

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)**

**CIVIL SUIT NO 004 OF 2011 (O.S)**

**TESTIMONY MOTORS LTD (suing by representative action on behalf of  
numerous importers of used motor vehicles in Uganda and on its own behalf)  
..... PLAINTIFF**

**Vs.**

**THE COMMISSIONER CUSTOMS}  
UGANDA REVENUE AUTHORITY}..... DEFENDANT**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA**

**RULING**

This ruling arises from a preliminary objection to the originating summons taken out by the Plaintiffs against the Defendant. The background of the originating summons is that on the 8<sup>th</sup> of April, 2011 the registrar of the commercial court division granted an order giving permission to the Plaintiff on his own behalf and that of and for the benefit of numerous importers of used motor vehicles in Uganda having interest in one suit to sue for refund of monies allegedly illegally collected by Commissioner Customs Uganda Revenue Authority in respect of used vehicles in the financial years 2010/2011.

The order also directed that the Plaintiff is given leave to notify other importers of used motor vehicles in Uganda of the institution of this suit by way of advertisement on the notice boards of all the high court registries in Uganda. The application for leave to sue on behalf of other Plaintiffs was made in miscellaneous application number 177 of 2011. Subsequently on the 15<sup>th</sup> of April, 2011 the applicant filed a suit under order 37 rules 6 and 8 of the Civil Procedure Rules by way of originating summons. The application for leave to commence

action by originating summons was argued ex parte before me. On the 24<sup>th</sup> of June, 2011 I declined to issue the originating summons on the ground that the applicants were seeking an interpretation of the East African Community Customs Management Act which was the preserve of the East African Community Court of Justice. In my ruling I stated as follows:

“The interpretation of the High Court should be limited to questions of enforcement of the Act. The rationale for this is obvious. The Act overrides domestic legislation in case of conflict. Its provisions are therefore international or regional in application. Its domestication by enactment by the National Parliament does not change the character of the enactment as the East African Community law. Should the High Court of Uganda indulge the Plaintiffs and interpret the Act?”

Subsequently, the applicant filed another application for review of the decision refusing leave in miscellaneous application number 397 of 2011. The crux of the previous ruling refusing leave was that the High Court should not exercise jurisdiction in the matter. However upon the applicant’s application for review ex parte the application for review was allowed on the 14<sup>th</sup> of October, 2011. Consequently the present originating summons was signed on the 14<sup>th</sup> of October, 2011 and served on the Defendant. The Defendant accordingly opposed the summons in its affidavit in reply. When the OS came for hearing, the Plaintiffs were represented by Counsels Fred Muwema assisted by Siraje Ali and Terrence Kavuma all of Muwema Mugerwa and Company Advocates while the Defendant was represented by Counsels Mary Kuteesa and George Okello of the Legal Services and Board Affairs Dept of Uganda Revenue Authority.

At the hearing, learned Counsels for the Defendants raised preliminary points of law on the competence of the suit. These points for determination are:

1. Whether the dispute before court is properly brought by way of originating summons.

2. Whether the representative order was properly obtained and complied with before the institution of this suit.
3. Whether the Plaintiffs have the same cause of action against the Defendant.
4. Whether the Plaintiffs are properly before court

I have considered the lengthy oral and written submissions of learned Counsels for both parties on the preliminary points of law objecting to the OS and the replies thereto. I have also tried to peruse the authorities submitted for consideration.

The first issue relates to the competence of the originating summons and in case it is resolved in favour of the Defendants, there would be no need to consider the issue of whether the Plaintiff's action in its representative character is proper.

**Whether the dispute before court is properly brought by way of originating summons**

Learned Counsels for the Defendants submitted that the dispute before court is improperly brought by way of originating summons because originating summonses only encompasses limited inquiries as spelt out under order 37 rules 1 – 6 which lists the instances when originating summons may be issued. In brief originating summons are envisaged in matters to do with determination of issues of trust, administration of estates, sale and purchase of land, mortgage, dissolution of partnerships, and is of limited scope. The laid out categories cannot be stretched and there is no room for doing so in the rules. He contended that Rule 6 under which this suit was brought is equally inapplicable because it only applies to cases where a person claims to be interested under a deed, will, or a written instrument. He submitted that it is those persons listed who can apply to court by originating summons to determine questions of construction arising under the instrument and for a declaration of the rights of the persons so interested. Learned Counsel invited the court to consider if in the context of the

purposes of order 37 which intends to apply strictly to the cases listed. Counsel contended that the matter before court is neither for interpretation of a deed, will or instrument envisaged under this rule. The term “written instrument” as used in this rule should be interpreted *ejusdem generis*. Meaning that it should be interpreted restrictively to apply to classes of the matters preceding, i.e. wills and deeds. It has been held that the extent of inquiry to be made on an Originating Summons is very limited. See **Bhari vs. Khan [1965] EA 95** at page 99 paragraph C, decision of the East African Court of Appeal. At best this dispute should have been properly brought by way of an ordinary suit in a plaint. Section 19 of the CPA is to the effect that suits have to be commenced in the manner prescribed by the CPA. In exceptional cases of proceedings begun otherwise than by plaint, the circumstances therefore are clearly stated. These rules of procedure should be complied with. They are not mere technicalities to hide under. The word instrument does not include laws. On rules of procedure in the Khan case, it was emphasised that the rule of procedure cannot be got rid of by a side wind. This was emphasised by the Supreme Court in **Steven Mabosi vs. URA SCCA 26 of 1995**. See **Utex vs. Attorney General**. In the case of **The Environmental Action Network Action Ltd vs. AG and NEMA MA 39 of 2001** justice Ntabgoba PJ said at page 11 that in representative actions parties proceed by way of a suit. In that case learned Counsel submitted that the suit should have been by ordinary plaint. This is buttressed by the manner in which the rules committee developed the form to be used in OS. Form 13 of appendix B to the CPR is clear and even tells an intending litigant how to entitle the proceedings. From these it is deducible that the matters being brought are in only rules 1 – 5. Rule 6 simply emphasises what the foregone rules were for. Accordingly, the purported institution of this rule is superfluous. Counsels prayed that the court finds that the procedure adopted to institute the suit was irregular and that the suit cannot be saved under the provisions of rule 11 of the rules of order 37 where Court can change a matter to proceed in an ordinary manner. Rules apply where the matter was properly brought by OS. They prayed that the suit be struck out or dismissed for use of the wrong procedure with costs.

The Plaintiff's Counsels put in written submissions in reply and also addressed the court orally.

In their written response learned Counsels first addressed the court on the appropriateness of the procedure by way of originating summons. Firstly learned Counsels argued that under order 37 rule 8 (2) a ruling was made in which the court satisfied itself that the issues raised in the originating summons were capable of being determined by originating summons. Consequently learned Counsel contended that the objection raised by the Defendant challenging the propriety of the originating summons is redundant for the reason that the court had already satisfied by itself that the case is a proper one to be dealt with on an originating summons. Learned Counsels also submitted that the court is *functus officio* as far as its satisfaction of the procedure adopted is concerned. He referred to Goodman Agencies vs. Attorney General constitutional petition number 3 of 2008. They further contended that if the Defendant wished to challenge the propriety of the order of the court to proceed by way of originating summonses, the proper procedure was to file a separate application to review the court's ruling and not by a way of a preliminary objection.

Without prejudice learned Counsels submitted that order 37 rule 6 specifically provides for determination of questions of construction arising from other written instruments. The terms "instrument" has been said to embrace contracts, deeds, statutes, wills, for orders in Counsel, for orders, warrants, schemes, the letters patent, rules, regulations, bye laws, whether in writing or print or partly in both in Black's Law Dictionary page 869. Learned Counsels submitted that the procedure by the way of originating summons has been held by several authorities to be the proper procedure to be followed in questions of interpretation of statutes. These authorities are:

- a. Nakabugo vs. Francis Drake Serungjogi [1981] HCB 58
- b. Talyaba Nyakana vs. Beatrice Kobusingye Civil Suit No. 6 of 1992
- c. Pearl Impex vs. KCCA OS No.3 of 2011
- d. Rock Petroleum vs. URA OS No. 9 of 2009

Lastly learned Counsels submitted that the Defendant has not shown that it will suffer any prejudice with the use of the originating summons procedure.

In rejoinder learned Counsels for the Defendant submitted in writing and also orally gave highlights thereof:

As far as the Plaintiffs argument that the court is *functus officio* because it endorsed the originating summons on 14 October 2011 is concerned, learned Counsels for the Defendant submitted that as far as the doctrine of *functus officio* is concerned, it must be shown that the duties of the court had been fully accomplished. The court must have duly pronounced a final judgment or order the matter. And that the jurisdiction in the case must have been fully and finally exercised. Authority over the subject matter must have ceased. Learned Counsel referred to page 5 of the ruling of the court in this matter where the court held that "that it would first determine whether the matter is properly before the court in terms of jurisdiction and forum". The court then dismissed the application for leave to issue the originating summons on 24 June 2011. Thereafter in miscellaneous application number 397 of 2011 the Plaintiffs applied for a review of the decision. The ruling on review was delivered on 14 October 2011 but did not address all the issues of whether the matter was properly before the court in terms of the procedure used. Learned Counsel submitted that the issue the court determined in the review was whether there was an error apparent on the face of the record with regard to the jurisdiction of the court. Quoting from the earlier ruling:

"I am satisfied that leave to issue the OS in my earlier ruling was refused on erroneous grounds which are apparent on the face of the record. The error relates to the conclusion of the court relating to its mandate to determine the question under section 220 (1) of the East African Community Customs Management Act. Consequently and without determining any other questions submitted on in the application for review, the prayer of the applicant to review the order of court dated 24th of June 2011 is granted. An originating summons is hereby issued in civil suit number 004 of 2011 as prayed."

Learned Counsel contended that the issue before court is whether the dispute is properly brought by way of originating summons while in the previous matter, it related to the jurisdiction of the court.

In rejoinder to submissions of the Plaintiff that order 37 rules 6 of the CPR gives authority to bring the proceedings by way of originating summons, learned Counsel distinguished the authorities referred to by the Plaintiffs in the reply. As far as the Rock Petroleum Case (*supra*) is concerned, it did not discuss the propriety of the procedure of originating summons adopted in that case and is not good authority. Secondly the definition of the words "an instrument" by Black's Law Dictionary has a broader meaning than that submitted by learned Counsels for the Plaintiff. The words used in order 37 rules 6 is "written instrument". The word "instrument" depending on context, would receive various interpretations. Learned Counsel contended that the words "or other written instrument" should be interpreted *ejusdem generis* with reference to written instruments referred to immediately preceding such as "will" or "a deed". Learned Counsels for the Defendant is further stated that the *ejusdem generis* principle is closely linked to the *Noscitur a sociis* principle which means that the word or phrase is not to be construed as if it stood alone but in light of its surroundings. Learned Counsel submitted that the authorities referred to by the Plaintiffs Counsels never interpreted order 37 rules 6 of the Civil Procedure Rules. He relied on my decision in Pearl Impex Uganda Ltd versus Attorney General and Kampala City Council. He agreed with my observations in that case that in the United Kingdom, the rules of the court expressly and in clear terms provide for the use of originating summonses where the question is one of construction of an Act or any instrument made under an Act. Learned Counsel concluded that the present case before court is for interpretation of the East African Community Customs Management Act 2004, a law made by the East African Parliament.

## Ruling

The first matter to be considered is whether I am *functus officio* and therefore cannot determine the issue of appropriateness of the originating summons as far as the procedure is concerned. The facts disclosed are that the court had initially

refused leave to issue the originating summons on the ground that it was not appropriate in the circumstances of the case. In the earlier application leave was refused and at pages 5 and 6 of the ruling I stated as follows:

“Section 3 thereof provides "the directorate of Customs as established by the Council and the Treaty shall be responsible for the initiation of policies on Customs and related trade matters in the Community and the coordination of such policies in the Partner States." Section 253 of the Act provides that: “This Act shall take precedence over the Partners States’ Laws with respect to any matter to which its provisions relate.”

The sum total of the above as far as the suitability of trial of this suit by the High Court of Uganda and for interpretation of the Act is concerned is directed inter alia by sections 1, 2, 3 and 253 of the Act to the effect that:

- a. The Directorate of Customs under the Act is established by the Council created under the treaty forming the East African Community and the Council is responsible for policy matters.
- b. The East African Community Customs Management Act, 2004, is an Act of the East African Community.
- c. The Act is meant to apply to all the Partner States of the East African Community and it takes precedence over national laws.

The East African Community Customs Management Act, 2004 is for all intents and purposes a creature of the East African Community Treaty and therefore part of international law. Its provisions have to be uniformly applied across all the Partner States. For that reason and in theory, the interpretation of its provisions by the High Court of Uganda would if allowed affect the application of the law for all the Partner States a proposition which is without jurisdiction. This in my humble finding is not only inappropriate but the High Court should refrain from interpreting the provisions of the Act for purposes of uniform application of the law in all the Partner States of the Community. The jurisdiction of the High Court extends only to the boundaries of Uganda and certain subjects matters which I need not mention here. The High Court of



Kenya, Tanzania, or the courts of Rwanda and Burundi may if different interpretations are permitted come up with different interpretations of the same provisions that the Plaintiff would like this court to interpret. Though the East African Community Customs Management Act, 2004 is an Act of Parliament, it is just a domestication of International Treaty Law for application and enforcement by national agencies of Partner States in the East African Community. Counsel referred me to section 220 of the Act to support his contention that the High Court has jurisdiction to interpret the Act.

Section 220 of the Act deals with enforcement of the provisions of the Act but does not apply to questions as to interpretation of the Act. As far as enforcement is concerned, national courts of competent jurisdiction have jurisdiction and should freely exercise the same.”

Subsequently, the Plaintiff applied for review of the above decision and my decision thereon is as follows:

“I am satisfied that leave to issue the OS in my earlier ruling was refused on erroneous grounds which are apparent on the face of the record. The error relates to the conclusion of the court relating to its mandate to determine the question under section 220 (1) of the East African Community Customs Management Act. Consequently and without determining any other questions submitted on in the application for review, the prayer of the applicant to review the order of court dated 24<sup>th</sup> of June 2011 is granted. An originating summons is hereby issued in Civil Suit No. 004 of 2011 as prayed.”

I agree with learned Counsel for the Defendant that the court did not determine all the points raised in the application for review. The court just noted that section 220 (1) of the East African Community Customs Management Act conferred jurisdiction on the High Court and it was erroneous to hold that the High Court should not exercise jurisdiction. The court determined the question of jurisdiction but can it be said that it finally determined the question of whether the originating summons was the appropriate procedure in the circumstances of

the case? The submission of learned Counsels for the Plaintiff is to the effect that by issuing the originating summons the court has finally resolved the question of whether originating summons is appropriate procedure in their case. The rules however vest further jurisdiction in the court to determine whether an originating summons is the appropriate procedure after giving leave to issue the same and after completion of pleadings.

The power of the court to decide whether to issue an originating summons is vested in the judge under order 37 rule 8 (2) of the Civil Procedure Rules. The rule provides that:

The person entitled to apply shall present it ex parte to a judge sitting in Chambers with an affidavit setting forth concisely the facts upon which the right to the reliefs sought by the summons is founded, and the judge, if satisfied that the facts as alleged are sufficient and the case is a proper one to be dealt with on an originating summons, shall sign the summons and give such directions for service upon persons or classes of persons and upon other matters as may then be necessary."

Where the judge signs the originating summons, the act of issuing the originating summons is complete. It can be said that the judge is *functus officio* as far as the issuance by the signing of the originating summons is concerned. A judge is however not *functus officio* for purposes of determining other matters after issuance of the originating summons for the simple reason that the rules allow the judge to dismiss the originating summons after it has been issued for not being appropriate in the circumstances. The judge may order for further evidence by way of affidavits in support of the summons or make the necessary amendments to the summons to accord with existing facts. A judge is not precluded from taking evidence viva voce or hearing arguments. Where it appears to the judge that the matters in respect of which relief is sought cannot be properly disposed of in a summary manner, the judge may refuse to pass any order on the summons and may dismiss it or refer the parties to a suit in the ordinary course and make such orders as to costs as may appear to be just under rule 11 of order 37. In other words objection may be taken by a party on the

grounds that the originating summons is not appropriate in the circumstances of the case. Secondly, the respondent/Defendant had not yet been heard on the question of the propriety of the originating summons which matter is handled ex parte. However, once the summons has been issued, the Defendant can only contend that in the circumstances it was not a proper procedure for disposal of the issues. The court assesses the pleadings of both parties to determine this question under order 37 rules 11 of the Civil Procedure Rules. Prior to that, the court only considers the pleadings of the Plaintiffs. For the above reasons this court is not *functus officio* to consider the question of whether originating summons is appropriate. Moreover, the principles of natural justice and fair hearing under article 28 of the Constitution of the Republic of Uganda, means that the Defendant cannot be denied the right to raise the question of appropriateness of the originating summons as soon as it comes on board. Issuance of summons cannot conclusively determine the appropriateness of procedure without giving a chance to the opposite party to raise points of objection to the originating summons after being served for the first time.

The question of whether the originating summons is the most appropriate procedure in the circumstances of this case must first be examined in light of the claims of the Plaintiffs in the originating summons itself. Whereas during the scheduling conference the parties agreed to frame issues differently from that contained in the originating summonses, it is proper to first set out what the originating summons seeks the court to determine for purposes of assessing its appropriateness after pleadings were completed. There are two questions for determination of the court set out in the originating summons namely:

1. Whether the directive of the Commissioner Customs Uganda Revenue Authority to unilaterally suspend operation of the transaction value method set out under section 122 and the fourth schedule of the East African Community Customs Management Act, Act number 5 of 2005 with regard to used motor vehicles is lawful.

2. Whether the Plaintiffs are entitled to an account and a refund of monies illegally collected by the Defendant from the 20<sup>th</sup> day of April, 2010 onwards, pursuant to the said directive of the Commissioner Customs Uganda Revenue Authority.

At the scheduling learned Counsels for both parties and the court further refined the issues to read as follows:

1. Whether the suspension of the operation of the transaction value method by the Defendant contravened the provisions of section 122 of the East African Community Customs Management Act 2004.
2. If the first issue is answered in favour of the Plaintiffs, whether the Plaintiffs are entitled to reassessment in accordance with the law.

The ground of the objection of the Defendant on the first issue is that the issues framed for determination by the court do not fall under the provisions of order 37 rules 6 of the Civil Procedure Rules which reads as follows:

“Any person claiming to be interested under a deed, will or other written instrument may apply in chambers by originating summons for determination of any question of construction arising under the instrument and for a declaration of the rights of the persons interested.”

The Defendant dwelt on whether the words "or other written instrument" includes an Act of Parliament. Learned Counsels for the Defendants went as far as to contend that construction under rule 6 of order 37 should be restricted to construction of matters arising under orders 37 rules 1 to 5 of the Civil Procedure Rules. The Plaintiffs on the other hand disagreed that such a restriction would be put on the language of order 37 rules 6 of the CPR. The submissions of Counsels have been set out above. Before I consider the lines adopted by both Counsels in the arguments, it is necessary to examine order 37 rule 6 on the basis of its language.

An analysis of order 37 rules 6 discloses pertinent ingredients the first of which is that there has to be a person claiming to be interested under a deed, will or other written instrument. Secondly the originating summons should be for the determination of a question of construction arising under the instrument in issue. The term "instrument" encompasses all categories of instruments mentioned under order 37 rules 6 of the CPR. Thirdly, the question of construction must result in a declaration of the rights of the person interested in the construction of the instrument. Fourthly, the person applying by originating summons for determination of questions of construction must have an interest in the outcome of the question.

Does the originating summons and the questions spelt out for determination or as refined by the parties give rise to a question of construction arising under the written instrument? What is a "question of construction"? The word "construction" means "interpretation". The word "construction" when put in context means to "construe". I have endeavoured to ascertain several dictionary meanings of the word "construction". According to the Cambridge International Dictionary of English, the word "construe" means to "understand the meaning especially of other person's actions and statements, in a particular way. On the other hand the word "interpret" means to decide what the intended meaning of something is. Interpretation also means to ascribe a meaning to. Chambers 21st Century Dictionary revised edition defines the word "construction" as the process of building or constructing. As far as grammar is concerned, the arrangement of words in a particular grammatical relationship. It also means "interpretation". It further defines the word "interpret" as to explain the meaning of or to consider or understand or to convey one's idea of the meaning of. Interpretation is an act of interpreting or the sense given as a result. It is the representing one's idea of the meaning of something such as a piece of music. Last but not least a comprehensive meaning of the word "construction" is given by Black's Law Dictionary seventh edition at pages 308 and 309. The word construction means:

"The act of building by combining or arranging parts or elements; the thing so built. 2. It is the act or process of interpreting or explaining the sense or intention of a writing (usually a statute, opinion, or instrument)....

"Construction, as applied to written law, is the act or process of discovering and expounding the meaning and intention of the authors of the law with respect to its application to a given case, where the intention is rendered doubtful either by reason of apparently conflicting provisions or directions, or by reason of the fact that the given case is not explicitly provided for in the law." Henry Campbell Black, *Handbook on the Construction and Interpretation of Laws* 1 (1896)

"Some authors have attempted to introduce a distinction between 'interpretation' and 'construction.' Etymologically there is, perhaps, such a distinction; but it has not been accepted by the profession. For practical purposes any such distinction may be ignored, in view of the real object of both interpretation and construction, which is merely to ascertain the meaning and will of the lawmaking body, in order that it may be enforced." William L Lile *brief making and the use of law books* 337 (third edition 1914).

"There is no explanation of the distinction between interpretation and construction [in the Blackstone], nor can it be inferred from the matters dealt with under each head. The distinction is drawn in some modern works, but it is not to be taken in this book because it lacks an agreed basis. Some writers treat interpretation as something which is only called for when there is a dispute about the meaning of statutory words, while speaking of construction as a process to which all statutes, like all other writings, are necessarily subject when read by anyone. Others treat interpretation as something which is mainly concerned with the meaning of statutory words, while regarding construction as a process which mainly relates to the ascertainment

of the intention of the legislature." Rupert Cross, *Statutory Interpretation* 18 (1976)."

The purpose of construction is to ascertain the meaning and the will or intent of the maker of the instrument in order that what is provided in the instrument may be enforced. Construction then has implementation as one of the objectives. Some distinction was made between interpretation and construction. As far as can be discerned from the passage quoted from Black's Law Dictionary (*supra*), interpretation is called for where there is a dispute about the meaning. Interpretation relates to the meaning of the words used while construction relates to ascertainment of the intention of the maker or author of the instrument. It follows that the purpose of construing a deed, will or other written instrument is to ascertain the meaning for purposes of implementation. Finally, there can be no construction without interpretation of words. The distinction between construction and interpretation may not add any value to use of the words "any question of construction arising under the instrument". The inescapable meaning of the above passage is that the person interested in any question of construction would be interested in ascertaining the meaning and intention of the maker or author of the instrument with the ultimate result of establishing their interests under that instrument. Learned Counsel for the Defendant further referred me to form 13 which is the general form for originating summons under order 37 rules 8 of the Civil Procedure Rules. The form provides

"Whereas the above named AB, who claims to be interested in the above named matter, (the applicant is supposed to state the nature and particulars of the claim) has applied for the determination of the following questions..."

The nature and particulars of the claim would show the interest of the Plaintiff in the questions to be construed under order 37 rules 6 of the Civil Procedure Rules. It is quite easy to understand what is meant by "construction" of a will because one is dealing with a private document whose meaning or intent needs to be established. Often, the executor or beneficiaries would want to ascertain the

intention of the testator. It is also easy to appreciate what is meant by construction of a deed. Finally, the words "any question of construction arising under the instrument" mean that there is a controversy for determination by the court relating to the construction of the instrument. The word "instrument" is used to mean, a "will", "a deed" and "other written instrument" as specified under order 37 rules 6 of the Civil Procedure Rules. A controversy by necessary implication admits for various interpretations and which the court is called upon to decide or determine. A question or questions for interpretation or construction must therefore involve a dispute or controversy as to the meaning or interpretation of a provision of or the whole of the "will", "deed" or "other written instrument" in which the person who moved the court by originating summons has an interest. Last but not least the word 'interpretation' has been defined by Black's Law Dictionary to mean:

"The process of determining what something, especially the law or a legal document, means; the ascertainment of meaning.

"Interpretation, as applied to written law, is the act or process of discovering and expanding the intended signification of the language used, that is, the meaning which the authors of the law designed it to convey to others." Henry Campbell Black, Handbook on the Construction and Interpretation of Laws 1 (1896).

"There is more to interpretation in general than the discovery of the meaning attached by the author to his words. Even if, in a particular case, the meaning is discoverable with a high degree of certitude from external sources, the question whether it has been adequately expressed remains." Rupert Cross, Statutory Interpretation 149 (1976).

After considering what a question of construction is, it is my conclusion without answering the question of whether the terms "other instrument" used under order 37 rule 6 includes statutes, that the questions specified by the parties are not questions for construction of an instrument as envisaged by order 37 rule 6 of



the Civil Procedure Rules. On the contrary, the true intention and outcome of the framed questions for determination is whether the acts of the Commissioner are ultra vires the Act namely the East African Community Customs Management Act. Specifically the court is supposed to determine the question whether the directive of the Commissioner Customs Uganda Revenue Authority to suspend the operation of the transaction value method set out under section 122 and the fourth schedule of the East African Customs Management Act is lawful. Whether or not a matter is lawful requires the testing of the action against the law. It is not a question of construction i.e. of section 122 of the East African Community Customs Management Act. It is a question of whether the acts of the Commissioner are ultra vires the Act. Even if this by necessary implication involves construction or interpretation, it concerns enforcement of the Act and not questions of construction. A question for interpretation would presuppose that the interested persons in the determination of the question would be seeking from the court an interpretation that would guide them in the matter in which they are interested. It will not be a suit to challenge the acts of an authority that is asserted to be contrary to law. The affidavit in support of the originating summons sworn by Twesigye Osborn paragraphs 4 to 10 is reproduced. They clearly assert that the acts of the Commissioner are illegal and contrary to law. They raise the question of whether the acts are lawful. It is necessary to set out the said paragraphs of the affidavit in support which states as follows:

3. ... "

4. That on the 13th day of July, 2010 the Plaintiff Company imported into the country a used motor vehicle from Japan and entered the same for customs purposes...

5. That the Plaintiff companies said declared value was unlawfully rejected by the respondents officials and the Plaintiff company was appraised using alternative methods of valuation which where inapplicable to this transaction and as a result of which it paid customs duty computed on the value of US dollars 11,200... In taxes.

6. That upon inquiry the Plaintiff Company was informed by the respondent's officials that the operation of the transaction value method in respect of used motor vehicles has been suspended by the Commissioner Customs Uganda Revenue Authority on 19th of April 2010 as copy of the said directive attached hereto as annexure "G" can refer.
7. That I am further advised by my lawyers whose advice I verily believe to be true that the Commissioner Customs has no authority to suspend the operation of an Act of Parliament and that therefore the purported suspension is unlawful.
8. That as a result of the said suspension there is uncertainty and dispute between motor vehicle importers and Uganda Revenue Authority as regards the proper valuation methods applicable to used motor vehicle importers thus this suit.
9. That this matter is clear and straightforward as it only requires an interpretation of the provisions of the East African Community Customs Management Act, Act number 5 of 2005 and will not require adducing other evidence outside this affidavit.
10. That I depose hereto in support of the Originating Summons to determine the proper construction of the East African Community Customs Management Act, Act number 5 of 2005 for the purpose of determining the following questions;
  - a. Whether the directive of the Commissioner Customs Uganda Revenue Authority to unilaterally suspend the operation of the transaction value method set out under section 122 and the fourth schedule of the East African Community Customs Management Act, Act number 5 of 2005 with regard to used motor vehicles is lawful.

- b. Whether the Plaintiffs are entitled to an account and a refund of monies illegally collected by the Defendant from the 20th day of April 2010 onwards, pursuant to the said directive of the Commissioner Customs Uganda Revenue Authority."

It is clear from the above that the Plaintiff asserts that the acts of the Commissioner are illegal and in contravention of the East African Community Customs Management Act 2004. Secondly the question of whether the suspension of the transaction method set out under section 122 and the fourth schedule of the East African Community Customs Management Act 2004 is not a question of construction of the Act. No controversy is raised as to the meaning or construction of sections 122 and the fourth schedule of the East African Community Customs Management Act 2004. There is no question for construction of sections 122 and the fourth schedule of the East African Community Customs Management Act 2004. In other words, there is no doubt about the meaning of the provisions quoted above. What is sought is the application of the said provisions to the acts of the Commissioner to determine whether those acts are in contravention of the said provisions. Lastly a question of construction has to be stated in the originating summons itself and cannot be implied. The originating summons must set out the question of construction of the instrument. It must raise a controversy that is for determination of the court as to the proper construction or interpretation of a provision of the whole or part of the instrument.

The Supreme Court in the case of **Ismail Serugo versus Kampala City Council and Attorney General Supreme Court constitutional appeal number 2 of 1998** has made a distinction between enforcement and interpretation in the context of article 137 and 50 of the Constitution of the Republic of Uganda. As far as the Constitution is concerned article 50 provides that a person whose fundamental rights and freedoms are infringed or threatened may apply to a court of competent jurisdiction for enforcement of his or her fundamental rights or freedoms. The judgment of Mulenga JSC is that where the infringement or threatened infringement does not call for interpretation of the Constitution, the

concerned party may apply to any other competent court other than the Constitutional Court for enforcement of the rights. On the other hand article 137 of the Constitution confers jurisdiction on the Constitutional Court to hear questions as to the interpretation of the Constitution. A clear distinction emerges between interpretation and enforcement. Of course enforcement includes a process of interpretation but does not require determination of questions as to interpretation of the Constitution. The court noted that it is only the Constitutional Court which has jurisdiction to determine questions as to interpretation. In his judgment, Wambuzi CJ also concurred and stated:

"In my view for the Constitutional Court to have jurisdiction the petition must show, on the face of it, that interpretation of a provision of the Constitution is required. *It is not enough to allege merely that a constitutional provision has been violated. If therefore any rights have been violated as claimed, these are enforceable under article 50 of the Constitution by another competent court.*" (Emphasis added)

He further noted that one cannot rule out malicious prosecution, wrongful detention or false imprisonment, matters dealt with under specific rules. Such matters can be enforced by a competent court and should a question of interpretation of a provision of the constitution arise, that question can always be referred to the Constitutional Court. What a question for interpretation is in the context of article 137 of the constitution of the Republic of Uganda was considered by the Court of Appeal in **Constitutional Reference No. 07 Of 2006 Emmanuel Nagoli Vs Attorney General and Manafwa Dealers Ltd.** In that case the high Court per Muhanguzi, J referred questions for interpretation by the Constitutional Court pending hearing. The Constitutional Court held:

"In this court's view, the three aforesaid issues are not merely alleging contravention of the constitution, but do call for interpretation of the various articles of the constitution cited therein. All three issues do call for determination of whether the Hon. Minister's decision or conduct contravened articles 20, 21, 42 and 44 of the constitution. *In order to do so*

*court must determine the meaning of the specified provisions of the constitution allegedly contravened ...” (emphasis added)*

In conclusion, questions of construction under order 37 rules 6 of the Civil Procedure Rules only arise when there is a controversy as to the meaning, scope, purpose, intention, ambit or application of the instrument or any part thereof. The purpose of construction is to have the correct meaning, purpose, scope, intention, ambit etc applied in the interest of persons having an interest in the question of construction.

It is possible to file an action for determination of points of law and under order 6 rule 28 and 29 such a point of law may be determined preliminarily before claims for consequential relief. It is also possible to file an action for declaration that the acts of the Commissioner are a nullity. It is further also possible to apply for judicial review on the ground that the acts of the executive or authorised officer under the Act are ultra vires the Act. An ultra vires act is an act not authorised by the statute and may be challenged by judicial review of administrative action. An application for an order of mandamus, prohibition or certiorari or injunction may be brought by way of an application for judicial review. In other words, there is a remedy for the challenge of the acts of the Commissioner of customs. The remedy of judicial review under the Judicature (Judicial Review) Rules, 2009 however, are time bound. Unless time is extended, the time for applying for judicial review is within three months from the date when the grounds of the application first arose. (See rule 5 of the Judicature (Judicial Review) Rules, 2009).

Secondly it was strongly submitted for the Defendant that the words "other written instrument" in order 37 rules 6 do not include an Act of Parliament. Learned Counsel for the Defendants maintained that the words "other written instrument" include Acts of Parliament. My opinion on this question was expressed in the case of Pearl Impex versus Attorney General and Kampala Capital City Authority and I have no reasons neither have I been addressed on any grounds to depart from it. In that case I considered whether the words "other written instrument" may include Acts of Parliament or Statutory Instruments. This is what I said:

*Decision of Hon. Mr. Justice Christopher Madrama*

“My readings of rule 6 of order 37 of the Civil Procedure Rules casts doubt in my mind as to whether rule 6 can be invoked purely for the interpretation of an Act of Parliament without showing the interest the applicant has in the “written instrument”. Firstly those cases never interpreted the equivalent of order 37 rules 6 of the Civil Procedure Rules. They should therefore be taken to refer to cases arising within the other rules invoked which may involve a construction of a statute. I.e. the construction of a statute may arise when a vendor or purchaser takes out originating summons under order 37 rule 3 “for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale, not being a question affecting the existence or validity of the contract.” Such cases may involve the construction of a statute or a pure point of law. However rule 6 of order 37 should be considered on its merits....

Firstly, there has to be a person claiming to be interested under a deed, will or written instrument. The operating words as far as this provision is concerned are “written instrument”. The person claiming must claim an interest under the written instrument. The term “written instrument” is construed *ejusdem generis* as being of the nature of things such as deeds or wills, powers of attorney or other written instruments. It is hard to conceive whether legislature intended it to be applied to an application to interpret a law and have not used the terms *Act of Parliament* or *provision of any law*”. The words *written instrument* are not defined by the Civil Procedure Act, neither is it defined by the Interpretation Act cap 3. On the other hand the words “Act” or “Act of Parliament” is specifically defined under section 2 (a) to mean with reference to legislation the law made by Parliament. Secondly the word “statutory instrument” is defined under section 14 of the Act to mean powers conferred by an act of Parliament and exercised by the President, a Minister or any other authority to make proclamations, rules, regulations, by laws, statutory orders or statutory instruments, any document by which that power is exercised is to be known as a statutory

instrument. Why did legislature not use the words “Act of Parliament” or “statutory instrument” or provision of laws?

Secondly, rule 6 of order 37 envisages a tangible interest under an instrument such as a power of attorney. It is therefore inconceivable to read under the words “any other written instrument” an Act of Parliament or Statutory Instrument. There must be a kind of right or interest conferred by the document or written instrument giving a standing to the applicant to invoke order 37 rule 6. ...

... Notwithstanding my finding that order 37 rule 6 does not directly cater for direct applications for the interpretation of legislation (An Act of Parliament or Statutory Instrument)..”

My conclusion in that case was that there would be no prejudice to the Defendant if the matter was dealt with by Originating Summons which was convenient to dispose of the case where there was no dispute of fact. That conclusion was not based on my interpretation but on the convenience of the parties. In this case, there has been an objection in which learned Counsel for the Defendant relied on the interpretation I gave to order 37 rule 6 and particularly the words “or any other instrument”. I cannot detract from my earlier ruling but would lend additional support to it. The word "instrument" further defined by **Halsbury’s Laws of England 4<sup>th</sup> Ed volume 13 paragraphs 139** where it is stated:

“The word ‘instrument’ as applied to writing may have a still wider scope, and may include documents which affect the pecuniary position of parties although they do not create rights or liabilities recognised in law; but usually it applies to a document under which some right or liability, whether legal or equitable, exists.”

The words "any person claiming to be interested under a deed, will or other written instrument" import within it some right or liability, whether legal or equitable. Locus standi is given by the tangible interest claimed under the deed, will or other written instrument. As far as interpretation within the context of order 37 rule 6 of the terms "or other written instrument" is concerned, I further

agree with learned Counsels for the Defendants and confirm my earlier ruling on the matter in the case of Pearl Impex Uganda Ltd versus Attorney General and Kampala City Council (supra). According to Halsbury's laws of England fourth edition volume 44 (1) paragraph 1491 an uncertain meaning is recognised by its associates. That means that to establish the meaning of the word "or other instrument", one has to look at its associate words which are "will" and "a deed". Those associates are private documents. An Act of Parliament or a statutory instrument would not fit in. As far as the tenets of interpretation of statutes in context is concerned, contextual interpretation was considered in the case of **Attorney-General v HRH Prince Ernest Augustus of Hanover [1957] 1 All ER 49 at page 53 Viscount Simonds** of the House of Lords said:

“For words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use context in its widest sense which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy.”

The House of Lords took into account the relevant preamble of the Act in interpreting its provisions. Similarly in the case of **Bourne (Inspector of Taxes) v Norwich Crematorium, Ltd [1967] 2 All ER 576** at page 578 STAMP J of Chancery division held that:

English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back again into the sentence with the meaning which you have assigned to them as separate words, so as to give the sentence or phrase a meaning which as a sentence or phrase it cannot bear without distortion of the English language.



The head note of order 37 rules 6 of the Civil Procedure Rules clearly provides that it deals with "Summons by persons interested in deeds or wills." A Statute or an Act of Parliament if it was intended to be included in the provision as an instrument ought to have been mentioned in the head note or side note of the provision. It would be strange indeed if the rules committee provided the heading as "a will or deed" and left out an Act of Parliament or Statutory Instrument. The words "or any other instrument" derives its colour or meaning from the words "will" or "deed". It therefore follows that it cannot refer to an act of Parliament or a Statutory Instrument. My holding in the case of Pearl Impex Uganda Ltd versus Attorney General and Kampala City Council (supra) was therefore correct.

It is therefore my conclusion that the questions raised by the Plaintiffs are not questions of construction of any other instrument. Secondly, I have no doubt that the words "or other instrument" under order 37 rule 6 do not include an Act of Parliament. The words "or other instrument" has to be construed *ejusdem generis* as referring to things such as wills, deeds and other such private documents. It does not refer to a Statutory Instrument or an Act of Parliament.

Where there is no question of construction of an instrument, the originating summons in this suit is inappropriate for handling the questions framed therein. In the premises, the Plaintiff is at liberty to file a suit for declarations of the legality or illegality of any act of the Commissioner of customs and for consequential relief (i.e. under order 2 rule 9 of the Civil Procedure Rules).

As far as remedies are concerned, the intended action of the Plaintiff is of public interest and may affect numerous persons in Uganda. The objection of the Defendants relates only to the appropriateness of the procedure by originating summons and does not deal with the substance of the suit. In the premises, I do not agree with learned Counsels for the Defendant that the court should not apply the provisions of order 37 rules 11 of the Civil Procedure Rules. The court will not hear the Plaintiffs under the procedure of originating summons. The originating summons is struck out with no order as to costs.

Ruling delivered in open court the 18th of May 2012.

Hon. Mr. Justice Christopher Madrama

Ruling delivered in the presence of:

George Okello counsel for the defendant

Defendants representative Jane Ashaba Kanya in court

Plaintiffs representative Osborne Twesigye in court

Siraje Ali and Terence Kavuma for the Plaintiffs.

Hon. Mr. Justice Christopher Madrama

18<sup>th</sup> May 2012