

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

HIGH COURT CIVIL SUIT NO 56 OF 2007

- 1. TIBETENDERANA BAHIGWA}**
- 2. TSEDHA LONJIRINGA }**
- 3. MUGAVU LONJIRINGA}.....PLAINTIFFS**
- 4. MOIZE LOMBE }**
- 5. NGAVE }**

VERSUS

ATTORNEY GENERAL}DEFENDANT

BEFORE HON MR. JUSTICE CHRISTOPHER MADRAMA

JUDGMENT

The plaintiffs filed this action in February 2008 against the Attorney General in his representative capacity under the Government Proceedings Act for special and general damages for conversion, interest and costs of the suit.

The plaintiffs case is that on 28th of February 2007, the plaintiffs bought 30 tons of salted Nile Perch Fish from the open market around Nkodo on Lake Albert. They loaded their fish on a boat en route to Panyamur. The defendant's servants/agents commandeered the boat and took off with 13 tonnes of the plaintiffs fish valued at Uganda shillings 45,000,000/=. The plaintiffs followed the boat and demanded to know what was wrong from the Maritime officers/defendants agents but were chased away. The agents of the defendant loaded the fish on a Fusso Truck and two pickup trucks and transferred the fish to Kampala. The plaintiffs were helped by a UPDF officer to track the fish up to Kampala. The plaintiffs nominated their agents including the first plaintiff to follow up the fish in Kampala which they did up to Bugolobi Ice Plant. The plaintiffs learnt from the Commissioner for Fisheries that the fish had been disposed of pursuant to a court order. The plaintiff's contention in the plaint is that the impounding and disposal of their fish was unlawful. Secondly that the Maritime officials who impounded their fish were acting in the course of their duty and the defendant is vicariously liable.

The Attorney General in the written statement of defence filed on court record denied the averments in the plaint and contended that the plaintiffs were found in possession of immature fish en route to the Democratic Republic of the Congo. The fish were impounded by Maritime Security and the Hoima District Fisheries Officers on reasonable suspicion that the plaintiffs had committed or were about to commit an offence under the provisions of the Fish Act.

Subsequently the plaintiffs and others still at large were subsequently charged under SD 58/06/03/07 and the exhibited impounded fish were lawfully disposed of by court order in application No. 131/7/2007 under the provisions of the Fish Act. Finally the Attorney General contends that the claim was too remote to hold the defendant vicariously liable.

At the hearing of the suit and during the scheduling conference the plaintiff was represented by Counsel Mugisha K Samuel while the Attorney General was represented by Counsel Bafirawala Elisha, Senior State Attorney. The suit was filed in February 2008 and spent over five years without proceeding. It was scheduled for quick disposal in March 2013 under a special civil session for quick disposal of backlog cases in the commercial court division. Because the personnel of the fisheries department who had acted in the matter were difficult to trace after so many years, both counsels agreed to proceed on the basis of undisputed facts and to dispense with the calling of witnesses to adduce evidence. The scheduling memorandum of the parties was signed on the 2nd of May 2013 and contains the following agreed facts:

1. Around 28th of February 2007, the plaintiff's fish was impounded by maritime security at Nkondo on Lake Albert and was later brought to Kampala.
2. On 15th of March 2007 the Commissioner for fisheries applied to Nakawa court to dispose of 40 bags of impounded immature fish (*Tilapia Niloticus*).
3. The plaintiff's fish which was impounded by the defendant's servants/agents was packed in 86 bags.
4. A case was reported at Jinja road police station by one Sam Okidi of maritime security of impounding approximately 7 tons of fish from Nkondo, vide Lake Albert SD/58/06/03/07.
5. The plaintiffs were not judged in court in respect of the impounded fish.

Counsel was also admitted the correspondence concerning the matter. This included:

1. A letter of the plaintiff's counsel to the Commissioner Fisheries exhibit P1.
2. Letter of the Commissioner Fisheries to the plaintiff's counsel. Exhibit P2
3. A copy of the application for a court order in Nakawa Miscellaneous Application Number 131 of 2007. Exhibit P4.
4. The order in Nakawa miscellaneous application number 131 of 2007. Exhibit P3
5. The memorandum of the head of the maritime security to D/OPNS inter alia copied to the Commissioner for Fisheries. Exhibit P5
6. A photo copy of the photo of the exhibit marked at Jinja Road Police. Exhibit P6

Counsels agreed to file written submissions.

In the written submissions the plaintiff's case is that the suit is for special and general damages for conversion, interest and costs of the suit. Counsel contended that the facts are undisputed from the pleadings. The plaintiffs loaded their fish on a boat and the boat was commandeered by Maritime officers who impounded the fish and brought to Kampala. The fish was disposed of

purportedly under a court order obtained from Nakawa court and a case was opened at Jinja Road Police Station.

The fish was disposed of and cannot be examined by the court to determine whether or not it was immature fish. Counsel contended that the case can be disposed of by determining issues of law. As to the measure of damages, the National chamber of Commercial and/or fisheries shall avail to the court the prevailing prices at that time of impounding the fish to determine the quantum. In the alternative if the issues of law are determined in favour of the plaintiffs, counsel prayed that the matter is referred to the registrar to determine the quantum of damages.

The issues agreed upon are:

1. Whether the impounding and disposal of the plaintiff's fish was lawful.
2. Whether the defendant is vicariously liable.
3. Remedies available to the parties.

The plaintiffs submissions are that the power to impounded fish caught in possession in contravention of the Fish Act is vested in the authorised officer under section 30 (c) of the Fish Act. An authorised officer is defined by section 2 (f) of the Fish Act and does not include officers of the Maritime Security. If the maritime security officers felt that an offence had been committed by the plaintiffs, they ought to have contacted either the police or the Fisheries Department who are authorised to handle such contraventions. Consequently the maritime security officers acted illegally.

Fish seized in accordance with the Fish Act is disposed of in the manner prescribed by section 30 (c) (i) and (ii) of the Act. It is disposed of by sale and the money deposited in court and forfeited to the government in the event of the offender being convicted under the Act. If the offender is not convicted, the money is paid to the owner. In this case the plaintiffs were not prosecuted and the Fish impounded ought to have been returned to them.

In the particular case the fish was allegedly disposed of by court order exhibit P3 which ordered that it be distributed to the prisons, hospitals, police and army barracks. The defendant did not state that it was given to any of those institutions. However even if it was stated, the order would have been unlawful, given that the law prescribed a disposal method different from the one ordered by the court.

Additionally the court which made the order acted without jurisdiction both geographically and as far as pecuniary jurisdiction is concerned. The fish was impounded at Nkondo Lake Albert and the Chief Magistrates Court of Nakawa court did not have jurisdiction to handle a matter outside its geographical jurisdiction. Secondly it the subject matter was outside the geographical and beyond the pecuniary jurisdiction of a Chief Magistrate's Court which was Uganda shillings 5,000,000/=. The value of the plaintiff's fish was way above the jurisdiction of that court.

Furthermore the magistrate proceeded ex parte without evidence and denied the plaintiffs their constitutional right to be heard before making a decision which affected them. Consequently the sum total of the Magistrate's Court proceedings is that it was a nullity. Counsel submitted that a judgement of the court without jurisdiction is a nullity and relied on the case of **Stephen Mubiru vs. Annet Mubiru Revision cause number 4 of 2012** (per Tuhaise J).

In reply on the first issue, the Attorney General's counsel broke down the issue into two parts. This was firstly whether the impounding of the fish was lawful? And secondly whether this disposal of the fish by the court was lawful?

On the first leg of the issue of whether the impounding of the fish was lawful, the Attorney General's counsel submitted that the power to impound or seize any fish which one reasonably believes to be in possession of another person in contravention of the Fish Act was the preserve of an authorised officer under section 30 (c) of the Act. He submitted that the definition of an authorised officer under the provisions cited by the plaintiff's counsel included a fisheries officer, a Chief Magistrate, a Police Officer of or above the rank of corporal or any employee of the fisheries department authorised in writing in that behalf by the Chief Fisheries Officer. From the available documents agreed it was not in dispute that the district fisheries officer and the maritime security officials on suspicion that the plaintiffs were engaging in trading or in possession of immature fish contrary to the provisions of section 27 of the Fish Act arrested the plaintiffs and impounded the immature fish. The act of impounding the fish was lawful and the court should answer the sub issue in the affirmative.

On the second sub issue of whether the disposal of the fish was lawful, counsel submitted that disposal is provided for by section 30 (c) of the Fish Act which permits an authorised officer to sell off the fish in such manner as the authorised officer may think fit. The last wording of section stipulates that: "No person shall be subject to any liability on account of his or her neglect or failure to exercise the powers conferred under the paragraph." Counsel submitted that the Chief Magistrate who issued the disposal order is an authorised officer and the disposal order was issued in respect of fish and was lawful. On the question as to whether the disposal of the fish was unlawful on the basis that the court acted without jurisdiction both as to its pecuniary and geographical jurisdiction, counsel contended that the subject matter in question was at Bugolobi at the time of the application for the order. This was within the jurisdiction of the Nakawa Chief Magistrate's Court.

On the question of pecuniary jurisdiction, by March 2007 when the order was issued, the defendant does not deny by March 2007 owing to amendment to the Magistrate's Court Act, the pecuniary jurisdiction of a Chief Magistrate's Court was increased from Uganda shillings 5,000,000/= to Uganda shillings 50,000,000/=. However the law was not in operation. There is no evidence on court record to show that the subject matter was beyond the 5,000,000/= threshold. Consequently the Chief Magistrates Court acted with jurisdiction and the disposal order was lawful.

On the second issue of whether the defendant is vicariously liable, the plaintiffs' counsel relied on exhibit P5 which is a report of the head of maritime security showing that they impounded the fish at Lake Albert. The defendant does not deny that they were acting in the course of their employment. The fish appears to have been put in the hands of the fisheries according to exhibit P2 and P4 and the fisheries department was equally to blame for the manner of disposal of the fish. In as far as the manner contravened the law, the defendant would be vicariously liable.

In the reply the Attorney General's counsel submitted that the defendant is not vicariously liable for the lawful action of a judicial officer exercised in the judicial capacity. The Chief Magistrate is by law authorised to dispose of fish under the Fish Act. Counsel contended that it is a settled principle of law that any person aggrieved by a decision of the Chief Magistrates Court may lodge an appeal against the decision. This court is not hearing an appeal from the orders of the Chief Magistrates Court. He prayed that the suit is dismissed for being misconceived and devoid of any merit.

On the question of remedies, the plaintiff's counsel submitted that the plaintiffs are entitled to compensation for the converted fish, general damages in respect of handling the fish, packaging, following up the loss and inconvenience. The plaintiffs should also be awarded interests as they were trading in the fish and were entitled to recover the money lost. Counsel further prayed for costs of the suit.

In reply the Attorney General's counsel submitted that the plaintiffs are not entitled to any remedies. The plaintiffs were arrested for being in possession of fish contrary to the Fish Act. The impounded fish was lawfully disposed of by the chief magistrate of Nakawa and not appeal was ever lodged against the order of the court. He prayed that the suit is dismissed with costs.

I have carefully considered the agreed facts, the agreed documentary exhibits and the submissions of both counsels.

The first agreed issue is whether the impounding and disposal of the plaintiff's fish was lawful?

There is no evidence about the particular facts of how the fish came to be impounded. The fish was impounded anyway and an order of the court was issued disposing of the exhibits. It is clear from exhibit P2 that the position of the office of the Commissioner Department of Fisheries Resources is that the plaintiffs were charged under SD 58/06/03/07 and exhibits were involved. They alleged that one of the plaintiffs was a serial smuggler of immature fish to the Democratic Republic of the Congo. The Commissioner contended in the letter that the vice of smuggling will ultimately lead to the collapse of the fisheries if it is unchecked. He advised that the plaintiffs hand themselves over to the police. He noted that the goods were disposed of under the Fish Act.

This evidence is strong enough to point to the fact that the plaintiff's fish was impounded on suspicion of being immature fish. The fish was subsequently disposed of under section 30 (c) of

the Fish Act cap 197. The order of the chief magistrate is dated 15th of March 2007. It reads as follows:

"Upon an application by the Commissioner for Fisheries for disposal of immature fish made this 15th day of March, 2007, it is hereby ordered that:

The immature fish being perishable but fit for human consumption, the same be disposed of by distribution for consumption to institutions such as Prisons, Hospitals, Police and the Army Barracks among others.

Given under my hand and seal this 15th day of March, 2007."

The reason for disposal of the fish is contained in exhibit P4 in the application of the office of the Commissioner Department of Fisheries. Exhibit P4 is an application for a court order by the Commissioner for fisheries dated 15th of March 2007 and addressed to the Chief Magistrate Nakawa Magisterial area. The letter reads as follows:

"In the interest of the implementation of laws (Fish Act, cap 197 of 1964), the Department of Fisheries Resource, would like to dispose of approximately 40 bags of impounded immature fish (Tilapia Niloticus) impounded by the Department of fisheries resources and now at Ice Plant Bugolobi – Kampala.

Therefore, this is to request your honourable office to grant a court order that will enable the department to dispose of impounded fish as its smell is considered an inconvenience to the neighbouring offices."

There are several points to be made from the above exhibits. The first one is that the fish was disposed of under section 30 (c) of the Fish Act which provides that any fish impounded shall be sold in such manner as the authorised officer may think fit and the proceeds of the sale shall be paid into court. The provision deals with the proceeds of the sale and provides for two case scenarios. In the first scenario the impounded fish and proceeds thereof will be forfeited to the government in the event of any person being convicted of any offence against the Act or any rules made under the Act in regard to the capturing of such fish. Or in any case in which the owner of the fish is unknown and does not make a claim for the proceeds within two months of the payment into court. In the second case scenario, the proceeds of the sale will be handed over to the person who captured the fish if that person is known and either no person is prosecuted or the person prosecuted is discharged or acquitted.

The impounding of the fish is part of due process in enforcement of the Fish Act. It was alleged that the fish which had been impounded were immature fish. As to whether the plaintiffs had committed an offence was yet to be proved in a court of law. It is an agreed fact that there was no prosecution of the plaintiffs. Nonetheless the impounding of the fish was a lawful process and cannot be impeached. The issue as submitted by counsel for the plaintiff are issues of law.

Section 30 is very explicit that where no person is prosecuted, the money from the sale will be handed over to the owner of the fish. The sale of the fish is for purposes of preserving the property because fish is a perishable commodity.

The peculiar facts of this case are that the order was to hand over the fish to certain departments of government namely the prisons, the police and hospitals. It is the duty of the fisheries officer or authorised officer under section 30 of the Fisheries Act to sell the fish and thereafter deposit the money in court. It was not upon the chief magistrate's court to order disposal of the fish. The fish was supposed to be sold in such manner as the authorised officer may think fit and the proceeds of the sale to be paid into the court. Consequently the authorised officer adopted an unlawful method of disposal of the fish. He was supposed to dispose of the fish as he deemed fit by selling it. Even though the impounding of the fish was lawful and in due process of implementation of the Fish Act on allegation that the fish was immature fish, it was the duty of the authorised officer to sell the fish in such manner as he deemed fit. I have further considered the submission that the chief magistrate is an authorised officer in terms of section 30 of the Fish Act. I was referred to the definition section namely section 2 (f) for the definition of "authorised officer" which provides that the definition includes a fisheries officer, the chief magistrate, a magistrate of any grade, a police officer of or above the rank of corporal or any employee of the fisheries department authorised in writing in that behalf by the chief fisheries officer. The use of the term "authorised officer" is indeed very wide. In the context of section 30 of the Fish Act it must receive a restricted meaning. It provides in subsection (c) as follows:

Any authorised officer may –

(c) seize any fish, dried fish or fish product which he or she reasonably believed to have been caught or to be possessed in contravention of this Act or any rules made under this Act. Any such fish, dried fish or fish product so seized would be sold in such manner as the authorised officer may think fit and the proceeds of the sale shall be paid into court and shall –"

In the context of the plaintiff's case, the authorised officer here refers to the officers who seized the products. I have further considered the submissions of the Attorney General's counsel to the effect that no person shall be subject to any liability on account of his or her neglect or failure to exercise the powers conferred by the paragraph referred. The law refers to handing over to the person who captured the fish where the person who captured the fish is known and either no person is prosecuted or the person prosecuted is discharged or acquitted. It is not in any way related to the seizure of the fish.

Consequently I am satisfied that the manner of enforcement of the act was in contravention of the clear provisions of section 30 (c) of the Fish Act which only permits the authorised officer not only to seize the fish suspected to have been captured in contravention of the Fish Act but also authorises the officer to sell the fish in a clear provision meant to preserve the subject

matter. The owner of the captured fish cannot be deprived of his or her property rights unless a person is convicted of an offence in relation to the captured fish. In this case nobody was convicted of an offence. The authorised officers were content to have the fish impounded and disposed of in a manner not authorised by the Fish Act section 30 (c). In those circumstances, the first issue is answered in the affirmative and the fish was not lawfully disposed of.

Remedies

On the question of whether the defendant is vicariously liable for the acts of a judicial officer I was addressed on the fact that the chief magistrate is an authorised officer. I have already held that it was the fisheries officers who impounded the fish and made an application for disposal of the fish. The case cannot proceed on the premises of the acts of the chief magistrate. The duty was upon the fisheries Department to sell the fish and deposit the proceeds in the court. It was upon them to prosecute the suspects whereupon the money would be forfeited to the government. They however deemed it fit not to follow the explicit provisions of section 30 (c) of the Fish Act. Furthermore I do not agree with the plaintiff's submissions that the right of the plaintiffs to be heard have been infringed. An order of disposal is meant to preserve the property in the fish by selling it so that it does not go bad since it is a perishable commodity. Exhibit P4 is a letter applying to the chief magistrate for permission to dispose of the impounded immature fish. The grounds were that the fish smell was an inconvenience to the neighbouring offices. Even though it is not necessary to seek the permission of the chief magistrate, granting the permission to dispose of the fish was superfluous. The chief magistrate noted that the immature fish being perishable but fit for human consumption would be disposed of by the distribution for consumption to institutions such as prisons, hospitals, police and army barracks among others. There was no order that such distribution was for free. It was left to the discretion of the Commissioner for fisheries to dispose of the fish as he or she deem fit just as authorised by section 30 (c) of the Fish Act. Furthermore I have considered the submissions on the jurisdiction of the magistrates. I agree with the Attorney General's counsel that the impounded fish were caught in Bugolobi – Kampala within the geographical jurisdiction of the chief magistrate's court Nakawa. Secondly, the jurisdiction which they submitted on was pecuniary jurisdiction. The jurisdiction conferred on Magistrates Courts is a statutory jurisdiction by definition of who an authorised officer is under section 2 (f) of the Fish Act. First of all, the jurisdiction is penal in nature and not civil and provisions for pecuniary jurisdiction are inapplicable. Any court seized with the jurisdiction to try an offence under the Fish Act is seized with the jurisdiction. For emphasis that is no definition of "court". However an authorised officer includes a chief magistrate and a magistrate of any grade. I have also noted that the matter before the court does not include proceedings against any accused person. In case there are proceedings against an accused person the ordinary place of trial is determined by section 34 from the Magistrate's Court Act cap 16 which provides that every offence shall ordinarily be inquired into or tried by a court within the local limits of whose jurisdiction it was committed. As I have noted above, the magistrate acted to preserve perishable commodities within the local limits of his or her

jurisdiction. Such an order can be made irrespective of the place of trial for accused persons charged under the Fish Act.

In the absence of a conviction for any offence under the Fish Act, the plaintiffs are entitled to compensation for the impounded fish which was consumed or disposed of under the provision which envisages that monies of the sale would be deposited in court. Without a conviction let alone prosecution for any offence under the Fish Act, the acts of the defendants servants amounted to deprivation of property and the plaintiffs are entitled to compensation.

Exhibit P5 is evidence that 86 bags of immature salted fish had been seized. The fact that it was called immature salted fish does not prove that they were immature salted fish (Nile perch). I further noted that exhibit P4 refers to 40 bags of tilapia. This only proves that there was another batch of bags the subject matter of this suit. All in all the evidence shows that they were 86 bags of salted Nile perch in addition to 40 bags of tilapia which was the subject of court proceedings.

The agreed facts are that the Fish amounted to 7 tons weight. The correspondence and agreement is that 86 bags of fish were impounded.

In the circumstances, the defendant will compensate the plaintiff for 126 bags of fish comprising of 40 bags of tilapia and 86 bags of salted Nile perch weighing 7 tonnes. The size of the bags can be discerned by exhibit P6 which is a photo of the exhibits.

The value of the fish shall be determined by the Commissioner of fisheries as at the date when the fish was impounded in February 2007. The determination as far as the quantum of the fish is concerned shall be based on the findings of the court in this judgement and shall be made within a period of one month from the date of this judgement under section 27 of the Judicature Act. The Commissioner shall use the prevailing prices of fish between February and March 2007 to determine the amount due. Last but not least the determination shall be filed with the registrar of the commercial court division within a period of one month from the date of this judgement.

The value determined shall attract interest at 14% per annum from the date of filing the suit until the date of judgement. Furthermore the value determined shall become the decreed sum and shall attract interest at 18% per annum from the date of judgement till payment in full

The plaintiffs are awarded costs of the suit.

Judgment delivered in open court this 14th day of May 2013

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Mugisha Mukeeri Samuel for the plaintiffs

Kampiire Genevieve State Attorney holding brief for Elisha Bafirawala appearing for the Attorney General

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

14th May 2013