THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 212 OF 2012

TESTIMONY MOTORS LTD}.....PLAINTIFF

VERSUS

THE COMMISSIONER OF CUSTOMS}

UGANDA REVENUE AUTHORITY}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff's action against the defendant is for a declaration that the directive of the defendant to unilaterally suspend the operation of the transaction value method under section 122 and the fourth schedule of the East African Community Customs Management Act, Act number 5 of 2004 for used motor vehicles, is unlawful. It is further for a declaration that the plaintiff is entitled to a revaluation of the customs duty payable on its car and an order for payment by the defendant of sums found to be due from the defendant upon the revaluation prayed for above, general damages, exemplary damages, interests and costs of the suit.

The basic facts averred in the plaint are not disputed. They are that the East African Community Customs Management Act number 5 of 2005 and section 122 (1) thereof, provides that where imported goods are liable to import duty ad valorem then the value of such goods shall be determined in accordance with the fourth schedule and import duty paid on that value. Paragraph 2 of the fourth schedule provides that customs value of imported goods shall be the transaction value which is the price actually paid or payable for the goods when sold for export to Uganda. The interpretative notes of the Act provides that the methods of valuation are set out in a sequential order of application and the primary method of customs valuation is defined in paragraph 2 as the Transaction Value Method. Imported goods are to be valued in accordance with the provisions of that paragraph whenever the conditions prescribed therein are fulfilled.

The plaintiff was an importer of used motor vehicles in Uganda in the year 2010. On 30th July 2010 the plaintiff company imported into Uganda a used motor vehicle from Japan and entered the same for customs purposes under entry number C68958 with a declared transaction value of US$5,200 out of which it was supposed to pay taxes of US$3,588. At that time the rate of the dollar to the Uganda shillings was 2232/= and therefore the taxes due amounted to Uganda shillings 8,008,416/= under the transaction value method. The plaintiff company declared value

was rejected by the defendant's official and the plaintiff company was appraised using alternative methods of valuation inapplicable to the transaction. Consequently the plaintiffs computed customs duty was US$11,200 and at the exchange rate and amounted to Uganda shillings 19,558,879/=. The plaintiff was informed by the defendant's officials that the operation of the transaction value method for used motor vehicles had been suspended by the Commissioner Customs Uganda Revenue Authority on 19th of April 2010. The plaintiffs claim is that the defendant had no authority to suspend the operation of an Act of Parliament and the alternative method used was unlawful. As a result of the suspension, the defendant has been appraising and continues to appraise the plaintiff and other importers of used motor vehicles thereby arriving at customs duties manifestly higher than those the plaintiff would have paid under the transaction method. As a consequence of the defendant's unlawful action, the plaintiff claims to have suffered loss and damage for which it holds the defendant liable. Furthermore the plaintiff claims it is unable to give particulars of loss and damage until after the taking of account prayed for in the action.

The plaintiff’s case is that the defendant's action of suspending the operation of the law on customs valuation methods was unlawful, arbitrary wherefore the plaintiff seeks exemplary damages against the defendant. Furthermore the plaintiff avers that in suspending or amending the provisions of the East African Community Customs Management Act 2004, the defendant exercised a power that are not vested in him under the law. The plaintiff alleges that actions of the defendant infringe the plaintiffs constitutionally guaranteed right to property in monies illegally collected in taxes by the defendant pursuant to its directive. The plaintiff claims interest at 25% per annum on the sums found to be due from the defendant to the plaintiff upon taking into account monies illegally collected by the defendant pursuant to the directive.

In the written statement of defence, the defendant asserts that the plaintiff is not entitled to the reliefs claimed. The defendant further denies the statement of facts in the plaint. The defendant avers in its defence that the decision of the defendant dated 19th of April 2010 to appraise all motor vehicles imported into Uganda for customs valuation purposes by using alternative methods of valuation is supported by the law. The decision was prompted by challenges facing valuation of used motor vehicles in Uganda, which challenges include undervaluation, use of false documents like invoices, receipts etc by importers. The decision of the defendant is supported by and is consistent with the World Customs Organisation (WCO) report and study 1.1 of the Technical Committee of Customs Valuation of 1982 and 1995 respectively. The defendant consulted importers of used motor vehicles and their input came with indicated values for used motor vehicles which qualify under the fallback value method that is method number 8 under the Act. The defendant's decision is lawful and consistent with similar decisions taken by other countries in the East African Region. The defendant did not infringe any of the plaintiffs or other person’s constitutional right to own property.

The transaction value of the plaintiffs vehicle was declared at US$5,200 while the transaction value by the plaintiffs clearing agent, Kob Freight Uganda Limited was US$11,300 and attracted

community import duty, value added tax and withholding tax of Uganda shillings 13,405,742/= plus registration fees of 1,000,000/= and Uganda shillings 80,000/= respectively. The plaintiff voluntarily and willingly without any protestations made a self-assessment of taxes through its clearing agent, Kob Freight Links Uganda Limited and duly paid taxes totalling Uganda shillings 19,458,879/=.

At the hearing the plaintiff was represented by a Messieurs Muwema and Mugerwa Advocates while the defendant was represented by its Legal Services and Board Affairs Department. At the pre-trial conference, both counsels agreed on relevant facts for resolution of the dispute and opted not to adduce evidence through witnesses. Counsels further agreed to file written submissions on the basis of the agreed facts.

The agreed facts are that the plaintiff is a private limited liability company registered and carrying on business in Uganda as an importer of used motor vehicles. Secondly the defendant is the Commissioner of Customs, Uganda Revenue Authority with capacity to sue and be sued. Section 122 (1) of the East African Community Customs Management Act 2004 provides that:

> "Where imported goods are liable to import duty ad valorem then the value of such goods shall be determined in accordance with the fourth schedule and import duty shall be paid on that duty".

The interpretative notes of the East African Community Customs Management Act (supra) indicate that the methods of valuation are set out in a sequential order of application and the primary method of customs valuation is defined in paragraph 2 (as the transaction value method) and imported goods are to be valued in accordance with the provisions of that paragraph whenever the conditions prescribed therein are fulfilled. The plaintiff was an importer of used vehicles in the year 2010. On 19 April 2010, the defendant decided that all used motor vehicles imported into Uganda should be appraised for customs valuation purposes using alternative methods of valuation with immediate effect. The defendant consulted with some importers of used motor vehicles and their representatives and came up with indicative values of used motor vehicles which guide in determination of the customs value of used vehicles for tax purposes. On 13 July 2010, the plaintiff imported from Japan into Uganda a used Jaguar vehicle and declared it to the defendant for tax purposes. The plaintiff paid import taxes, surcharge (environmental levy), registration and form fees, totalling Uganda shillings 19,558,879/= to the defendant.

The East African Community Customs Management Act, 2004 was enacted by the East African Community and assented to on 1 December, 2004 and with a commencement date of 1st of January 2005. There are challenges such as undervaluation and use of false documents by some importers, faced by customs administration in the valuation of imported used motor vehicles. The plaintiff engaged the services of Kob Freight Links (U) Ltd, a clearing firm in Uganda to clear the plaintiff's imported used motor vehicle for tax purposes with the defendant. The plaintiff did not object to the taxes paid on its used motor vehicle. The parties admitted exhibit

P1 – P 11 as the plaintiff's documents to be relied upon and the defendant's documents exhibits D1 – D9 were also admitted in evidence.

Counsels agreed to the issues for resolution of the dispute by court.

The agreed issues for trial:

1. Whether the decision of the defendant in the directive dated 19th of April, 2010 to appraise all used motor vehicles imported into the country for customs valuation purposes by alternative methods of customs valuation other than the transaction value method is unlawful.
2. What remedies are available to the parties?

Issue No. 1

Whether the decision of the defendant in the directive dated 19th of April, 2010 to appraise all used motor vehicles imported into the country for customs valuation purposes by alternative methods of customs valuation other than the transaction value method is unlawful.

On the first issue, the plaintiffs written submissions was premised on the powers of the Commissioner of Customs under the East African Community Customs Management Act 2004 and secondly the rules of valuation under section 122 of the East African Community Customs Management Act.

As far as the powers of the Commissioner Customs is concerned. The powers of the Commissioner under the East African Community Customs Management Act are set out under section 5 (2) and are strictly limited to management and control of customs including the collection of and accounting for customs revenue in the respective partner state. The plaintiff's case is that the powers do not include power to suspend the operation of the transaction value method of valuation in respect of any goods and or used vehicles. Article 49 (1) of the Treaty for the Establishment of the East African Community specifies the organ with legislative powers as the Assembly. The Assembly has not delegated its legislative role of limiting or suspending the operation of the transaction value method of valuation in respect of used motor vehicles to the defendant. Counsel submitted that under section 19 (1) of the EACCMA the Assembly had power to delegate its powers. Furthermore under section 19 (2) (b) of the EACCMA, the assembly had powers to limit the operation of the second schedule. In the case before the court, counsel submitted that there was no such delegation of the Assembly's powers to the defendant to suspend or limit the operation of the transaction value method of valuation in respect of used motor vehicles by way of suspending the method. Consequently the defendant exercised a power not vested in him and the circular dated 19th of April 2011 exhibit P1 and valuations made pursuant to the directive are unlawful.

Secondly the plaintiffs case is that the determination of customs duty payable on imported goods is regulated by section 122 (1) of the East African Community Customs Management Act. The section provides that: "Where imported goods are liable to import duty ad valorem, then the value of such goods shall be determined in accordance with the Fourth Schedule and import duty shall be paid on that value." By the use of the word 'shall', it is mandatory for the defendant to determine customs duty payable on used motor vehicles in accordance with the Fourth Schedule. Part 1 of the Fourth Schedule of the Act disclaims various methods of customs valuation in paragraphs 2 to paragraph 9 thereof. Part II is the most pertinent provision to the circumstances of the case because it describes the manner of application of the customs valuation methods in paragraphs 1 to paragraph 4 thereof. Counsel referred to paragraph 1 of the interpretative notes for the provision that the only exception to the use of the transaction value method of customs valuation is if the conditions prescribed therein are not fulfilled. Counsel submitted that the conditions are not fulfilled in the circumstances set out in paragraph 2 (1) (a) – (d) if there are restrictions as to the disposition or use of the goods by the buyer or if the sale price is subject to some condition or consideration for which a value cannot be determined with respect of the goods being valued, or if part of the process of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller or the buyer and seller are related.

If the prescribed conditions are fulfilled by the importer of used motor vehicles, the defendant has no legal basis to use alternative methods of customs valuation in respect of used vehicles. Counsel urged the court to note that the East African Community Customs Management Act 2004 does not treat used vehicles differently from new vehicles for purposes of customs valuation. The only circumstances were used items are specifically referred to in the Act is in the second schedule, part A (10) were used tyres for light commercial vehicles and passenger cars are specifically prohibited. Counsel contended that if it was the intention of the Legislative Assembly that used vehicles are to be excluded from the transaction value method of customs valuation, they would have legislated as such. Counsel further referred to the text book by Sheri Rosenow and Brian J O’shea in 'A Handbook on WTO Customs Valuation Agreement' were at page 129 with reference to the valuation of used goods, they are of the opinion that under the agreement, if a valid transaction value exists, it should be used as the customs value of imported goods. The principle applies equally to second-hand goods imported by individuals to their personal use as it does to new goods imported by commercial enterprises for resale or distribution. Counsel submitted that the principle stated by the author's, reflect the true spirit of the East African Community Customs Management Act. This principle was a court in the Tax Appeals Tribunal Application Number 11 of 2003 in the case of **Kanoni Trading Company vs. Uganda Revenue Authority**. In that case they held that the respondent had no reason to doubt the transaction value. The information which was required from the applicant was given and should have been accepted as providing a basis for valuation of the applicant’s goods under article 1. The implication being that once the proper transaction documents have been submitted by an importer of used vehicles, the defendant has no room for rejecting the same and relying on

another method of valuation. Consequently counsel contended that the defendant circular dated 19th of April 2010 exhibit P1 was inconsistent with section 122 (1) and the Fourth Schedule of the East African Community Customs Management Act and is unlawful.

In reply the defendants counsel's submitted that due to numerous practical challenges faced by the Uganda customs administration with respect to the customs valuation of used motor vehicles and of the need to address them, the defendant made the decision on 19 April 2010 that all used motor vehicles imported into Uganda should be appraised for customs valuation purposes using alternative methods of valuation with immediate effect. Subsequently the defendant came up with indicated values for valuation of imported used motor vehicles. In a stakeholder meeting held between the defendant and some importers of used motor vehicles and their representatives and Kampala City Traders Association on 23rd of April 2010 it was agreed inter alia that the indicative value guidelines (test values) for used motor vehicles be reviewed every three months to reflect the prevailing price trends.

2 1/2 months later on 13th of July 2010 the plaintiff imported a used Jaguar motor vehicle from Japan and declared it for tax purposes. The plaintiff willingly paid taxes and fees of Uganda shillings 19,550,879/= on 22nd of September 2010. Two years later, the plaintiff filed the instant suit challenging the decision of the defendant and the taxes it voluntarily paid.

On the first issue of the defendants counsel submitted that the issue as framed recognises the defendant's decision of 19 April 2010 for the use of alternative methods of valuation for used motor vehicles. Counsel submitted that what should be ascertained next is the precise name of the alternative methods. He submitted that this is settled by paragraph 5 (v) of the written statement of defence where it is pleaded that it is the "fallback method" as the one in use in the special circumstances obtaining in Uganda and the world over.

Counsel submitted that the submissions of the plaintiff are legally misconceived. First of all the decision of the defendant is not unlawful. It was agreed that imported goods are liable to (duty that is data based on the percentage of the value of imported goods and valued in accordance with the fourth schedule to the East African Community Customs Management Act, 2004 section 122 (1) thereof). In applying or interpreting section 122 and the provisions of the fourth schedule quoted above, the person applying or interpreting must have due regard to the decisions, rulings, opinions, guidelines and interpretations given by the directorate, the World Trade Organisation or the Customs Cooperation Council under section 122 (6) of the EACCMA, 2004. The first question involved in the suit is not that of interpretation but determination of how the defendant applied the provisions of the fourth schedule of the Act in coming up with a decision on how to value imported used vehicles for customs purposes.

Counsel submitted that the Fourth Schedule of the Act prescribes six methods of determining the customs value of imported goods liable to duty based on a percentage before the tax rate can be applied. Duty rates are not contained in the EACCMA, 2004 but in the Common External

Tariff's Book. The defendant does not dispute that the first primary method of valuation is the transaction value method. The second method is the transaction value of identical goods method. The third method is the transaction value of similar goods method. The fourth method is the deductive value method. The fifth method is the computed value method and while the sixth method is the fallback value method.

Counsel submitted that the alternative method of valuation mentioned in the defendant's decision is the fallback method. The fallback method is a lawful method for purposes of valuation of used motor vehicles because it is the only viable recommend method in the opinion of the technical committee of the customs cooperation Council for use by customs administration when faced with challenges in the valuation of imported used/second-hand motor vehicles. What is important is that the conditions for the use of the fallback method must first of all be complied with. Counsel contended that the plaintiff’s case is not based on whether the conditions for the use of the alternative methods were fulfilled but rather that the decision of the defendant is unlawful.

Counsel's submission is that the fallback value method is applied where the customs value of imported goods cannot be ascertained under methods 1 - 5. The fallback method is where reasonable means consistent with the principles and general provisions of the fourth schedule and on the basis of the data available in a partner state is applied. Counsel submitted that the fourth schedule is substantially transplanted from the Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) also called WTO (World Trade Organisation) valuation agreement or the Agreement on Customs Valuation. The only distinction between the agreement and the fourth schedule of the East African Community Customs Management Act 2004 is the description of the provisions as articles whereas the provisions of the fourth schedule and referred to as paragraphs. Counsel contended that the court's attention was drawn to the two legal instruments because the defendant's submissions are referred to some of the decisions, opinions, guidelines and interpretations given by some of the bodies named under section 122 (6) of the East African Community Customs Management Act, 2004.

Defendants counsel submits that for the fallback method to be applied, both the fourth schedule of the Act and specifically paragraphs 8 and article 7 of the GATT 1994, require that the two conditions are fulfilled. It prescribes the use of reasonable means consistent with the principles and general provisions of the agreement/schedule based on the data available in the country of importation. The term "reasonable means" permitted in determining the value of imported goods under methods six is highly circumscribed by the provisions of two legal instruments namely the customs is prohibited from determining customs value on the basis of the considerations listed therein. The valuation would be illegal if it can be shown that any of the listed prohibited considerations are shown to have influenced the determination of the customs value under the fallback method and secondly if it is shown that unreasonable means inconsistent with the principles and general provisions of the fourth schedule of the East African Community Customs Management Act, 2004 of the GATT 1994 were used.

The defendants counsel submitted that there is no evidence adduced by the plaintiff to the effect that the defendant violated any legal principles regarding the determination and use of the fallback method of valuation. Secondly it is undisputed that the decision of the defendant took cognizance of practical challenges faced in the used motor vehicle industry and the need to address them. These included fraud especially in the use of false documents and undervaluation by importers of used second motor vehicles.

The practical challenges demonstrated are the same challenges faced by almost all world economies are stated by a study of the Technical Committee on Customs Valuation (A Committee of the Customs Cooperation Council or World Customs Organisation). According to the study it may not be possible to envisage the standard method of valuation for used motor vehicles. Nonetheless a value determined must be defensible at law. It must be left to its administration to choose a method compatible with the principles and general provisions of the agreement so that an account can be taken of each country's specific circumstances. Consequently the opinion gave the defendant a free hand in the choice of customs valuation methods.

The defendant relied on the opinion of the Committee of Customs Cooperation Council or World Customs Organisation, in coming up with the decision to use the fallback method of valuation of used motor vehicles. In applying the provisions of the fourth schedule of the Act, the defendant sincerely applied the opinion of the world body, which is a competent body envisaged by the treaty law. The defendant's decision to follow the opinion was lawful because section 122 (6) permits it. Counsel emphasised that in this suit the court is dealing with lawfulness and not fairness of the decision.

Counsel further submitted that had it been proved that the fallback method violated the legal principles for its application, then the question of legality of its use would perhaps have been worth considering in a court of law. The defendant further dealt with the specific circumstances of the importation of a particular motor vehicle by the plaintiff which is not necessary to delve into in determining the first issue which admittedly deals with the legality of the defendant's directive dated 19th of April 2010. Secondly the fact that the plaintiff voluntarily paid taxes upon self assessment by its agent cannot resolve the first issue of whether the directive was lawful and the court will not delve into the submissions of the defendant on that point.

The defendant’s submission is that the Uganda customs administration is allowed to choose a method compatible with the principles and general provisions of the agreement and article VII of the general agreement so that an account can be taken of it specific circumstances when it comes to used vehicles. Counsel relied on this tiny 1.1 annexed to the submissions. This tiny recognises the challenges of fraud especially in the use of false invoices as part of a wider problem of trade in the used to/second hand goods, inclusive of vehicles. These challenges are mentioned by Sherry Rosenow and Brian J O’Shea in "A Handbook on WTO on Customs Valuation Agreement at pages 128 – 131. The defendant contends that other countries face similar

problems. These countries include the United Republic of Tanzania, Canada, Zimbabwe, Australia, Korea, India and Bulgaria. There is an adoption of varied customs valuation methods by those countries. The Uganda customs administration cannot hide its head in the sand and pretend that everything is okay by using the transaction value method in determining the customs value of used vehicles when the law permits it to be guided by the opinion of the Customs Cooperation Council in applying the fourth schedule of the East African Community Customs Management Act, 2004. Counsel emphasises that section 122 (6) of the East African Community Customs Management Act, 2004 and a study of the Customs Cooperation Council permitted the course taken by the defendant and the grievance of the plaintiff is misplaced.

I will further consider additional submissions of the defendants counsel on the first issue in the resolution of that the issue. The plaintiff's submissions in rejoinder primarily reiterates and emphasises their earlier submissions.

The plaintiff's first argument is that the Commissioner of Customs Uganda Revenue Authority has no authority to suspend the transaction value method for assessment of customs duty provided for under section 122 (1) of the East African Community Customs Management Act and the Fourth Schedule thereto. The plaintiff's counsel relied on the provisions of section 5 (2) of the East African Community Customs Management Act 2004. Section 5 and subsection 2 thereof provides that the Commissioner shall be responsible for the management and control of the customs including the collection of, and accounting for, customs revenue in the respective Partner State. The plaintiff’s argument is that it is only the legislative assembly of the East African community which may suspend or legislate on any matter. It is a submission that the directive of the Commissioner amounts to legislation. This is because the provisions of section 122 (1) of the East African Community Customs Management Act are couched in mandatory terms and cannot be suspended without amendment. This is read in conjunction with Part II of the fourth schedule which gives primacy to the transaction value method for the calculation of customs duty on imported used motor vehicles. The defendant's approach on the other hand is that the defendant was merely applying or interpreting the provisions of section 122 (supra). So it was a question of how the defendant applied the provisions of the fourth schedule of the East African Community Customs Management Act, 2004. Consequently the defendant focused on the desirability and appropriateness of applying the fallback method to the primary method of valuation which was the transaction value method in the circumstances of the defendant. In other words the defendant's submission is that the Commissioner was justified in directing Customs officers to apply alternative methods in the prevailing circumstances. Subsequently the defendant submitted that under section 5 (2) of the East African Community Customs Management Act, 2004, the use of the words "management and control of customs including…" is not exhaustive. Legislature did not limit the Commissioner customs in her role in the management and control of customs. Counsel contended that there were other provisions of the East African Community Customs Management Act which give other functions and powers of the Commissioner such as sections 2, 14, 62, 106, 127, 145, 160, 166, 168, 169, to 19, 229, 247 etc. Counsel contended that

the customs administration has the sole discretion on the issue of valuation of used motor vehicles administratively without recourse to the Legislative Assembly and as guided by the opinions of the Customs Cooperation Council. It was therefore incorrect to submit that the Commissioner customs had no power to suspend the transaction value method. In other words the suspension of the transaction value method was made within the powers to manage and control customs. Secondly the defendant never amended the provisions of the East African Community Customs Management Act 2004 because an amendment can only be made by the Legislative Assembly upon being moved by a Partner State. The East African Community Customs Management Act 2004 is a treaty law and cannot be amended in the manner suggested by the plaintiff's counsel. As far as the application of the fourth schedule is concerned, the Commissioner customs did not require the consent of the Legislative Assembly of the East African Community.

I have carefully considered the first aspect of the first issue which is whether the directive of the Commissioner customs was ultra vires the Act. There is no need to consider whether there was any amendment to the East African Community Customs Management Act 2004. This is because the wording of the preamble is clear enough to show that it is an Act of the Community. The Act came into force on a date to be appointed by the Council. Section 3 of the East African Community Customs Management Act provides that the Directorate of Customs as established by the Council under the treaty shall be responsible for the initiation of policies on customs and related matters in the community and the coordination of such policies in the Partner States. In other words legislative authority is only vested in the body established by the treaty creating the East African Community. Article 48 of the treaty establishing the East African Community provides for the composition of the Legislative Assembly while article 49 provides that the Legislative Assembly shall be the legislative organ of the Community. On the other hand section 5 of the East African Community Customs Management Act provides for the appointment in accordance with the partner state legislation of a Commissioner responsible for the management of customs by each Partner State and support staff. None of the provisions of section 5 gives the Commissioner so appointed, any legislative powers. In other words, the Commissioner can only purport to amend the East African Community Customs Management Act but has no power to do so. Secondly, the directive of the Commissioner which is an internal memorandum dated 19th of April 2010 exhibit PE 1, does not purport to amend any Act. Thirdly, any purported amendment can only in the circumstances, implied. Such an implication would be misplaced because there is no power vested in the Commissioner to legislate for the Community. In those circumstances, the submission on the premise that the Commissioner amended or purported to amend the East African Community Customs Management Act through his directive of 19 April 2010 is misconceived and cannot form the basis for deciding the agreed issue number one or any part thereof.

The second arm of the plaintiff's submission is on the legality of the directive of the Commissioner dated 19th of April 2010. Before considering whether the directive is ultra vires, I

need to set out the directive which forms the basis of the submissions of the parties. The directive was admitted in evidence as exhibit PE1. It is dated 19th of April 2010 and is entitled memorandum to all Customs Staff with copies to the Customs Management. It is on the subject of "**Customs Valuation on Used Motor Vehicles Imported into the Country**." The memorandum is reproduced herein below and reads as follows:

> "The above matter refers.
>
> Customs is currently faced with numerous practical challenges with respect to the customs valuation of used motor vehicles.
>
> In order to address the challenges, this is to instruct that with immediate effect, all used motor vehicles imported into the country will be appraised for customs valuation purposes, using alternative methods of valuation until further notice.
>
> All head of stations should take note and implement accordingly."

First of all, the memorandum is addressed to all Customs Staff. Secondly it specifically deals with valuation of used motor vehicles. Thirdly the Commissioner makes reference to numerous practical challenges with respect to customs valuation of used motor vehicles. The alleged various challenges are however not mentioned or particularised in the memorandum. The Commissioner only directs that in order to address the challenges, his staffs were instructed with immediate effect to use alternative methods of valuation until further notice as far as used motor vehicles imported into the country are concerned. The directive is a general directive to all members of Customs Staff. Both counsels have not disputed the directive and agreed that it took effect as stipulated in the memorandum. The alternative methods of valuation are not given. Both counsels addressed the court on the primacy of the transaction method of valuation.

The transaction method of valuation is provided for under section 122 (1) of the East African Community Customs Management Act and the fourth schedule thereto. Section 122 (1) (supra) provides that:

> “Where imported goods are liable to import duty ad valorem, then the value of such goods shall be determined in accordance with the fourth schedule and import duty shall be paid on that value”.

It is not in dispute that section 122 (1) (supra) is couched in mandatory terms. The fourth schedule gives several methods of valuation under Part I thereof. The submission of the plaintiff is premised on Part II which provides for the sequential application of valuation methods. In paragraph 1 thereof it is provided that the methods of valuation are set out in a sequential order of application. The primary method for customs valuation is defined in paragraph 2 and imported goods are to be valued in accordance with the provisions of the paragraph whenever the conditions prescribed therein are fulfilled. In paragraph 2 of Part II of the fourth schedule, it is

provided that where the customs value cannot be determined under the provisions of paragraph 2; it is to be determined by proceeding sequentially to the succeeding paragraphs to the first subparagraph under which the customs value can be determined except as provided for in paragraph 5. It is stipulated that where the customs value of imported goods can be determined under the provisions of paragraphs 2, 3 and 4, the customs value to be determined under the provisions of paragraph 6 or where the customs value cannot be determined under that paragraph, under the provisions of paragraph 7 save that at the request of the importer, the order of application of paragraph 6 and 7 shall be reversed. Consequently, the primary method of valuation of imported goods under Part I of the fourth schedule is found in paragraph 2 which prescribes the transaction value method of valuation. The transaction value method is based on the price actually paid or payable for the goods when sold for export to the Partner State and as adjusted under the provisions of paragraph 9. In other words, it is the price paid for the goods by the buyer or importer which forms the basis for assessing the customs duty payable on the goods.

I have carefully considered the directive of the Commissioner of customs. It is a blanket directive that affects all imported used motor vehicles at the point of valuation for purposes of customs duty. On the other hand a transaction value by implication and on the face of the provisions deals with each product and is therefore subjective. No evidence was led as to what could be the challenges faced by customs officials in establishing the transaction value of each used motor vehicle imported into the country. In my analysis, the crux of the issue is whether the Commissioner can make a general directive affecting every person who imports any used motor vehicle into this country without trying out in each case the primary method for customs valuation of goods. The primary method which was agreed upon by both counsels is the transaction value method. The transaction value has to be assessed on a case by case basis.

The defendant leaned heavily on the fallback method of valuation. Indeed the fallback method of valuation can be applied in appropriate cases. However, the directive of the Commissioner customs dated 19th of April 2010, does not prescribe expressly any particular method. It only excludes the transaction value method of valuation as far as used motor vehicles are concerned. Paragraph 8 of Part I of the fourth schedule prescribes the fallback value method. It explicitly provides that where customs value of imported goods cannot be determined under the provisions of paragraphs 2, 3, 4, 5, 6 and 7, inclusive, the customs value shall be determined using reasonable means consistent with the principles and general provisions of the schedule and on the basis of data available in the Partner State.

The defendant therefore erroneously premised his submission on the question of how the defendant applied the provisions of the fourth schedule to the East African Community Customs Management Act 2004 in writing the directive. Every importation of used cars is made by particular individuals or entities. Each transaction should be considered a separate and severable transaction by any individual or Corporation or groups of individuals or corporations. The directive of the Commissioner customs however, does not deal with separate individual

transactions of importation but with the general importation by everybody of used motor vehicles into the country.

It is not true as submitted by the defendants counsel that the alternative method of valuation mentioned in the defendant's decision is the fallback method. The memorandum exhibit PE1 which I have quoted above only provides for: "*using alternative methods of valuation until further notice*." The alternative methods of valuation are not specified and there is no basis whatsoever for suggesting that it the fallback method of valuation. The memorandum on the face of it leaves it to the customs staff to use any other alternative methods of valuation. It is abundantly clear from a reading of the fourth schedule and part I thereof together with part 2 thereof, that alternative methods are methods alternative to the transaction method of valuation which is the primary method of valuation. In fact the defendant submitted at page 3 of the written submissions that it is not disputed that the first and primary method of valuation is the transaction value method. The second method is the transaction value of identical goods method and the third method is the transaction value of similar goods method. The fourth method is the deductive value method while the fifth method is the computed value method. Lastly the defendant submitted that the sixth method is the fallback value method. From that submission, the defendant launched into a surprising statement that the alternative method of valuation mentioned in the defendant's decision is the fallback method. Therefore the submission that the fallback method is a lawful method is misplaced and does not answer the primary controversy as to whether the directive of the Commissioner is ultra vires or unlawful. The whole submission is that based on the premise under the schedule where the customs value of imported goods could not be determined under the previous methods 1, 2, 3, 4, and 5, the fall back methods are applied. The defendants counsel also dwelt on the applicability of the fallback method.

I have further considered the submissions of the defendants counsel that there were practical challenges faced by the defendant such as fraud. The defendants counsel further submitted that the fraud included the use of false documents and under valuation by importers of used second-hand vehicles. The submission suggests that it was the position of the Commissioner that all importers of used motor vehicles could be involved in fraud or falsification of the transaction value of imported used motor vehicles hence the need for the directive. I have further considered the submissions of the defendant based on the argument on implementation of article VII of the General Agreement on Tariffs and Trade 1994 and particularly articles 4 thereof and article 7. Article 7 thereof merely provides that where customs value of imported goods cannot be determined, the value shall be determined using reasonable means consistent with the principles and general provisions of the agreement and on the basis of data available in the country of importation. In other words it applies where the customs value cannot be determined. However, customs value should be determined in each case of importation of particular goods by particular persons or entities and not generally.

The reference by the defendant’s counsel to the written text of the Technical Committee on Customs Valuation second edition, July 1997 also deals with situations where customs value of

imported goods cannot be determined under the provisions stipulated. In the text on the treatment of used motor vehicles, they noted that one of the practical challenges is to establish whether a vehicle is "used" or not. An illustration given is one where a vehicle is shown to have only travelled 250 km. This may represent the distance travelled from the factory to the port of departure in the country of exportation. A vehicle could have been driven for a distance of 1560 km from the place of purchase to the place of introduction in the country of importation. They however note that on importation the actual price paid or payable in connection with the transaction shall serve as the basis for establishing the transaction value. They only note that when vehicles are valued using the fallback method it is important to have in mind the broad principles laid down in the agreement. What is important in the text is that, the committee deals with each transaction as far as valuation is concerned and does not suggest a general directive for valuation of all goods or imported used vehicles.

The directive of the Commissioner has the effect of ignoring the transaction method of valuation in all cases where used motor vehicles are imported into this country so long as the directive remains in force. That is the problem with the directive. It directs customs staff to ignore the transaction value method of valuation in all cases. This is irrespective of whether it was possible to determine the transaction value of the used motor vehicle for purposes of assessment. In other words, the customs staffs do not have to establish whether it is feasible to use the transaction value method before proceeding to other methods in every case.

It is quite surprising that the defendant argued that the Commissioner had the power to give the directive dated 19th of April 2010 exhibit PE 1. The Commissioner can only manage the customs as provided for by the law. Both parties are in agreement that the transaction value method is the primary method. I agree with the plaintiff's submission that section 122 of the East African Community Customs Management Act, 2004 subsection 1 thereof, is couched in mandatory terms. It provides that the value of such goods shall be determined in accordance with the fourth schedule and import duty shall be paid on that value. It does not give any discretionary powers on the Commissioner to rely on alternative methods without following the procedure or directives laid out in the fourth schedule. The primary method which was agreed upon is the method that must first be attempted. It is only upon failure of the primary method that alternative methods can be applied. Secondly the provision deals with imported goods which are liable to import duty ad valorem. It deals with specific goods that are liable to import duty and such goods can only be liable to import duty on a case by case basis. There may be challenges in ascertaining the transaction value of imported used motor vehicles. As submitted by the plaintiff's counsel, there is no distinction between goods and particularly vehicles as to whether they are used vehicles or new vehicles. Obviously, it would be easy to establish the factory price or wholesale price of new vehicles. Used vehicles on the other hand are presumably purchased from individuals or companies dealing in used motor vehicles and there may be a wide range of price differences. Indeed the defendant's submission is that the association of traders have come up with price ranges for particular types of used vehicles. Such a range of prices give a basis for

customs officials to compare the prices of used motor vehicles with that declared by any particular importer. It can immediately be seen that individuals who buy motor vehicles for personal use may not use the standard values as opposed to traders dealing in used motor vehicles whose price ranges may be ascertainable. Indeed the text relied upon by the defendant on customs valuation namely the WTO agreement and the text of the Technical Committee on Customs Valuation second edition July 1997 article 7 thereof explicitly provides that where customs value of imported goods cannot be determined under the provisions of articles 1 read with article 6, inclusive, the customs value should be determined using reasonable means consistent with the principles and general provisions of the agreement. In article 7 (2) and paragraph G thereof, they specifically recommend forbidding of arbitrary or fictitious values in establishing customs value. In dealing with the concept of "Sale" they noted that in the implementation of article VII of the General Agreement on Tariffs and Trade 1994, there is no definition of the term "sale". They noted that in conformity with the basic intention of the agreement, the transaction value of imported goods should be used to the greatest extent possible for customs valuation purposes. They go on to define specific cases which do not arise from a "sale" such as free consignments, i.e. gifts, samples and promotional items. Goods may be consigned for sale in the country of importation. Furthermore goods may be imported under a hire purchase or leasing contract. Goods may be supplied in the loan and remain the property of the sender or vendor/exporter. As far as the treatment of used motor vehicles is concerned, they noted that there is no specific question of principle involved but only practical challenges or problems in valuation. Two situations are considered. The first situation is where the vehicle is imported pursuant to a purchase without intervening use. The second is where the vehicle is imported after additional use since the purchase. In other words they consider depreciation in the value of the vehicle. Finally and consistent with the East African Community Customs Management Act, 2004 and particularly section 122 and the fourth schedule thereto, the committee notes that importation usually follows a sale and the price actually paid or payable in connection with the transaction shall serve as the basis for establishing transaction value whenever the requirements and conditions of article 1 of the agreement are fulfilled. Both parties did not address the court on the requirements and conditions of article 1 of the GATT agreement. However the agreement on the implementation of article VII of the General Agreement on Tariffs and Trade 1994 relied on by the defendants counsel and attached to the submissions clearly provides in page 1 thereof that the transaction value as defined in article 1 is to be read together with article 8 and is the primary basis for customs value under the agreement.

The determination of the transaction value is not necessarily based on the declared value. If the declared value is a forgery, customs officials can try to ascertain the transaction value. Indeed it would be a case where they have failed to establish the transaction value. Whatever the case may be, I agree with the plaintiff's submission that Part II of the fourth Schedule paragraph 2 thereof which gives the interpretative notes gives primacy to the transaction value method in the following words:

> "Where the customs value cannot be determined under the provisions of paragraph 2, it is to be determined by proceeding sequentially to the succeeding paragraphs to the first such paragraph under which the customs value can be determined. Except as provided in paragraph 5, it is only when the customs value cannot be determined under the provisions of the particular paragraph that the provisions of the next paragraph in the sequence can be used"

Consequently, it is abundantly clear that other methods are to be used for valuation purposes if the method prescribed by paragraph 2 fails to establish the customs value. Secondly the interpretative notes require the succeeding method to be applied sequentially that is one after the other. It is only after failure of the succeeding paragraph that the next paragraph can be applied. That is the methodology prescribed by the Legislative Assembly of the East African Community. In those circumstances the directive of 19 April 2010 given by the defendant to use alternative methods of customs valuation in respect of used motor vehicles is contrary to the statute because it ignores the primary method prescribed by law and purports to prescribe alternative methods as the primary method.

According to **H.W.R Wade in "Administrative Law"** fifth edition Oxford University Press at page 39, an act which is for any reason in excess of power (ultra vires) is often described as being outside jurisdiction. Any administrative act or order which is ultra vires or outside jurisdiction is void in law or deprived of legal effect. This is because in order for an act to be valid, it requires statutory authorisation and if it is not within the powers given by the Act, it has no legal basis to stand on. The court will either quash it or declare it to be unlawful or prohibit any action to enforce it. The ultra vires doctrine is defined by **Osborn's Concise Law Dictionary 11th edition at page 421 to** mean beyond the power or an act in excess of the authority conferred by law and therefore invalid.

The above definitions are useful for the conclusion that the Commissioner Customs had and has no powers under section 122 (1) of the East African Community Customs Management Act, and the fourth schedule thereof particularly paragraph 2 of Part II to exclude the primary method prescribed by the Act. The directive of the defendant which was admitted in evidence as exhibit PE1 dated 19th of April 2012 and addressed or custom staff in its effect and operation excludes the application of the primary method of valuation of used motor vehicles imported into Uganda namely the transaction value method. Consequently the directive dated 19th of April 2012 (supra) was made ultra vires the powers granted to the Commissioner under section 5 of the East African Community Customs Management Act 2004. It was an act outside the jurisdiction of the defendant whose mandate is expressly to be responsible for the management of customs and such other staff as may be necessary for the administration of the East African Community Customs Management Act and the efficient working of customs. In other words, the duty of the defendant is to implement the provisions of section 122 (1) and the fourth schedule as prescribed. The Commissioner had no power to exclude the primary valuation method and therefore the acts of the Commissioner are unlawful and of no legal effect to the extent that he directed the exclusion

of the transaction value method as the primary method of valuation of used motor vehicle imported into Uganda. The first issue is therefore answered in favour of the plaintiff.

What are the remedies available to the parties?

The plaintiff's submission through its counsel is that the plaintiff was deprived of the use of the transaction value method of customs valuation on the vehicle it imported on 13 July 2010. Counsel therefore prayed that the defendant be compelled to reassess the customs duty on the vehicle taking into account the transaction value method of customs valuation. Secondly the plaintiff prays for general damages for inconvenience due to the unlawful circular of the defendant in the sum of Uganda shillings 50,000,000/=. The plaintiff also prays for costs under the provisions of section 27 of the Civil Procedure Act.

On the other hand the defendants counsel contended that the plaintiff admitted that its import duty was made under a self assessment regime by its clearing agent. The plaintiff never rejected nor paid the duty under protest. It is therefore estopped from making a prayer for reassessment. Counsel submitted that under section 144 (2) of the East African Community Customs Management Act, 2004, a refund of duty paid in error cannot be made after a period of 12 months from the date of payment of the duty. The plaintiff paid duty on 22nd of September 2010 according to exhibit P 11 and the claim is barred by the law of limitation. Counsel relied on the decision of honourable Mr Justice Geoffrey Kiryabwire in **Mandela Auto Spares Ltd versus Commissioner Customs Uganda Revenue Authority civil suit number 201 of 2011** and the Court of Appeal case of **Makula International versus Cardinal Nsubuga [1982] HCB at page 11**.

As far as general damages are concerned, the defendants counsel submitted that entitlement to general damages must be proved. It is not sufficient to cover or submit that the plaintiff suffered inconvenience and is entitled to general damages. No evidence was led to prove general damages suffered. Secondly the plaintiff is an artificial person and any alleged inconvenience cannot simply be assumed without any evidence. Thirdly because the basis of entitlement to damages has to be proved, then the plaintiff should have justified why it seeks for the amount paid for. This would have enabled the defendant to address the court on the quantum. Because the plaintiff did none of the above, the claim for damages should be rejected.

As far as the claim for costs is concerned, the defendants counsel agreed that costs follow the event. Counsel therefore prayed that the plaintiff's suit is dismissed with costs to the Commissioner customs.

I have carefully considered the prayer for reassessment. The defendants counsel raised an objection to the claim for reassessment under the provisions of section 144 of the East African Community Customs Management Act 2004. Section 144 deals with the refund of duty. Section 144 (1) provides that subject to any regulations, the Commissioner may grant a refund of any import duty, or any part thereof which has been paid in respect of goods which have been

damaged or pillaged during the voyage or damaged or destroyed while subject to customs control. Secondly the Commissioner may grant a refund of any import duty or any part thereof which has been paid in error. Under section 144 (2) a claim for refund can only be successful if the person claiming the refund makes the claim within a period of 12 months from the date of the payment of the duty.

In the circumstances of the plaintiff's case, it cannot be said that duty had been paid in error. The plaintiffs claim is for an account and reassessment on the basis of principle. The principle involved is that the plaintiff is entitled to be assessed in accordance with the transaction value method. The limitation period provided for by section 144 (2) of the East African Community Customs Management Act, does not apply to the plaintiffs case. It only applies to cases where a tax payer applies for refund of any import duty paid in error or in respect of goods damaged during the voyage or damaged or destroyed while subject to customs control. Section 221 (1) of the East African Community Customs Management Act, 2004 provides that where under the Act, proceedings may be brought by or against the Commissioner, the Commissioner may sue or be sued in the name of the Commissioner. The section further provides that that an action can lie against the Commissioner in tort. It further provides that the Commissioner shall be responsible for the acts and defaults of any officer as if such officer were his or her servant or agent. As far as appeals are concerned, under section 229 (1) of the East African Community Customs Management Act, a person directly affected by a decision or omission of the Commissioner or any officer in matters relating to customs shall apply for a review of the decision or omission within 30 days from the date of the date of the decision or omission. The application for review shall be made to the Commissioner within 30 days. The Commissioner is obliged to render a decision within 30 days after receiving the application. Where the Commissioner does not communicate his or her decision to the person lodging the application for review, the Commissioner is deemed to have allowed the application. Finally a person dissatisfied with the decision of the Commissioner under section 229 may appeal to the Tax Appeals Tribunal.

The gist of the plaintiff's case is not directly an appeal from a decision but a challenge to the directive of the Commissioner customs to customs officials to use alternative methods for calculation of customs duty other than the transaction value method. From the proceedings both parties treated the directive of the Commissioner dated 19th of April 2010 as being operational at the time they filed their written submissions. The directive was therefore in operation by the time the action was filed and no question of limitation can be raised. Secondly, it is an action challenging the action of the Commissioner Customs issued generally for customs control and management. In those circumstances, the plaintiff's action is not barred by any limitation period.

Secondly, the appropriate remedy that the plaintiff seeks cannot be for an account but for reassessment in accordance with the finding of the court on the first issue. I have carefully considered the plaintiffs amended plaint. The suit is primarily for a declaration that the directive of the defendant to unilaterally suspend the operation of the transaction value method provided for under section 122 and the fourth schedule of the East African community customs

management act, with regard to used motor vehicles is unlawful. The suit for an account or reassessment can only be a consequential relief pursuant to the finding of the court and a declaratory judgment. Starting with the prayers for a declaratory judgement, the court has already held that the directive of the defendant to suspend the operation of the transaction value method set out under section 122 and the fourth schedule to the East African Community Customs Management Act, is unlawful to the extent that it tries to exclude the application of the transaction value method. It is further the finding of the court pursuant to that declaration that the plaintiff is entitled to be assessed under the provisions of section 122 and the fourth schedule the East African Community Customs Management Act. There is no evidence notwithstanding the self assessment of the plaintiff that it was inappropriate to apply the transaction value method in assessing the plaintiff for customs duty in respect of the Jaguar motor vehicle. Before obtaining a declaratory judgment, it was not certain whether the procedure adopted by the defendant was unlawful or not. Upon determination of the first issue in favour of the plaintiff, the remedy of the plaintiff is determined by order 2 rule 9 of the Civil Procedure Rules which provides as follows:

> "No suit shall be open to objection on the ground that a merely declaratory judgement or order is sought by the suit, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not."

The plaintiff sought re-evaluation or reassessment of the customs duty payable on a vehicle in question. The plaintiff is entitled to the consequential relief of reassessment of the customs duty payable and the defendant shall proceed to reassess the plaintiff with respect to the Jaguar motor vehicle, the subject matter of the suit.

As far as the claim for an account is concerned, there is no need for an account to be taken and that is not the plaintiff’s case as disclosed by the pleadings. The plaintiff’s prayer for refund of any monies falling due after reassessment is also granted. However, the refund shall be based on what the reassessment reveals. I must emphasise that the plaintiff ought to have indicated what percentage of duty ought to have been paid on the basis of the transaction value known to the plaintiff. However, in reassessing the plaintiff, the Commissioner is entitled to determine whether the transaction value claimed by the plaintiff is genuine or not.

As far as the claim for general damages is concerned, assessment for general damages is based on the principle of *restitutio in integrum* as held by the East African Court of Appeal in the case of **Dharamshi vs. Karsan [1974] 1 EA 41.** In that case the East African Court of Appeal held that the fundamental principle by which Courts are guided in awarding damages is *restitutio in integrum*. It means that the plaintiff has to be restored as nearly as possible to a position he would have been had the injury complained of not occurred. This principle is also explained in Halsbury's laws of England fourth edition (reissue) volume 12 (1) and paragraph 802 where damages are defined as the pecuniary recompense given by the process of law to the person for the actionable wrong that another has done him. Damages may, on occasion, be awarded to the plaintiff who has suffered no ascertainable damage and damage may be presumed. Furthermore,

general damages are those damages which will be presumed to be the natural or probable consequence of the wrong complained of, with the result that the plaintiff is required only to assert that such damage has been suffered. In the plaint, the plaintiff prayed for exemplary damages. However in the written submissions the plaintiff sought only general damages of Uganda shillings 50,000,000/=. In doctrine, the claim for Uganda shillings 50,000,000/= amounts to a claim for aggravated damages.

As far as exemplary damages are concerned, counsels never addressed the court on the same and presumably the plaintiff abandoned the prayer for exemplary damages. Exemplary damages are defined by Osborn's Concise Law Dictionary as damages awarded in relation to certain tortious acts (such as defamation, intimidation and trespass) but not for breach of contract. In contrast to aggravated damages which are compensatory in nature, such damages carry a punitive aim at both retribution and deterrence for the wrongdoer and others who might be considering the same or similar conduct. Exemplary damages was considered by the Court of Appeal sitting at Nairobi in the case of Obongo and another v Municipal Council of Kisumu [1971] 1 EA 91 per Spry VP at page 94 by way of a summary of the case of Rookes vs Barnard [1964] A.C. 1129. He said:

> “In the first place, it was held that exemplary damages for tort may only be awarded in two classes of case (apart from any case where it is authorized by statute): these are, first, where there is oppressive, arbitrary or unconstitutional action by the servants of the government and, secondly, where the defendant’s conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff. As regards the actual award, the plaintiff must have suffered as a result of the punishable behaviour; the punishment imposed must not exceed what would be likely to have been imposed in criminal proceedings if the conduct were criminal; and the means of the parties and everything which aggravates or mitigates the defendant’s conduct is to be taken into account. It will be seen that the House took the firm view that exemplary damages are penal, not consolatory as had sometimes been suggested”.

Firstly, exemplary damages would be awarded for arbitrary or unconstitutional action by government officials. Secondly, it is awarded where the wrongful conduct of the defendant is calculated to procure some benefit at the expense of the plaintiff. Lastly the plaintiff must have suffered as a result of the punishable behaviour. Consequently even in a claim for exemplary damages, the plaintiff must prove that it has suffered from the acts of the defendant. Nevertheless, the plaintiff did not purport in the submissions to claim for exemplary damages and the defendant did not address the court on it and therefore none can be awarded. The question therefore is whether aggravated damages should be awarded? According to Halsbury's laws of England fourth edition volume 12 paragraph 811, aggravated damages may be awarded. "In certain circumstances the court may award more than nominal measure of damages, by taking into account the defendant's motives or conduct and such damages may be either aggravated damages which are compensatory in that they compensate the victim of a wrong for mental distress, or injury to feelings, in circumstances in which the injury has been caused or

increased by the manner in which the defendant committed the wrong." Furthermore under paragraph 1114, aggravated damages in tort are where damages are "at large". This means that they are not limited to the pecuniary loss that can be specifically proved. In such cases the court may take into account the defendant's motives, conduct and manner of committing the tort, and where these have aggravated the plaintiff's damages by injuring his proper feelings of dignity, and pride, aggravated damages maybe awarded. The defendant may have acted with malevolence or spite or behaved in a high-handed, malicious, insulting or aggressive manner.

In the plaintiff's case, it is impossible to presume that the plaintiff has suffered losses due to failure to apply the transaction value method. In any case, in case of having suffered losses, the principle of restitutio at integrum ensures that the plaintiff is compensated for the loss by an award of general damages. The plaintiff is yet to be assessed using the transaction value method for import duty payable on the vehicle in question. In those circumstances, the court can only award damages for the wrong suffered. I agree with the defendant's counsel, that the plaintiff has not made the task of the court any easier by giving indicators about the appropriate damages suffered due to the utilisation of alternative methods. Moreover the submission of the defendant that the plaintiff assessed itself for tax through its agent and paid the tax willingly has not been rebutted by the plaintiff. Exhibit DE 8 was admitted by consent of the parties among the defendant's documents. It is a declaration in favour of the consignee namely the plaintiff made by Kob Freight Links Uganda Limited and gives details of importation of the Jaguar saloon car. It was valued at US$11,300.11. Particulars of the declaration were however not given. What has been printed out is the manifest entered into the defendant's system. None of the parties called any witnesses. The plaintiff on the other hand admitted in evidence the unit price in the pro forma invoice from Century Auto Trading Company Limited based in Japan giving a price of US$5200. These are exhibits P3 and exhibit P4. Finally before reassessment, the court cannot presume that damages have been suffered by the plaintiff as a result of the assessment of the imported vehicle for import duty using alternative methods of customs valuation authorised under the East African Community Customs Management Act, 2004. The best that the court can do is to award damages without proof of loss for breach of the statutory provisions of the East African Community Customs Management Act, 2004 by the commissioner customs through the directive challenged in this action. Breach of statute is a tort in common law.

Breach of statutory duty is a tort at common law and entitles a plaintiff upon proof to damages to an injunction or to both. In the case of **Dawson vs. Bingley Urban Council [1911] 2 KB 149,** it was held by Farwell L.J. at page 156 that:

> "Breach of a statutory duty created for the benefit of an individual or a class is a tortuous act, entitling anyone who suffers special advantages there from to recover such damages against the tortfeasor"

At page 153 Vaughan Williams held that public bodies representing the public are not liable to be sued by an individual member of the public who has sustained injuries in consequence of the

omission of such a body to perform a statutory duty created for the benefit of a class of which such a person is one, yet the Public body may be liable if by its acts, it alters the normal condition of something which it has a statutory duty to maintain and in consequence some person of a class for whose benefit the statutory duty is imposed is injured. Kennedy L.J. held at page 159 that the proper remedy for a breach of statute is an action for damages especially where the statute lays no rule for non-compliance or breach and in appropriate cases an injunction.

Unfortunately, the plaintiff has not proved any damages it has suffered as a consequence of being assessed for customs duty using alternative methods of assessment. Moreover any reassessment may either reveal money overpaid or even underpaid. The court cannot presume that the transaction value declared by the plaintiff is the right transaction value. Consequently and in the circumstances, the plaintiff can only be awarded aggravated damages. The basis for the aggravated damages is the manner in which the defendant ignored the express provisions of the statute and gave a directive which was meant to float the provisions of section 122 and the fourth schedule of the East African Community Customs Management Act 2004. By the directive, the defendant made customs officials to exclude the transaction value method of assessment of customs duty for imported used motor vehicles. This is despite the mandatory wording of the law and the primacy of the transaction value method in the assessment of ad valorem duty. Secondly, the law makes no distinction between used or new imported vehicles. The court however takes into account, the difficulties that the defendant was facing in the assessment of ad valorem duty for used motor vehicles. However no specific evidence was adduced about the nature and extent of the malpractices. Moreover the malpractices have to be assessed on a case by case basis and it cannot be assumed that everybody who imports a used motor vehicle is involved in it. Such an assumption is arbitrary and does not assess tax payers on merit. It was however an agreed that there could be some false declarations by importers of used motor vehicles among other malpractices. Such cases should be assessed on a case by case basis. The express breach of East Africa Community law through such a directive should be discouraged.

In the circumstances, the following orders shall issue namely:

1. A declaration issues that the directive of the Commissioner Customs Uganda Revenue Authority suspending the operation of the transaction value method provided for by section 122 and the fourth schedule of the East African Community Customs Management Act, 2004 is unlawful to the extent that it excludes the application of the transaction value method for assessment of customs duty in every case of imported used motor vehicles.

2. The plaintiff's vehicle, the subject matter of this suit, shall be reassessed for customs duty. If the reassessment shows that the plaintiff overpaid customs duty, then the balance over and above the assessed customs duty paid by the plaintiff shall be refunded.

3. In case the plaintiff paid over and above the amount reassessed, the excess amount shall attract interest at 21% per annum from the date of overpayment to the date of judgement.

4. The plaintiff is awarded aggravated general damages of Uganda shillings 20,000,000/ for breach of statutory duty owed to importers of used motor vehicles by the defendant (and of whom the plaintiff is one such importer) to assess them using the primary method and upon failure to determine the value using it, to use alternative methods after the conditions for use of any particular alternative methods are fulfilled. The defendant's staff further made no case for use of the fallback method and tried to justify the fallback method without using the sequential prescribed procedure and acted in disregard of the express provisions of community law and in justifying the Commissioner's directive.

5. The plaintiff is awarded additional interest on the general damages and any overpaid customs duty established through reassessment ordered herein from the date of judgement till payment in full.

6. Costs follow the event and the plaintiff is awarded costs of the action.

Judgment delivered in open court the 7th of August 2013

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Terrence Kavuma and Siraje Ali appearing for the plaintiff

Osborne Twesigye representative of plaintiff in court

Angela Nairuba Mugisha appears for the defendant

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

7th August 2013