity seized on truck 107 UEG.

(iv) Police statements on record, by officials of Uganda Railways Corporation at Jinja show that two other vehicles, one identified as 991 UDN, also loaded from the same wagon, before the vehicle 107 UEG began loading. This was the vehicle impounded in action.

Therefore, your client should tell us the true quantity which was initially loaded into wagon NO CLBR 54929 and imported into the country-----"

The defendant in paragraph 7 of her Written Statement of defence pleads:

"7 In further reply to paragraph 4 of the plaint, the defendant shall adduce evidence to show that 4000 cartons of chewing gum were imported to Uganda consigned to the following Pascal Lumu of P.O. Box 350 Jinja, 1000 cartons, 1500 cartons to Kilumba Richard P.O. Box 770 Jinja, and 1500 cartons to Kasule Edward Sekito of P.O. Box 470 Jinja ----"

The defendant is bond by her pleadings above.

In his statutory declaration, exhibit P1, Pascal Lumu avers:-

> "2. That Tonny Lumu through me imported a consignment of assorted chewing gum from Everest Distributors as per invoice and receipt attached as "1" and "2"respectively.
>
> 3.That upon arrival the goods were declared under Form C63. No. OR. MAL, TR10.S800.154.04/086. Copy is attached as "3"."

The form C63, exhibit D3, a declaration at Tororo Entry Point shows 1000 packages declared and that the goods were in wagon NO CLBR 54929. It is a fact agreed at the Scheduling Conference that the plaintiff's total consignment and seized contained 1000 cartons of Big G. Section 57 of the Evidence Act provides:-

> " No fact need be proved in any proceedings which the parties to the proceedings or their agents agree to admit at the hearing or which, before the hearing, they agree to admit by any writing under their hand or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings, except that the court may, in its discretion require the fact admitted to be proved otherwise than by such admission."

Mr. Arike's submission that the plaintiff's consignment was bigger than the 1000 cartons declared on from C63 contradicts the agreed facts at the Scheduling Conference. The Scheduling Memorandum adopted as part of the scheduling conference was signed by counsel for both parties. It is trite that so long as counsel is acting for a party in a case and his instructions have not been terminated, such counsel has full control over the conduct of the case and has apparent authority to compromise all the matters connected with the case. See *Bulandina Nankya and Anor Vs Bulasio Konde (1979) HCB 239; Peter Kaggwa V/S New Vision Printing and Publishing Corp and others HCCS No: 244 of 2002 (unreported*).

Further exhibit D2 is a set of three forms C63, one for Richard Kulumba whose consignment was 1500 cartons; another by Kasule Edward whose consignment was 1500 cartons and Pascal Lumu's consignment which was for 1000 cartons. Pascal Lumu's consignment has been admitted as the plaintiff's consignment. The three consignments were contained in one wagon No: CLBR 54929.

In the defendant's letter, exhibit Exh D9, it is stated that what was declared on form C63 contradict the quantities on the invoice and cash sale receipt. The letter does not show the extent of the contradiction and the stated invoice and cash sale receipt were not tendered in evidence to enable court make a decision as to whether what was bought by the plaintiff on the alleged invoice and receipt was more than the 1000 cartons he had declared on form C63.

The letter, exhibit D9, states that the goods were seized on truck 107 UEG. This contradicts exhibits D4 and D16 which state that the quantity in motor vehicle 107 UEG was not established. The two exhibits show that the verification was of the goods still in the wagon.

The defendant's evidence shows several contradictions in the cartons. Exhibit D2, the three forms C63, show a total declaration of the goods in wagon CLBR 54929 to be 4000 cartons. Exhibit D4, the verification document shows that the quantity in the wagon then was 1503 cartons. The same quantity is also shown by exhibit D16. Exhibit D4 is dated 6th Feb 2003 while exhibit D16 is dated 6th Feb 2004. One of the seizure documents is dated 6th Feb 2003 and the quantity seized thereby is 1503 cartons. This shows that the quantities seized and verified on 6th Feb 2003 were 1503 cartons. However there is another seizure document dated 7th February 2004. By it 166 cartons were seized. There is no evidence to show where these 166 cartons were seized from and there is no evidence of verification. That put aside, the total quantity seized is 1669 cartons and it is this total which was sold as evidenced by the letter dated 29th October, 2004, by URA to the winning bidder- exhibit P6.

The above defendant's evidence show that some of the cartons declared on Forms C63, exhibit D2 had been ferried away by the time of the seizure. Probably this had been by motor vehicles Reg. No. 107 UEG and / or 991 UDN.

The letter of tax assessment, exhibit, D6, shows that the taxes had been assessed for a total of 3790 cartons. Still this was less than the 4000 declared on the three form C63.

Such is evidence of under declaration of the quantities contained in the wagon. But the issue is by who of the three; the plaintiff, Kilumba Richard or Kasule Edmond Sekito? There was no evidence of conspiracy by the three to under declare or to ferry some of the goods away without the payment of tax. Neither was there evidence adduced by the defendant to connect the plaintiff with the goods taken away by the alleged three vehicles. There is no evidence to show either Kilumba Richard or Kasule Edmond Sekito turning up to claim any of the goods still contained in the wagon and seized by the defendant. There is evidence to suggest that some of the items had been loaded on motor vehicle Reg. 107 UEG. The defendant did not adduce evidence to show who of the three; the plaintiff, Kilumba or Kasule was responsible for that loading. Further there is no evidence as to what happened to the items which by the time of seizure were already loaded on that vehicle. This lends credency to a presumption that it could have been the plaintiff's declared 1000 cartons still in the wagon plus some few still remaining of either Kasule's or Kilumba's consignment.

Considering all the above I find that the defendant has failed to adduce sufficient evidence to show that the plaintiff had committed any of the acts or offences provided by the Act so as to make his goods liable for forfeiture. In answer to the third issue I find that the defendant has failed to adduce sufficient evidence to raise the presumption that the plaintiff's consignment was or is liable to forfeiture under the Customs Management Act.

Issue No 4. Reliefs available to the parties.

The plaintiff has in his pleadings, prayed for:-

(a) An account of the taxes payable by the plaintiff on the seized goods.
(b) Refund of the balance due as taxes against the sale proceeds of Ushs 90,443,000/= plus shs37,778,976/= paid by the plaintiff on account of taxes totalling to Shs106,515,742/=
(c) Interest on (b) above as envisaged under the URA Act
(d) Costs of this suit.

With regard to prayer (a) for an account of the taxes payable, the same has been resolved by the parties' agreement. It has already been agreed that the plaintiff's consignment which was seized was 1000 cartons of Big –G and both Counsel did concede that tax payable on the 1000 cartons of Big–G is Shs11,098,126/= I therefore hold that the taxes payable by the plaintiff on the seized goods is Ugshs 11,098,126/=

As regards prayer (b) I have already held that the plaintiff's goods were not liable to forfeiture. The plaintiffs tax liability was Shs11,098.126/= yet it is an agreed fact that the plaintiff had on 24the May 2004 paid shs37,778,976/= in taxes for the consignment which sum was duly received by the defendant. There was therefore an over payment of Shs 26,680,850/= The plaintiff is seeking refund of the amount over paid in the above sum. This is a payment which URA was not entitled to, so the plaintiff is entitled to a refund of the above sum.

The plaintiff is also seeking payment of part of the proceeds from the sale of the seized and sold goods. It is an agreed fact that URA sold 121 cartons of Orbit and 1548 cartons of Big G at shs 90,443,000/= and that that amount comprised part of the sale proceeds for the 1000 cartons of Big – G and chewing gum claimed by the plaintiff. In paragraph 4 (g) of the plaint it is stated that the goods were of a perishable nature being Big G and Orbit chewing gum which were bound to expire. Section 159 (2) of the Act provides:-

"Where any goods which are of a perishable nature or are animals are seized the Commissioner General may direct that such goods shall be sold forthwith, either by public auction or by private treaty, and that the proceeds of such sale shall be retained and dealt with as they were such goods."

If the goods so seized and sold were liable to forfeiture under the Act, then the proceeds from the goods so sold could be forfeited to the Government under the Act. I have already held that the plaintiff's consignment was not liable to forfeiture under the Customs Management Act. It accordingly follows that the proceeds of sale of the plaintiff's seized goods were not liable for forfeiture.

In his submission counsel for the defendant argued that the plaintiff did not claim for his goods within the stipulated time. Secton159 (3) of the Act provides:-

"(3)Where any thing liable to forfeiture under this Act has been seized, then –

(a) if any person is being prosecuted for the offence by reasons of which such thing was seized, or such a thing shall be detained until the determinant of such prosecution and dealt with in accordance with section 160.

(b) In any other case, such a thing shall be detained until one month after the date of seizure or the date of any notice given under subsection (i) as the case may be; and if no claim is made therefore as provided in subsection (4) within such period of one month, such thing shall thereupon be deemed to be condemned."

Sub section 4 requires the owner of the seized goods within one month of the date of seizure or notice of seizure given, by notice in writing to the Commissioner – General to claim for such goods.

Section 162 provides:-

"(2) Where any thing is condemned under this Act, then

(a)subject to section 163, such things shall be forfeited and may be sold, disposed of, in such a manner as the Commissioner-General may think fit,

(9)the condemnation of such thing shall have effect as from the date when the liability to forfeiture arose."

In the instant case the seizures were on 6th and 7th February 2004. The plaintiff did not adduce any evidence of written claim to the Commissioner General for the goods. In absence of such a claim then the plaintiff's goods were after the lapse of one month deemed condemned and therefore forfeited and subject to sale, if the Commissioner-General so directed. However as a condition precedent for any such condemnation and forfeiture to arise the goods seized should have been liable for forfeiture. I have already held that the defendant has failed to adduce sufficient evidence to prove that the plaintiff's goods seized were liable to forfeiture. So the plaintiff's goods could not have been deemed condemned due to the plaintiff's failure to claim for the goods within the statutory period.

In the circumstances I find that the proceeds form the sale of the plaintiff's consignment was not liable to forfeiture to the Government. He is therefore entitled to the proceeds from the sale of his goods. The sale was of 121 cartons of Orbit and 1548 cartons of Big –G. The consignment was sold as a whole at Shs 90,443,000/= The plaintiff's consignment was only 1000 cartons of Big G as per the agreed facts. The plaintiff is therefore only entitled to the proceeds from the sale of his consignment of 1000 cartons of Big-G.

In his submission, Counsel for the plaintiff claimed that the plaintiff is entitled to shs54,189,939/= being the value for the 1000 cartons. He argued that if 1669 cartons were sold at Shs90,443,00/= then each carton was sold at 54,189/93. At that cost per carton the 1000 cartons would fetch shs54,189,939/=.

Mr. Arike disputed the above computation on the ground that the consignment seized contained Orbit and Big G. He therefore contended that they could not be computed at the sale price per carton. Counsel also wondered why the plaintiff was claiming shs54,189,939/= on 1000 cartons of Big G sold while their total value was Shs27,068,602/=. While computing the tax liability on the 1000 carton of Big G both Counsel agreed on the sum of Shs27,068,600/= as the value of the consignment. I however agree with Mr Mbabazi that the sum of shs27,068,600/= was the cost price of the consignment and not the selling price. What should be considered at this stage is the selling price.

On the other hand I agree that the consignment seized and sold comprised of Orbit and as well as Big G and the two cannot be computed at the same price. For example Exh. D6 shows that the consignment assessed for tax purposes containing of 1382 cartons of Big – G was valued US$26,410 CIF which put the cost price value of each carton at approximately US$19.11. While 2,408 cartons of Orbit was valued at US$80,466 CIF which put the cost price value of each carton at approximately US$33.42. The above shows that Orbit costed more than Big G. The same would follow while selling. Unfortunately Counsel for the defendant did not help Court to determine the sale price per carton of either of the two types. In the absence of any guidance in that regard and since the consignment comprising of the two types was sold as one batch, I am inclined to adopt the computation provided by Counsel for the plaintiff and put the sale price for either at a flat rate of Shs54,189,/93 per carton. I accordingly find that for the 1000 cartons of Big-G sold the plaintiff is entitled to Shs54,189,939/=

Therefore under prayer (b) the plaintiff is awarded:-

(i) shs 26,680,850/= being the amount overpaid in taxes.

(ii) Shs54,189,939/= being his share for the 1000 cartons of Big G as part of the proceeds from the goods seized and sold

This makes a total amount of shs80,870,789/= which sum is awarded to the plaintiff.

The plaintiff also prayed for interest on the above sum and his Counsel suggested the rate of 26% per annum from the date of sale of the plaintiff's 1000 cartons till date of refund. It is trite that where a party is entitled to a liquidated amount and has been deprived of the same through the wrongful act of another party, he should be awarded interest from the date of filing the suit. However, section 26 (2) of the Civil Procedure Act provides that the plaintiff would also be entitled to interest form the date when the defendant denied him the use of his money by withholding it See *Congo Trading Corp Ltd Vs Uganda Land Commission & A/G Court of Appeal; Civil Appeal No 38 of 2002*. The plaintiff's funds in the sum of Shs26,680,850/= have been withheld from the date of over payment and the proceeds from his goods in the sum of Shs 54,189,939/= have been withheld since the date of sale. The goods were trade goods. The plaintiff is therefore awarded interest on the sum of Shs80,870,789/= at the rate of 26% per annum from 30th October 2004 until payment in full.

The defendant had in the Written Statement of defence counter-claimed for unpaid taxes, penalties, interest and in the alternative for an order that the goods be forfeited to the Government. The effect of my holding on the issues framed is that there are no unpaid taxes due from the plaintiff to the defendant. Therefore also no penalties arise. I have also held that the plaintiff's goods were or are not subject to forfeiture. So the defendant's counter-claim fails and the same is dismissed.

The plaintiff also prayed for costs. Costs follow the event. The plaintiff is therefore awarded costs of this suit.

Hon Mr, Justice Lameck N. Mukasa
Judge

Date: 22nd February 2008