

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)  
CIVIL SUIT NO 163 OF 2012**

**CARGOLAND INTERNATIONAL LTD}.....PLAINTIFF**

**VERSUS**

**UGANDA REVENUE AUTHORITY}.....DEFENDANT**

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

**JUDGMENT**

The Plaintiff filed this action against Uganda Revenue Authority for declaration that the cancellation or suspension of the Plaintiff's clearing licence or business is unlawful or wrongful and for an order that the Defendant removes or lifts the suspension or cancellation. It is also a claim for general, exemplary and special damages together with interest and costs for negligence, fraud and wrongfully cancelling or suspending the licence and clearing business of the Plaintiff.

The Plaintiff claims that at all material times prior to the suspension or cancellation of its licence and clearing business, it has been a clearing and forwarding agent duly licensed by the Defendant to carry on customs clearing and forwarding business throughout Uganda. To facilitate its business the Plaintiff secured insurance bonds up to the tune of Uganda shillings 600,000,000/=. On 3 February 2011 the Plaintiff's client one Musa Mudde requested the Defendant for permission to re-export one used Toyota land cruiser to the Republic of Rwanda. The Plaintiff was granted permission to re-export the vehicle subject to conditions set by the Defendant. The vehicle was cleared for re-export and escorted by the Defendant's agents/servants but the vehicle was diverted. Among other things the Plaintiff claims for declarations that the cancellation or suspension of the licence or clearing business is unlawful or wrongful and an order for reinstatement. The Plaintiff claims special damages of Uganda shillings 47,260,490/= monthly from March 2011 till judgment or settlement of the suit, general damages, exemplary damages and interest at 20% per annum on the claimed sums as well as costs of this suit.

The Defendant denies the claim. As far as the claims are concerned the Defendant asserts that the Plaintiff on 3 February 2012 sought permission to re-export a consignment namely a Toyota land cruiser on behalf of its client as claimed in the plaint. The Plaintiff was granted permission to re-export and further arranged for security personnel to escort the unit but the Plaintiff disappeared and the escort was given another assignment instead. The vehicle was released to an official from the Plaintiff Company and escorted by the Defendant's personnel within Kampala from the

customs bond to the transit monitoring unit offices at Nakawa in Kampala. However the Defendant's unit never received the vehicle and the exit point between Uganda and Rwanda. Thereafter sometime in March 2012 the Defendant requested the Plaintiff to account for the missing unit/motor-vehicle and the Plaintiff never responded. The vehicle was later seen with Ugandan registration numbers. The Defendant asserts that the motor vehicle was fraudulently entered into the Defendants motor vehicle information system using a forged number. In those circumstances the Defendant asserts that the cancellation of the Plaintiff's clearing licence is justifiable and legal. Furthermore the Defendant asserts that the Plaintiff had an intention to evade payment of 26,405,840/= in customs duties.

At the hearing the Plaintiff was represented by Counsel Candia Alex while the Defendant was initially represented by Gloria Twinomugisha.

Counsels filed a joint scheduling memorandum in which they agreed on certain facts namely:

The Plaintiff was at all material times a duly licensed clearing and forwarding company. On 3 February 2011 the Defendant granted permission to the Plaintiffs client, Mudde Musa to re-export one unit of a black Toyota land cruiser chassis number JTEHTO5J 842053059, 2004 model to Rwanda. The Defendant later suspended the Plaintiff from the business upon claiming that the suit vehicle did not reach its destination and secondly that the suit vehicle was fraudulently registered in Uganda as UKP 759Q without paying taxes of Uganda shillings 26,405,840/= and that the vehicle was registered in the Plaintiff's client's name. Issues agreed for trial are:

1. Whether the Defendant acted negligently and fraudulently in matters relating to the suit vehicle?
2. Whether the Plaintiff is liable to pay the outstanding tax liability of Uganda shillings 26,405,840/=?
3. Whether the Defendant wrongfully and unlawfully suspended the Plaintiff from the clearing business?
4. What remedies are available to the parties?

At the close of the respective party's cases, Counsels addressed the court through written submissions.

Whether the Defendant acted fraudulently and negligently in matters relating to the suit vehicle?

The Plaintiff's Counsel submitted on the basis of the pleadings on fraud and negligence and the witness statements of PW3 Rashid Mawanda and PW2 Kaita Joseph. He contended that because PW3 Mawanda was not cross examined on the particulars of fraud and negligence in his testimony, it should be taken to be proved according to the case of **Eladam Enterprises Ltd versus SGS (U) Ltd and 2 Others SCCA number five of 2005 [2007] UG SC 20** and its earlier decision in **Habre International Company Ltd versus Kassam and Others [1999] 1 EA 115**

*Decision of Hon. Mr. Justice Christopher Madrama*

to the effect that an opponent who has declined to avail himself or herself the opportunity to cross-examine the witnesses of the opposite side implies that he believed the testimony and does not dispute it. Consequently it implies that the evidence is accepted unless it is inherently incredible. Counsel submitted that the Defendant removed the vehicle from the bond on 11 February 2011 under physical escort by virtue of paragraph 9 of exhibit D2 and diverted the goods from the exit export point. Secondly the Defendant's witness DW2 Sarah Mirembe lied on oath to the effect that she released to the vehicle to one Joseph Kaita an officer of the Plaintiff without physical escort using a surveillance log sheet but the surveillance log sheet was never tendered in court. Counsel prayed that the court disbelieves the testimony of the Defendant's witness Sarah that escorts were unavailable at the time of release of the vehicle. Furthermore she had testified that the escorts only escorted the vehicle within Kampala. It was the Defendant's requirement that it was mandatory to move vehicles under physical escort and therefore the Defendant's contention that there was a shortage of physical escorts was an outright lie and an afterthought. Counsel submitted that in terms of paragraph 6 (c) of the written statement of defence the averment that the Defendant arranged for physical personnel to escort the unit and that the Plaintiff disappeared and the escort given another assignment coupled with the averment that the surveillance log sheet was issued in lieu of physical escort should not be believed. Secondly the averment that the Defendant released the motor-vehicle to an official from the Plaintiff Company Mr. Kaita Joseph and an escort to the transit monitoring unit offices at Nakawa ought not to be believed.

This is because exhibit D1 demonstrates that the Defendant released the vehicle to one Etigu on 11<sup>th</sup> of February 2011. The person who escorted the vehicle to the transit monitoring unit received the vehicle on 5 February 2011 while the second escort received it on 11 February 2011. Secondly the alleged escort was never called to testify to explain his role in the transaction. The Plaintiff proved that one Etigu removed the vehicle from the bond. The Defendant's witnesses could not testify on the facts only known by the escort. Furthermore according to the Plaintiffs witness Mr Joseph, the Defendant arrested the said Etigu for fraudulent conversion and diversion of the vehicle but they were never charged. Consequently the said escort acted as the Defendant's agent in removing the vehicle from the bond and taking it where ever he took it for which the Plaintiff is not liable. Furthermore the Defendant registered the vehicles without any queries or suspicion and never alerted the Plaintiff. Only upon the registration did the Defendant call the Plaintiff to account for it. The Plaintiff's Joseph received the call from the Defendant's witness Mr Ssozi whereupon he rushed to the bond and the transit document exhibit D1 shows that Etigu removed the vehicle from the bond on 11<sup>th</sup> of February 2011. The bond keeper notified Joseph that the vehicle had been registered by the Defendant and the question is how the Defendant knew that the vehicle had been registered? It is only the Defendant to explain the registration of the vehicle in Uganda. The fact that the Plaintiffs Joseph was notified by DW1 Geoffrey Ssozi is corroborated by paragraph 8 (b) of the written statement of defence. On the other hand the Defendant's witnesses contradicted the pleading by stating that the Defendant got to know about the registration of the vehicle from Kaita Joseph. The testimony is contrary to *Decision of Hon. Mr. Justice Christopher Madrama*

Order 6 rule 7 of the Civil Procedure Rules. Furthermore the Defendant maintains that the vehicle has been registered in the names of Mudde. However the Defendant's witness Sarah told court during cross-examination that the vehicle has never been registered in Uganda. So the question is whether the vehicle is registered or not. Counsel contended that it was the Defendant's mandate to register vehicles and not that of any other person. The files in the Central Registry are in the custody of the Defendant. The entire file concerning the vehicle cannot be missing since March 2011 until November 2013. Consequently it was an internal fraud.

Counsel concluded that the Defendant through the escort took the vehicle from the bond in accordance with clauses 4 and 9 of exhibit D1 and diverted it from the exit point. The Defendant registered it without any suspicion or notification of the Plaintiff and refused to call Etigu to testify about the truth. It refused to prosecute Etigu and his accomplices if any and only demanded accountability from the Plaintiff after registration before unilaterally suspending the Plaintiff. Counsel prayed that the court finds the Defendant's witnesses namely Mirembe Sarah and Geoffrey Ssozi to be stubborn, evasive and untruthful and therefore unreliable. There were several inconsistencies in the testimony of Mirembe Sarah. Counsel contended that it was trite law that inconsistencies leads to rejection of the whole testimony/evidence.

Counsel further contended that the acts and omissions of the Defendant amounts to fraud are defined by Black's Law Dictionary 6th edition. The acts of fraud involving the Defendant in removing the vehicle from the bond, directing it from the exit point, registering it locally, and demanding accountability from the Plaintiff after the registration. It includes refusal to punish the culprits and protecting them. It further includes refusing to call Etigu who moved the unit from the bond to establish the truth and suspending the Plaintiff for the actions and omissions of its own agents for which it is vicariously liable. Furthermore the Defendant heeded the vehicle file from the Central Registry of Motor Vehicles.

As far as negligence is concerned Counsel applied the test of the reasonable and prudent man and what he or she would have done. To succeed in negligence it has to be shown that the Defendant owed a duty of care and had breached that duty to the Plaintiff who suffered damages. In this case the vehicle was to move under physical escort and the Defendant undertook to provide the escort. The Defendant owed the Plaintiff a legal duty to provide physical escort up to the exit point as the vehicle was under its control. The Defendant through its agent Etigu removed the vehicle from the bond and failed to deliver it to the exit point but instead diverted it from the exit point. The diversion and eventual registration through its system after giving the unit a re-export permit was negligent. Consequently Counsel contended that no reasonable and prudent person would blame or penalise the Plaintiff for the actions and omissions of the agents of the Defendant.

In reply the Defendant reiterated relevant points of fact from its submissions which are that on 3 February 2011 the Plaintiff sought permission to re-export the consignment namely a Toyota  
*Decision of Hon. Mr. Justice Christopher Madrama*

land cruiser on behalf of one Mudde Musa to Rwanda. The Defendant granted permission on the same day. On 5 February 2011 the Defendant arranged for security personnel to escort the unit but the Plaintiff disappeared and the escort was given another consignment and instead a surveillance log sheet was issued to the Plaintiff on 10 February 2011. The motor vehicle was picked from the bond to transit monitoring unit offices at Nakawa by a gentleman called Joseph who was a representative of the Plaintiff, a driver and security personnel attached to the Defendant. The Defendant then issued a surveillance log sheet and flagged off the vehicle. However the vehicle never reached the Defendant's customs post at the exit point. Subsequently the Defendant demanded from the Plaintiff an account for the missing vehicle and the Plaintiff has never accounted for the same leading to the suspension of the Plaintiff.

The Defendant's Counsel dwelt at length on the laws relating to goods in transit under the East African Community Customs Management Act 2004.

First of all Counsel classified the vehicle in question as uncustomed goods in the sense that not all custom duties have been paid in full. Secondly the Commissioner under section 85 (1) of the East African Community Customs Management Act 2004 has powers to release goods without payment of import duties on terms and conditions as they deem fit. Secondly the Commissioner may require the owner of the goods to furnish security. Where the goods are in transit, the owner of the goods shall furnish the bond or any other security interest, as the Commissioner may require under regulation 104 of the East African Community Customs Management Regulations. Under the said regulations goods on transit have to be produced to the proper officer and approved documents of exportation together with a transit entry and the transit shall be terminated. The transit terminated under section 87 within the time limit specified by the Commissioner. The security furnished by the owner of the goods may only be released upon satisfaction that the goods have been exported and any amount of money refunded to the owner. Where there is no application within 30 days from the date of exportation, the goods shall be deemed to have been imported for home consumption and shall become liable for any import duty chargeable on similar goods. Furthermore Counsel contends that under Regulation 104 (22) of the East African Community Customs Management Regulations, a person who diverts from the transit route specified commits an offence and the goods shall become liable to forfeiture. Where the goods in transit cannot be traced, the person responsible to the proper officer shall pay the penalty to the bond in addition to a fine.

The Defendant's Counsel submitted that in practice once goods in transit enter Uganda, the owner through a clearing agent declares the intention to re-export in accordance with section 126 of the East African Community Customs Management Act. All relevant documents are presented to the Transit Monitoring Unit requesting for permission to re-export as enabled by section 248 (1) of the EACCMA which permits imported goods to be re-exported from a Partner State, destroyed or abandoned. Once permission to re-export is granted, the exporter is required to comply with all the necessary conditions and formalities prescribed by the Commissioner. The

clearing agent proceeds to clear the goods with the bond keeper or gives access to the goods, checks the condition of the goods and declares a re-export entry as prescribed. The entry for re-export is presented to any customer's business centre for obtaining a transit entry and a custom is bond executed as prescribed. Upon presentation of the relevant documents the bond keeper releases the goods. Thereafter the goods are supposed to exit the country via a specified office of destination and within the time limits. The transit goods may be physically escorted to the destination by the Defendant's enforcement agents or by issuing a surveillance log sheet in circumstances where the Defendant has no physical escort.

The Defendant's Counsel submits that in the circumstances the Defendant was not negligent or fraudulent in dealing with the suit motor vehicle. On 3 February 2011, the Plaintiff applied for re-export station of the Toyota vehicle and permission was granted on the same day. The permission was subject to conditions stated in exhibit D2. The testimony of Geoffrey Ssozi DW1 was that he was allocated a transit entry to attach a physical escort for the above vehicle. He attached a UPDF soldier one Mugisha according to the minutes in exhibit D1 but the Plaintiff was not ready to travel. On 10 February 2011 the Plaintiff was supposed to be ready to travel according to the testimony of Mirembe Sarah DW2 however the Defendant was short of physical escorts and instead issued a surveillance log sheet. Consequently DW2 Sarah Mirembe requested the officer in charge of the warehouses to release the vehicle to a URA soldier one Etigu who was a standby enforcement officer operating within Kampala. The vehicle was released to the soldier escort and that the minute in exhibit D1. At all material times exhibit D1 was in custody of the Plaintiff. The vehicle was driven to the transit monitoring unit by the Plaintiff's driver in the presence of the Plaintiff's agent one Joseph Kaita and escorted by Etigu Said, a UPDF soldier.

Because there was no escort, the vehicle was released to Joseph on a surveillance log sheet to be presented at the exit point. However it was later established that the vehicle did not exit Uganda.

It was preposterous according to the Defendant's Counsel, to suggest that the Plaintiff who had full authority from the client would let the Defendant take the suit vehicle from the bond without their knowledge. The Plaintiff's Joseph Kaita who testified as PW1 admitted during cross-examination that the Plaintiff was paid for the work done regarding the suit vehicle. The Defendant's Counsel further contends that the Defendant's case is supported by the fact that the vehicle when in bond has a key kept by the owner/agent of the vehicle or the bond keeper according to the testimonies of PW1 and DW2. The purpose of having an officer in charge of the bond is to ensure that the vehicle is in bond and customs procedures are complied with. The clearing agent starts the whole transaction by generating transit documents required by the system. The clearing agent owes a duty to the client to perform as required.

The fact disclosed by the evidence is that the vehicle was released by the officer in charge of the bond to the owner/agent who is responsible for payment of demurrage fees to the bond keeper. Secondly there is no evidence that Etigu and accomplices were arrested by the Defendant for

fraudulent conversion and diversion of the vehicle and freed without any charge or punishment. On the contrary there was a plan by the Plaintiff to import a vehicle, and fraudulently register it without payment of taxes. For purposes of the re-export, the Plaintiff attached a purported sale agreement between the owner and the buyer. However the signature of the owner deferred from the signature on the owners passport admitted as exhibit D9. DW1 and DW2 testified that they never met the owner of the vehicle but all along only dealt with the Plaintiff in the transaction. The buyer of the vehicle one Kibinge Ahamedi is a fictitious consignee. Thirdly the sale price of US\$6500 is not justifiable according to the Defendant's valuation.

Lastly the conditions set by the Defendant were not adhered to by the Plaintiff. False documents were presented by the Plaintiff and the exporter did not take full responsibility of delivering the vehicle to the exit point. No notification was given by the Plaintiff to the Defendant at the time they thought the vehicle ought to have exited the country. The bond could not therefore be retired within five days from the date of exportation because the Defendant waited for proof of exportation from the Plaintiff. The regulations require proof of exit from the Plaintiff together with a copy of the transit entry and thereafter the transit shall be terminated in accordance with regulation 104 (7) of the EACCMA Regulations. Because the transit of the suit vehicle has never been terminated the Plaintiff is liable for custom's legal sanctions under regulation 104 (22) and (23) of the EACCMA Regulations.

On the submission that the vehicle has never been registered in Uganda, the Defendants position is that the vehicle has never been legally registered in Uganda as required by The Traffic and Road Safety Act Cap 361 because taxes have never been paid. The purported taxes paid of 3,700,000/= under receipt number R 9903 dated 1 February 2011 exhibit D7 belonged to another vehicle. In the case of **Hebert Niwamanya versus Uganda Revenue Authority HCCS number 003 of 2008**, the authority impounded a vehicle that had been registered using a forged form. The same entries related to a genuinely registered import. The court held that the goods remained uncustomed and liable to forfeiture under section 210 of the EACCMA. In this case DW1 testified that the receipt used belonged to a small Toyota saloon vehicle. The letters by the Plaintiff were meant to conceal the illegality the Plaintiff committed.

The authorities cited by the Plaintiff on the definition of fraud do not apply to the Defendant since no evidence was adduced by the Plaintiff either to prove fraud or negligence on the part of the Defendant. The standard of proof in cases of fraud is higher than that on the balance of probabilities according to the case of **Kornak Investments (U) Ltd versus Stanbic Bank Uganda Limited HCCS number 116 of 2010** and the case of **Ronald Kayara versus Hassan Ali Ahmed SCCA number one of 1990** where it was held that a higher standard of proof than in ordinary civil cases is required in claims founded on fraud. Furthermore fraud has to be pleaded and strictly proved according to the Supreme Court case of **Kampala Bottlers Ltd versus Damanico (U) Ltd Civil Appeal Number 22 of 1992**.

#### **Submissions of the Plaintiff's Counsel in rejoinder**

*Decision of Hon. Mr. Justice Christopher Madrama*

After reference to the evidence Counsel for the Plaintiff submitted in rejoinder that the key issue is who diverted the suit vehicle from transit and caused it to be registered locally? Counsel reiterated submissions on the basis of the Plaintiff's evidence that the Defendant took possession of the vehicle from the bond, diverted from the exit point, registered it locally and hid the filing of the vehicle from the registry of vehicles. The Defendant refused to call Etigu to inform court where he delivered the vehicle and refused to prosecute or punish him. The Defendant then decided to call the Plaintiff to account for the vehicle after registering this vehicle before suspending the Plaintiff from the business of clearing and forwarding. Counsel further contended that the evidence of the Defendant's witnesses upon diversion and local registration of the vehicle, about there being no physical escort at the material time, and that the vehicle moved under a surveillance log sheet and was registered in Uganda fraudulently by the Plaintiff when the vehicle record was missing was not truthful.

**Resolution of issue number 1: Whether the Defendant acted negligently and fraudulently in the matters relating to the suit vehicle?**

I have carefully considered the pleadings, the evidence adduced in support and against the claim of the Plaintiff, the written submissions of Counsel and authorities cited.

The Plaintiff primarily claims a declaration that the cancellation or suspension of the Plaintiff's licence and clearing business is unlawful/wrongful or unjustified. Secondly the Plaintiff seeks an order that its licenses are reinstated by the Defendant forthwith. Thirdly the Plaintiff seeks payment of **Uganda shillings 45,000,000/=** as loss of earnings from agency fees monthly from July 2011 until judgement or settlement of the suit. The Plaintiff also claims special damages of **Uganda shillings 68,405,840/=** together with general damages, exemplary damages, interests and costs of the suit.

In paragraph 3, the Plaintiff pleads negligence and fraud. Negligence and fraud cannot be isolated pleadings from their consequential loss as they found a cause of action but must relate to loss or damages that can be quantified by a court of law for purposes of an award of damages or other remedies. The court cannot assume that the negligence alleged is for loss of vehicle or that the fraud relates to disposal of the vehicle. There is apparently no claim for loss of the vehicle on behalf of the owner of the vehicle. The Plaintiff's claim relates to cancellation of its business license for clearing and forwarding goods as an agent of importers and exporters. On the other hand the submissions of Counsel on the issue of negligence or fraud seem to relate to the failure of the Plaintiff to account for the exit of the vehicle as undertaken. It is a submission that deals with the grounds of failure for the vehicle to exit as undertaken by the Plaintiff to the Defendant. The Plaintiff's case is that it is not its fault but that of the Defendant's servants while the Defendant ascribes the blame on the Plaintiff. The Plaintiff's case is that it was wrongfully suspended from doing business and its licenses cancelled.



The issue has to be explored further. The claim of fraud or negligence is not in relation to any proprietary interest in the vehicle but concerns loss of the Plaintiffs clearing and forwarding licence. As far as the suit is concerned no claim has been brought on behalf of any claimant or owner to the effect that there has been any loss of proprietary rights to the vehicle in question on account of the Defendants conduct. On the contrary it is the Defendant which claims to have lost taxes firstly because there was no report of exit of the vehicle sought to be re-exported to Rwanda and secondly because of the alleged fraudulent registration of the vehicle in Uganda without payment of import duty. The claim for cancellation of the clearing licence is the foundation of the Plaintiff's claim. Damages claimed are alleged to arise from loss of business due to having no licence to carry on the business of a clearing and forwarding agent.

Negligence is defined by words and phrases legally defined in volume K – Q London Butterworth's 1989 pages 206 to 213. The key elements in the term "negligence" in as far as it forms a cause of action against a Defendant in a court of law includes the failure to exercise that care which the circumstances demand. They involve omission to do something which ought to be done or doing something which ought to be done either in a different manner or not at all. Negligence is a tort by failure to exercise care which the circumstances demand. Where the duty of care exists, reasonable care must be undertaken to avoid acts or omissions which can be reasonably foreseen to be likely to cause physical injury to persons or property:

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do..."

"The definition of negligence is the absence of care, according to the circumstances" (Page 207).

"Actionable negligence consists in the neglect of the use of ordinary care and skill towards a person to whom the Defendant owes a duty of observing ordinary care and skill, by which neglect the Plaintiff, without contributory negligence on his part, has suffered the injury to his person or property." (Heaven versus Pender) (1883) 11 QBD 503 at 507

There are several definitions from various authorities which give the elements which disclose the tort of negligence. Osborn's Concise Law Dictionary 11th edition (Sweet and Maxwell) page 281 defines "negligence" in the following terms:

"As a tort (q.v.), Negligence is the breach by the Defendant of a legal duty to take care, which results in damage to the claimant."

Consequently a claim that a licence has been wrongfully or unlawfully cancelled by the Defendant may be a claim falling under administrative law and invites the court to consider whether a statutory power has been properly exercised by the Defendant. This necessarily

*Decision of Hon. Mr. Justice Christopher Madrama*

requires an examination of the enabling law and procedures and grounds for the granting and cancellation of licenses by the Defendant. The same case goes for the claim of fraud against the Defendant. I am mindful of the fact that an allegation of fraud may mean acting dishonestly. However **Words and Phrases Legally Defined volume 2** (supra) at page 278 defines the term with reference to various authorities. In volume 16 Halsbury's laws of England fourth edition paragraph 1219 it is defined as follows:

"Actual fraud arises from facts and circumstances of imposition. It usually takes the form of a statement of what is false or a suppression of what is true. The withholding of information is not in general fraudulent unless there is a special duty to disclose it..."

"'Fraud' is used not in any general sense of dishonesty, but as meaning an intentional misrepresentation (or in some cases concealment) offered by one party with the intention of inducing another party to act on it, and thereby inducing the other party to act on it to his detriment. (Stafford Winfield Cook and Apartments Ltd versus Winfield [1980] 3 All ER 759 at 766].

Last but not least **Osborn's Concise Law Dictionary** 11th edition Sweet and Maxwell page 192 defines "fraud" in the following terms:

"The obtaining of material advantage by unfair or wrongful means; it involves obliquity. It involves the making of a false representation knowingly, or without belief in its truth, or recklessly. If the fraud causes injury the deceived party may claim damages for the tort of deceit. A contract obtained by fraud is voidable at the option of the injured party. Conspiracy to defraud remains a common law offence..."

Therefore the question remains as to what the Plaintiff is claiming it has lost due to the fraud or negligence of the Defendant's agent. The simple answer is that it is claiming loss of business and a licence of clearing and forwarding. Other claims are consequential claims. The Plaintiff is not claiming loss of the vehicle or loss of profit or any other kind of consequential loss arising from non-use of the vehicle. Furthermore as far as the Toyota land cruiser vehicle is concerned, the Plaintiff is an agent of the owner for purposes of exporting the vehicle to Rwanda. I am therefore of the considered opinion that the claim of the Plaintiff is founded on unclear premises in so far as the Plaintiff seeks to rely on the cause of action of negligence and fraud. This is because it is hard to conceive of cancellation of licenses, negligently or fraudulently in the circumstances of the case. All the allegations and evidence are about a claim to the effect that the Plaintiffs forwarding and clearing licence ought not to have been cancelled by the Defendant on the ground that the failure of the vehicle sought to be exported exiting Uganda was occasioned by the Defendant's servants and not the Plaintiff. In this kind of conception of the Plaintiff's case, there is no claim that the owner of the vehicle has lost anything. In other words the owner of the vehicle is not in the picture of the complaint. Secondly the Plaintiff is an agent of the owner of the vehicle. Going into the substance, the claim for taxes by the Defendant are a claim against a

client of the Plaintiff. There is no indication whatsoever that the owner of the vehicle on whose behalf the Plaintiff acted has lost anything other than having defaulted in paying taxes. The default or alleged default in the payment of taxes relate strictly to the allegation of the Defendant that the vehicle was not re-exported but consumed locally. There is a further allegation that the vehicle was fraudulently registered locally thereby evading taxes of over Uganda shillings 26,000,000/=. On the other hand the case for cancellation of the Plaintiff's licence is narrowed down to whether there are any grounds which justified the Defendant's action of suspending or cancelling the licence of the Plaintiff. In that context, the claim of negligence or fraud in the cancellation is misplaced because the cancellation cannot be fraudulent or negligent. It can only be on non-justifiable grounds, which claim as I have said earlier, is in the realm of administrative law and not tort law.

The crux of Plaintiff's actual claim is for unfair or unlawful or wrongful suspension of its licenses to do clearing and forwarding business. It is in the realm of administrative law and not tort because the actual action complained about is not related to the non-exportation of the vehicle or its registration in Uganda or indeed loss of the vehicle by the owner of the property. The claim is related to the suspension of the Plaintiff's licenses to do the clearing and forwarding business in Uganda. Because the action complained about is the alleged wrongful or unlawful suspension of the Plaintiff's licence, what are to be scrutinised are the grounds for suspension or cancellation of the licence. The issue as framed does not deal with the actual matter in controversy and the Plaintiff's case cannot be resolved on the basis of the first issue.

It is specifically averred in the plaint that before the suspension of its licence, the Plaintiff had been licensed by the Defendant to carry on customs clearing and forwarding business throughout Uganda. In other words it is apparent and disclosed by the plaint that the Defendant is the licensing authority which licensed the Plaintiff as well as the authority which suspended the Plaintiff from carrying out the licensed activity. In paragraph 6 of the plaint it is averred that the Plaintiff lost serious and many clientele following cancellation or suspension of its licence and clearing business and its bond has been rendered redundant and in operative for over a year. In paragraph 7 of the amended plaint it is averred that at the time of the unlawful or wrongful suspension from business around July 2011 the Plaintiff had been contracted by Benzina Petroleum Uganda Limited to clear certain properties thereby leading to loss of Uganda shillings 42,000,000/=. In paragraph 8 it is averred that the Defendant acted arbitrarily, oppressively and in a high-handed manner in unilaterally suspending or cancelling the Plaintiffs licence and clearing business without notifying or giving the Plaintiff a hearing for which the Plaintiff claims exemplary damages from the Defendant. Last but not least in paragraph 9 of the amended plaint the Plaintiff makes it clear that its case is that the alleged fraudulent and negligent actions or omissions of the Defendant's agents culminated into wrongful suspension or cancellation of its licence and clearing business from which it holds the Defendant liable in special, general and exemplary damages.

In a nutshell the crux of the Plaintiff's case is that due to the alleged negligence or fraudulent acts of the Defendant's servants, its licence was suspended. The claim for loss of earnings from the clearing business arises from the alleged wrongful suspension of the Plaintiff's clearing and forwarding licence. The court was addressed on the proposition by the Plaintiff that the Defendant is vicariously liable for the acts of its servants. Vicarious liability for the alleged negligence or fraudulent acts is further misplaced because they cannot relate to the exercise of statutory powers in the cancellation of the licence but are rather related to the allegations of negligence or fraud leading to damages. It is obvious that it is the Defendant who is responsible for licensing under the East African Community Customs Management Act 2004. To allege that it is vicariously liable suggests that it is liable for negligently suspending or fraudulently suspending the licence. Such a proposition cannot stand.

Because the claim is not in any way related proprietary interest in the vehicle which is the subject matter of the re-export and suspension of the Plaintiff, the only valid conclusions that can be made is that the Plaintiff's case hinges on alleged arbitrary and oppressive suspension of its clearing licence by the Defendant servants. There is no allegation that the suspension of the licence was fraudulent. He is only alleged that the suspension is wrongful or unlawful. I have been at pains in trying to pinpoint the actual matter in controversy as far as legal doctrine is concerned. The alleged arbitrary action must mean an action without regard to the rules of procedure or the right to a fair hearing. Indeed the Plaintiff alleges that its suspension was made without notification or a hearing.

In the circumstances issue number one cannot be resolved as framed but the submissions in relation to it can be combined with the issue of whether the Defendant wrongfully and unlawfully suspended the Plaintiff from the clearing business. In other words the only element which discloses the grounds for saying that it is the Defendant servants are responsible for failure of the vehicle to exit the country can be resolved under the issue of whether the Defendant wrongfully and unlawfully suspended the Plaintiff from the clearing business. Consequently the issue of whether the Defendant acted negligently and fraudulently in matters relating the suit vehicle is resolved in the negative on the above premises.

### **Whether the Defendant wrongfully and unlawfully suspended the Plaintiff from the clearing business?**

The Plaintiff's submission on this issue is that exhibit P5 discloses that the Plaintiff was suspended because it failed to exit the vehicle and later fraudulently had it registered locally without paying taxes of Uganda shillings 26,400,840/=. The crux of the Defendant witness testimonies are that the Plaintiff was suspended because it failed to exit the vehicle out of the country and secondly that the Plaintiff was suspended from the business because it did not show proof of exit and the bond was still outstanding. The Plaintiff Counsel submitted that the power to revoke and suspend licences is statutory. Its clearing licence can only be suspended, revoked or refused when the holder has been found guilty of an offence under customs laws or has been

*Decision of Hon. Mr. Justice Christopher Madrama*

convicted of an offence involving dishonesty or fraud or for any other reason that the Commissioner may deem fit under section 145 (3) of the East African Community Customs Management Act. It is the Plaintiff's case that there is no evidence that the Plaintiff was found guilty by a court of law for an offence under the customs laws neither is there any evidence that the Plaintiff has been convicted of dishonesty or fraud. The Plaintiff's Counsel submitted that the issue is whether the Commissioner acted under the ground of any other reason he or she deemed fit.

Counsel contends that such powers are not limitless to include anything under the sun. The powers in the proviso have to be construed ejusdem generis in relation to matters within breach of customs laws or offences involving fraud or dishonesty otherwise the Commissioner may use such powers to settle personal or private scores.

As far as the evidence is concerned it is the Plaintiff's case that it is the Defendant who had possession of the vehicle and whose agents diverted it from the exit point and registered it locally amounting to fraud and negligence for which the Plaintiff cannot be liable. Counsel reiterated submissions on the first issue addressed above. Counsel further submitted that on the basis of the fraud and negligence of the Defendant's servants, the Defendant cannot be permitted under the common law doctrine which does not permit a party to reprobate and approbate at the same time, asserted that the vehicle did not exit Uganda and that the bond has remained outstanding when the failure to exit was the fraud or negligence of the Defendant's servants.

Alternatively if the court finds that the Plaintiff is responsible for the disappearance of the vehicle, the Plaintiff suspension is unlawful or wrongful. The vehicle had a bond in force of Uganda shillings 26,405,840/= according to exhibit P5 and exhibit D4. The bond was executed pursuant to statutory requirements under sections 106 and 107 of the EACCMA. Where there is a breach of bond terms, the Surety which is the insurance company becomes personally liable as if it were the principal debtor under section 108 (1) of the EACCMA. The Defendant ought to have resorted to and enforced the bond guarantees from the Plaintiff to recover the taxes in accordance with section 109 (1) of the EACCMA but has refused to do so. Counsel submitted that the taxation powers must not be exercised wantonly, capriciously or vindictively to punish the taxpayer but rather judiciously. The Defendant chose to exercise its powers vindictively, capriciously and wantonly to punish the Plaintiff for the fault attributed only to the Defendant. In the circumstances the Plaintiff's Counsel prayed that the court finds the suspension of the licence or business as unlawful, wrongful or unjustified.

### **Submissions of the Defendants Counsel on issue number 3.**

The Defendant's defence is that the Defendant rightly and lawfully suspended the Plaintiff from the clearing business under section 145 (3) of the EACCMA. The Defendant granted the Plaintiff permission to re-export under a number of conditions listed under exhibit D2 but none of the conditions were fulfilled by the Plaintiff. The suit vehicle which was handled by the Plaintiff

neither exited nor paid taxes. Consequently the Plaintiff acting on behalf of the client did not follow the customs procedures prescribed and became liable to the sanctions under the enactment. Furthermore Counsel submitted that the powers of the Commissioner under section 145 of the EACCMA were misinterpreted by the Plaintiff's Counsel. This section gives the Commissioner wide powers to grant licenses to agents and revoke or suspend licences on the ground that the applicant or holder has been found guilty of an offence under customs laws or has been convicted of an offence involving dishonesty or fraud or for any other reason that the Commissioner may deem fit.

The Commissioner used his discretionary powers to suspend the Plaintiff on the ground that the suit vehicle never exited Uganda and taxes were never paid. The Defendant's Counsel prayed that the court finds that the Plaintiff was responsible for the disappearance of the suit vehicle. Consequently enforcement of the bond in force of Uganda shillings 26,405,840/= is premised on the guilt of the Plaintiff.

**In rejoinder the Plaintiff's Counsel** reiterated earlier submissions that the suit vehicle was fraudulently and negligently diverted and later registered locally by the Defendant through its agents and not the Plaintiff. The Defendant cannot benefit from its own fraud and negligence which in effect would be approbation and reprobation. It cannot blame the Plaintiff for the actions or omissions of its on agents/servants. Alternatively if the tax was due as alleged, the Defendant ought to have resorted to penalty or enforced the bond which is security for the tax.

**Resolution of issue number 3: whether the Defendant wrongfully and unlawfully suspended the Plaintiff from clearing business?**

I have carefully considered the submissions on the question of whether the Defendant wrongfully and unlawfully suspended the Plaintiff from the clearing business. The first issue for consideration is whether the Commissioner has powers to suspend a licence without a licensee being found guilty of an offence under the East African Community Customs Management Act, 2004 or any other law. The question of whether the ground for suspension or revocation of a licence is the established guilt of the licensed person is a question of law and depends on the interpretation of section 145 (3) of the East African Community Customs Management Act, 2004 which provides as follows:

"The Commissioner may refuse to issue a licence or may by order, suspend or revoke or refuse to renew, any such licence on the ground that the applicant or holder has been found guilty of an offence under the Customs laws or has been convicted of an offence involving dishonesty or fraud or for any other reason that the Commissioner may deem fit."

The above provision enables the Commissioner to revoke or refuse to renew any licence on the ground that the applicant has been found guilty of an offence under the customs laws. Secondly

the Commissioner may refuse to renew or revoke any licence on the ground that the applicant or a person has been convicted of an offence involving dishonesty or fraud. In the first case, the ground for revocation or suspension of a licence is the guilt of a person under the Customs laws. The second ground is the conviction for any other offence not under customs laws involving dishonesty or fraud. The third possible ground is for any other reason that the Commissioner may deem fit.

Any other reason that the Commissioner may deem fit cannot fall under the ground of the guilt of a person for an offence under the customs laws. Specifically the guilt referred to under section 145 (3) of the EACCMA is guilt for an offence defined by the Customs laws. "Customs laws" has been defined by the East African Community Customs Management Act section 2 (1) thereof to include the East African Community Customs Management Act, Acts of the Partner States and of the community relating to Customs, relevant provisions of the Treaty, the Protocol, Regulations and Directives made by the Council and relevant principles of international law.

I do not agree with the Defendant's Counsel that the Commissioner has wide discretionary powers under section 145 (3) of the EACCMA under the proviso: "for any other reason that the Commissioner may deem fit". Section 145 (3) (supra) limited the scope of the proviso by providing for specific grounds under this section and giving the commissioners powers to suspend for other reasons other than those stipulated in the section. The ground relied upon by the Defendant is clearly stated in exhibit P5 which is a letter written for the Commissioner customs Department addressed to the advocates of the Plaintiff to the effect that the Plaintiff was involved on 4 February 2011 in fraudulent processing of re-export entry number E4361 for one unit used Toyota land cruiser. The vehicle in issue was released from the bonded warehouse but did not reach its purported destination in Rwanda. The Defendant in the letter further alleged that the unit was later on fraudulently registered as UAP 759Q without payment of the requisite taxes.

In the submissions of the Defendant's Counsel and the testimony of the Defendant's witnesses what was being alleged is the commission of an offence under the Customs Laws. The Defendant's Counsel specifically submitted that under regulation 104 (22) of the EACCMA Regulations, any person who diverted from the transit route specified in the sub regulation 4 of any goods for re-export commits an offence and is liable to a fine not exceeding 50% of the value of the goods and the goods which are the subject of the offence shall be liable to forfeiture. Furthermore the Defendant's Counsel relied on section 200 (d) (iii) of the EACCMA and submitted that there was commission of an offence under that section by the Plaintiff by concealing uncustomed goods. The ground for suspension of the Plaintiff's licence is therefore the alleged commission of an offence under the Customs Laws as defined by section 2 of the EACCMA. The Defendant cannot rely on the proviso to section 145 (3) for the Commissioner to suspend or revoke a licence for any other reason that the Commissioner may deem fit. By using the phrase "for any other reason that the Commissioner may deem fit", legislature clearly

intended the other reasons to be reasons other than those already prescribed or provided for by section 145 (3) of the East African Community Customs Management Act. In other words any other reasons that the Commissioner may deem fit for the suspension of the licence of a licensed person cannot be for a ground expressly provided for under section 145 (3) but for any other grounds not expressly provided for. The commission of an offence or the guilt of a person for the commission of an offence under customs laws as defined is expressly provided for and does not fall under the ground of “any other reason that the Commissioner may deem fit”.

In the premises I agree with the Plaintiff’s position submitted by Counsel that the suspension or revocation on the ground of commission of an offence under customs laws can only be possible or lawful if a person has been found guilty of an offence under the customs laws. In other words the person has to be prosecuted for an offence and found guilty by a competent court for the licence to be suspended under section 145 (3) of the EACCMA. For the licence to be suspended for any other reason that the Commissioner may deem fit, it has to be for any other reason other than being guilty for an offence under the customs laws or the conviction for an offence involving dishonesty or fraud under other laws other than customs laws. Finally it is clearly the case that the Commissioner of customs purported to suspend the Plaintiff’s licence for an offence under the East African Community Customs Management Act, 2004. Because the Commissioner cannot determine the guilt of a suspect for an offence, to suspend a person for those reasons would be arbitrary and not based on statutory grounds provided for by section 145 (3) of the EACCMA. This conclusion is further supported by the evidence of the Plaintiffs witnesses generally and specifically that of PW1 to the effect that the Plaintiff has a lot of clientele. The clientele includes the New Vision, according to exhibit P9, Foneplus according to exhibit P8, Central Inn Ltd according to exhibit P 11, Olitec International according to exhibit P12, Orient Bank Ltd according to exhibit P 13, Eliana Agencies Ltd according to exhibit P 14, Makerere University according to exhibit P 15 and several others. I have also examined the audited financial statements of the Plaintiff for the year ending 30 June 2011 audited by Greenfield and Co Certified Public Accountants. To suspend the Plaintiff for a transaction involving one vehicle from one individual without compliance with the provisions of section 145 (3) of the East African Community Customs Management Act would have grave implications on the business undertakings of the licensed person.

In those circumstances the suspension of the Plaintiff’s licence was arbitrary and contrary to the provisions of section 145 (3) of the East African Community Customs Management Act. Before taking leave of the matter, it is my further finding that the Defendant’s officials had alternative ways and remedies for dealing with their case for recovery of taxes from the Plaintiff.

In the first premises the Plaintiff is an agent acting on behalf of a principal who was not made a party to any proceedings concerning the matter. Any payment of taxes has to be on behalf of the principal. The principal is liable for the acts of the agent. For the above reasons, the issue of alleged misconduct of the Plaintiff has to be examined in its totality so as to exclude the



possibility that the principal is culpable as well. This is further in light of the fact that the Plaintiff also acts on the behalf of several other clients. I have already indicated that there is no allegation that the property got lost as far as the principal is concerned. Secondly there seems to be no attempt and in fact there seems to have been no credible attempt at all by the Defendant's servant to impound the vehicle the subject matter of the re-export. Such a vehicle would be liable to forfeiture for payment of taxes. There is no evidence of the whereabouts of the vehicle. Moreover even if the vehicle was registered fraudulently, it was registered by the Defendant's registry and information about the registration is deemed to be with the Defendant and not any other person. Thirdly, the principal was not involved in the picture for the claim of taxes. Last but not least the primary reason for suspension of the Plaintiffs licence is the failure of the Plaintiff to produce evidence of exit of the vehicle out of the country. In the same breath the Defendant is suggesting that the vehicle has been fraudulently registered. There is no basis for disbelieving the evidence adduced on behalf of the Defendant that the vehicle has been fraudulently registered in Uganda. Indeed it is the Plaintiff's case according to the admitted documents that the vehicle had been registered in Uganda. This evidence is exhibit P2 which is a letter written to the Transit Monitoring Unit of Uganda Revenue Authority. The letter is dated 10th of March 2011 signed on the behalf of the Plaintiff. The Plaintiff wrote inter alia as follows:

“... And above all, we remain wondering why (or) how the unit ended up in the hands of wrong people who went ahead and registered it without our knowledge and URA (TMU) since it was for re-export to Rwanda via Katuna. We therefore request your office to provide manpower so that the vehicle is brought for accountability.

We also request you to give us some time to look/jointly for the above unit and if possible bring it to URA premises for accountability.”

In another letter exhibit P3 the Plaintiff wrote to the manager Transit Monitoring Unit of the Defendant. The letter is dated 15th of July 2011. In that letter they allege that they had discharged their duty at the time of handing over the unit to a soldier by the names of Etigu Said. They also suggested that wrong persons diverted the unit and were arrested. No further details of the wrong persons who are said to have diverted the unit were given in writing or in the oral testimonies. A conclusion can therefore be made that the vehicle did not exit the country but remained in Uganda and was registered as UAP 759Q and it was up to the Defendant's servants to apply practical recovery measures for import duty.

That takes me to the final point which is the bond undertaken as security exhibit D2. Exhibit D2 is dated third of February 2011 and is addressed to Mr Mudde Musa, the owner of the vehicle and is the permission to re-export the vehicle to Rwanda. Permission was granted subject to 9 conditions. Paragraph 2 thereof provides that the exporter must take full responsibility of delivering the vehicle to the exit point. Secondly it is provided that any activity performed contrary to the procedural requirements discharges the order and attracts Customs legal

sanctions. It further provides that the unit must move under physical escort at the cost of the principal.

The vehicle cannot be released to any other person other than the principal or his agents. I do not believe the testimony of the Plaintiff's witnesses that the vehicle was released to the escorts. Escorts are only provided for purposes of customs control but the vehicle is released from the bond to the owner or agent under escort. On this ground I believe the testimony of Sarah Mirembe to that effect. Secondly I believe the testimony that the driver who drove the vehicle out of the bond was the Plaintiff's servants. Secondly the owner or agent who was the Plaintiff undertook to have full responsibility for exiting the vehicle at the point of exit. The fact that the goods remained under customs control was only for purposes of ensuring that the goods exited the country. In retrospect if the Defendant neglected to provide sufficient escorts to ensure that the goods exited the country, would the Defendant be liable for any taxes evaded? I do not think so. If there is evidence of negligence on the part of any escorts, that would be the subject of disciplinary proceedings. The owner of the goods in the absence of allegations that the goods were stolen by the Defendant's servants remains responsible to the customs authorities and liable to pay taxes which are due. This is supported by exhibit D2 which is the permission to re-export the vehicle in question. Paragraph 2 of the conditions for re-export provides that the exporter shall take full responsibility of delivering the vehicle to the exit point. Paragraph 4 of the conditions of re-export is self revealing. It provides that the goods still remain under customs control until they exit. Secondly should any problems occur during the transit journey the Transit Monitoring Unit must be notified. It is apparent from reading paragraph 4 of the conditions that the goods would have been handed over for re-export to the exporter or agent who had a duty to ensure that the transit monitoring unit is notified if any problems occurred during the transit journey. Specifically the provision providing for escorts is paragraph 9 of the conditions of re-export which reads as follows:

"This unit must move under physical escort at your own costs."

In other words the escorts were there not to take charge of the vehicle or of the goods but to escort the goods. The goods would be under the control and possession of the exporter and the escorts costs are even paid for by the exporter. The documentary evidence does not indicate anywhere that the escorts had possession of the goods at any one time. Evidence further revealed that the person who drove the vehicle was a driver of the Plaintiff. In the circumstances of the case, the Defendant has established that the vehicle was not re-exported but registered in Uganda. The Defendant would be concerned with the diversion of the vehicle to Uganda as a strategy to evade tax. The Defendant was able to establish that the vehicle was fraudulently registered. It was incumbent upon the Defendant to impound the vehicle until the law is enforced. A reasonable explanation has to be given as to the whereabouts of the vehicle.

In conclusion the suspension of the Plaintiff's licence without seeking to enforce other provisions of the law for purposes of realising taxes and without undertaking prosecution of any

*Decision of Hon. Mr. Justice Christopher Madrama*

suspects and having the suspects subjected to criminal proceedings before an independent and impartial court or tribunal was arbitrary.

Issue number 2:

**Whether the Plaintiff is liable to pay the outstanding tax liability of Uganda shillings 26,405,840/=?**

Again the way issue number two has been framed assumes that there is a counterclaim for the amount. The only value for resolving the issue can be for purposes of ascertaining whether to exclude the liability of the Plaintiff for the taxes.

I have carefully considered the issue. The issue cannot be resolved in the manner suggested by Counsel for the parties. Tax liability is a liability arising from a taxable activity. The taxable activity is the registration of the Toyota land cruiser in Uganda when there was an application and undertaking to have it exit the country. Failure to have the vehicle exit the country is breach of exhibit D2 which gives the terms of the licence to re-export the vehicle to Rwanda. Alleged fraudulent re-registration of the vehicle in Uganda has the effect of evading tax only if import duty was not paid. The only matter to be established is the whereabouts of the vehicle. It is upon the Defendant to establish where the vehicle is in the absence of which it should enforce the bond or prosecute the suspected culprits and apply recovery measures. That is the mandate of the Defendant and the court cannot determine how the taxes are to be recovered. For instance the taxes can be recovered from the taxpayer. The taxpayer may be liable for the acts, subject to proof, of the Plaintiff. Section 146 (1) of the EACCMA stipulates that the owner of any goods may act through an agent. Under section 147 of the EACCMA, an agent who performs any act on behalf of the owner of any goods shall for the purposes of the Act shall be deemed to be the owner of such goods and shall accordingly be personally liable for the payment of any duties to which the goods are liable or the performance of all acts in respect of the goods which the owner is required to perform under the Act. Finally the proviso to this section provides as follows:

"Provided that nothing herein contained shall relieve the owner of such goods from such liability."

The liability of the agent supports the duty of the agent to act on behalf of the owner of the goods to carry out such duties as are prescribed without reference to the owner. That liability is not necessarily liability for misconduct. The issue of misconduct has to be handled on its own merits. The fact that the owner is not relieved of such liability (for the payment of duties in respect of goods) is further supported by the provisions of section 148 which reads as follows:

"148. An owner of any goods who authorises an agent to act for him or her in relation to such goods for any of the purposes of this Act shall be liable for the acts and declarations of such duly authorised agent and may, accordingly, be prosecuted for any offence

committed by the agent in relation to any such goods as if the owner had himself or herself committed the offence:

Provided that –

(i) an owner shall not be sentenced to imprisonment for any offence committed by his or her duly authorised agent unless the owner actually consented to the commission of the offence;

(ii) nothing herein contained shall release the duly authorised agent from any liability to prosecution in respect of any such offence."

The provision to make the agent liable for the offence committed on behalf of the owner gives discretionary powers to the Commissioner to decide whether to prosecute the agent or the owner or both. The liability for payment of customs dues on the other hand of the agent is an administrative convenience to enable the agent and Uganda Revenue Authority deal with the issue of payment of customs dues without reference to the owner of the goods. The agent fully stands in the shoes of and on behalf of the owner of the goods and for purposes of customs duties is deemed to be the owner of the goods. The terms of the relationship between principal and agent are a matter between the agent and his or her principal. Criminal liability on the other hand is a matter that has to be handled on its merits and all depends on the facts of each case. In this case the issue has not risen as apparently there has been no prosecution of the agent or owner of the goods or any other person for any breach of customs laws. The conclusion is that the liability for Uganda shillings 26,405,840/= can only be imposed on the Plaintiff as an agent of the owner of the goods. In conclusion therefore, upon establishing the tax liability for the taxable activity of import in the relevant transaction of registration of the vehicle which was due for re-export to another country, the consequent liability for import duty can be imposed on the agent. How the agent recovers the money from the principal is not the concern of the Defendant. The Defendant has an option to impose the liability on the agent. The issue of whether the Plaintiff is liable for the taxes depends on whether the taxes are due and is a matter for determination by Uganda Revenue Authority. The taxes can be imposed on the basis of exhibit D2 which gives the terms of the re-export. Failure to have the goods exit makes the Plaintiff liable which liability may also be imposed on the owner of the goods. As I have held earlier on, the primary responsibility to have the vehicle exit was undertaken by the owner of the goods. Escorts were only meant to ensure that the goods remained under customs control for purposes of exiting the country. The failure of the escorts does not take away the liability of the Plaintiff to comply with the terms of the bond reflected in exhibit D2. The Defendant does not provide the driver or fuel the vehicle. The driver remained the driver of the Plaintiff/owner of the goods and the goods remained in possession of the exporter. In those circumstances the Plaintiff is liable to pay the taxes due and issue number two is resolved in favour of the Defendant.

#### **Issue 4 on remedies available**

*Decision of Hon. Mr. Justice Christopher Madrama*

On the question of remedies the Plaintiff's Counsel submitted that the Plaintiff is entitled to a declaration that the cancellation or suspension of its licenses and clearing business is unlawful/wrongful or unjustified.

Secondly the Plaintiff seeks an order of reinstatement of its licence. The licence was suspended because the vehicle did not exit at the point of exit and was fraudulently registered without paying tax of Uganda shillings 26,405,840/=. Counsel reiterated submissions that the suspension was unlawful, wrongful or unjustified under the submissions on the fraud and negligence of the Defendant in diverting the vehicle from the point of exit.

In reply the Defendant's Counsel submitted that the Plaintiff is not entitled to any of the prayers sought since it was at the time responsible for the suit vehicle and no tax had ever been paid. Alternatively the Defendant's Counsel prayed for a declaration that the cancellation or suspension of the Plaintiff's licence was lawful and an order against the Plaintiff to pay outstanding tax of Uganda shillings 26,405,840/= for the suit vehicle, interests and costs of the suit.

On the question of declaration that the suspension of the Plaintiff's licence was wrongful, unjustified or unlawful, the court has already determined the issue and held that a suspension on the ground of breach of customs laws can only arise under 145 (3) of the EACCMA where a licensed person has been found guilty of an offence under Customs laws. A person cannot be found guilty of an offence without prosecution before an independent and impartial tribunal or court established by law under article 28 (1) of the Constitution of the Republic of Uganda. It is also the finding of the court that the goods never exited the country and it was the primary responsibility of the Plaintiff, acting on behalf of its client, to account to the Defendant which it has not done up to the time the court was addressed on the matter. Furthermore declaratory judgments or orders are made under order 2 rule 9 of the Civil Procedure Rules which enables the court to make binding declarations of right whether any consequential relief is or could be claimed or not.

In the premises the court will issue a specific and narrow declaration in scope under order 2 rule 9 of the Civil Procedure Rules to the effect that suspension or revocation of a licence under section 145 (3) of the East African Community Customs Management Act on the specific ground of breach of customs laws through commission of an offence has to be preceded by proceedings before an independent and impartial tribunal leading to a finding of guilt for an offence under customs laws. This declaration does not exclude other grounds enabled by section 145 (3) of the East African Community Customs Management Act for suspension or revocation of a licence.

On the question of reinstatement of a licence, it is an agreed fact that the Defendant suspended the Plaintiff from business. The agreed fact does not specify how the Plaintiff was suspended from business. However details of the suspension can be found in exhibit P5 dated 12<sup>th</sup> of January 2012 from the Commissioner customs Department and addressed to lawyers of the

Plaintiff. The last paragraph of the letter gives the information about the nature of the action taken by the Commissioner in respect of the agency licence of the Plaintiff and it reads as follows:

"You may wish to note that the motor vehicle in issue was bonded with a bond in force (BIF) of Uganda shillings 26,405,840/= which is equivalent to the taxes that would be payable on the vehicle and in order to enforce accountability we are constrained to deny your request for lifting suspension of agency licence of your client."

It is apparent that the Plaintiff's licence was only suspended. No further information was given about the duration of the licence. It is unknown whether this licence has since expired. Following a declaration that the suspension did not follow the procedure of prosecution for an offence under the EACCMA, the only order that this court will make is an order lifting the suspension issued contrary to section 145 (3) of the East African Community Customs Management Act. Consequently the order of suspension, suspending the Plaintiff from being an agent is lifted.

### **Whether the Plaintiff is entitled to special damages?**

On this issue, Counsel for the Plaintiff submitted that the Plaintiff is entitled to Uganda shillings 68,405,840/= as pleaded in the amended plaint. Uganda shillings 26,405,840/= is the value of the bond in force. Secondly Uganda shillings 42,000,000/= is money lost on 21 of 35 containers the Plaintiff was contracted to clear by its client.

I have carefully considered the prayer for special damages. The Plaintiff cannot be awarded Uganda shillings 26,405,840/= because the court has held that it is liable to pay taxes as an agent of the owner of the goods. The court also held that there is no evidence of any complaint by the owner of the goods that the vehicle has been lost. It is admitted that the vehicle was registered in Uganda and this was without payment of taxes worth the said amount of Uganda shillings 26,405,840/=. In the premises the claim for Uganda shillings 26,405,840/= is disallowed.

Concerning the claim for loss of earnings of Uganda shillings 42,000,000/= on the basis of agency fees I will generally consider the law before a conclusion on all the claims.

According to Oxford Dictionary of Law fifth edition at page 217:

Special damages are given for losses that are not presumed but have been specifically proved. ...are damages given for losses that can be quantified, such as out-of-pocket expenses or earnings lost during the period between the injury and the hearing of the action."

According to Words and Phrases Legally Defined volume 2 at page 8 the term "special damages" or "special damage":

"Relate to past pecuniary loss calculated at the date of trial, whilst 'general damage' or 'general damages' relates to all other items of damage whether pecuniary or non-pecuniary.... 'Special damages' refers to past expenses and loss of earnings...

"Special damages"... are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character, and, therefore, they must be claimed specially and proved strictly. In cases of contract, special or exceptional damages cannot be claimed unless such damages are within the contemplation of both parties at the time of the contract (*Stroms Bruks Akt Bolag vs. Hutchinson* [1905] AC 515 at 525, 526, per Lord Macnaghten).

The first observation to be made is that the special damages claimed do not arise from tort or contract. They arise from breach of duty to give the Plaintiffs a fair hearing or not to suspend the licence without the statutory grounds having been proved in a criminal proceeding. The special damages are based on loss of business due to suspension of the licence. Before considering the law, I would like to review the evidence the Plaintiff relies on for the claim of special damages.

The Plaintiff relies on exhibits P17, P18 and P19. Exhibit P17 is a letter authorising the Plaintiff to clear goods. Exhibit PE 18 is a draft Bill of lading. Finally exhibit P19 is an assessment notice showing that the assessed amount in taxes. It does not indicate agency fees which would be due to the Plaintiff. As far as special damages are concerned, the Plaintiff seeks to recover Uganda shillings 45,000,000/= in monthly income for loss of agency fees from July 2011 till judgement. The Plaintiff's Counsel submitted that the loss has not been challenged by the Defendants Counsel in the testimony of Mawanda. Counsel relied on the case of **Yoka Rubber Industries Ltd versus Diamond Trust Properties HCCS number 685 of 2006** where Honourable Justice Egonda-Ntende (judge of the High Court) as he then was held that where no actual loss of income was proved, he would award a lump sum figure for general damages for loss of earnings for nine years being the period of detention of the goods. In the premises Counsel prayed for an award of **Uganda shillings 1,395,000,000/=** as the accumulated monthly earnings lost by the Plaintiff from July 2011.

I have duly considered the claim for special damages in the context of the Plaintiff's cause of action which is the suspension of the Plaintiffs licence without regard to the grounds stipulated under section 145 (3) of the EACCMA. The Plaintiff claims damages from July 2011 up to the time of trial. The Plaintiff's suit was filed in this court on 26 April 2012. This is close to nine months from the time of commencement of the claim. Exhibit P5 indicates that the matter arose early in 2011. The exact date of the suspension is not specified in the documentary evidence. However exhibit P4 indicates that the Plaintiff's lawyers wrote to the Defendant on 27 July 2011 concerning the closure of the company/Plaintiff. Consequently the Plaintiff's complaint must have arisen within or before July 2011. The claims of the Plaintiff are with effect from July 2011 and it is inferred that the licence was suspended around that time.

Section 221 (1) of the East African Community Customs Management Act provides that the proceedings enabled by the EACCMA may be brought against the Commissioner. Further provisions of the EACCMA provide for appeals by aggrieved persons from the decision of the Commissioner. Section 229 (1) of the EACCMA provides that a person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to customs shall within 30 days of the date of the decision or omission lodge an application for review of that decision or omission. Section 229 (2) of the EACCMA provides that the application for review shall be lodged with the Commissioner in writing stating the grounds thereof. The Commissioner is required within a period not exceeding 30 days of the receipt of the application to communicate the decision in writing to the person lodging the application for review and stating the grounds for the decision.

Under section 230 a person dissatisfied with the decision of the Commissioner on appeal for review may appeal to a tax appeals tribunal established in accordance with section 231 of the EACCMA. Last but not least section 253 of the EACCMA provides that the Act shall take precedence over the domestic laws of the Partner States.

It was incumbent upon the Plaintiff to appeal or apply for review to the Commissioner of the decision to suspend its licence. There is no evidence of any application for review under the provisions of section 229 of the East African Community Customs Management Act, 2004 by the Plaintiff. The Plaintiff simply sat on its rights and subsequently within a period of nine months filed the current suit. In so far as the characterisation of the suit is properly an administrative lawsuit, the provisions of the East African Community Customs Management Act prevail over domestic laws on remedies available. Notwithstanding the overriding effect of the EACCMA over domestic legislation even the Judicature (Judicial Review) Rules, 2009 provides for applications for judicial review of administrative action. An application may be made for an order of certiorari, mandamus or prohibition. In an application for judicial review, the decision of the Commissioner could have been the subject to scrutiny for fairness or to establish whether there are any grounds for judicial review of the decision to suspend licence and issuance of prerogative orders for the remedy.

Such applications for review have to be made promptly and within three months from the date the grounds for judicial review arose under rule 5 of The Judicature (Judicial Review) Rules, 2009. Under rule 8 thereof, the court may award damages in an application for judicial review. As noted above the East African Community Customs Management Act restricts the period for applications for review of the Commissioner's decision or omission to 30 days. Thereafter there is a further right of appeal to the Tax Appeals Tribunal. Without deciding whether an application for judicial review may be made under the Judicature (Judicial Review) Rules, 2009, both the domestic law and the East African Community Customs Management Act apply a limitation period for applications for review of the Commissioner's decision.



The inevitable conclusion is that the Plaintiff did not exhaust the available remedies open to it. The effect of the inaction of the Plaintiff is that the Plaintiff did not mitigate losses which accrue on a monthly basis as claimed by making a prompt application challenging the decision to suspend its license. Secondly the Plaintiff cannot claim special damages for the periods claimed in the plaint as it did not seek to mitigate its losses by seeking a prerogative remedy using the procedures provided for under section 229 of the East African Community Customs Management Act or under the Judicature (Judicial Review) Rules, 2009. Thirdly the Plaintiff did not apply for extension of time within which to seek the remedies provided for under the laws referred to above so as to seek the remedies promptly and without aggravation of losses.

In those circumstances the claim of special damages of Uganda shillings 1,395,000,000/= which covers periods substantially outside the contemplation of the statutory period for resolution of the dispute cannot be sustained. This is primarily because an application for review is to be made within 30 days of the decision of the Commissioner and the Commissioner is obliged to render a decision within a further 30 days from the time the application is lodged giving a period of a maximum of 60 days for the applicant to have had an opportunity to redress the grievance caused by suspension of its licenses.

As far as the claim for general damages is concerned, an award of general damages is supposed to flow as a natural consequence of any breach of the rights of the Plaintiff. However, the Plaintiff sat on its rights due to inaction and the same holding on failure to mitigate losses applies. The Plaintiff never appealed by way of an application for review to the Commissioner or subsequently to the Tax Appeals Tribunal as prescribed under the East African Community Customs Management Act neither did the Plaintiff apply for judicial review for an order of mandamus, certiorari, prohibition and/or an injunction or damages under the Judicature (Judicial Review) Rules, 2009.

Order 2 rule 9 of the Civil Procedure Rules permits the High Court to make a binding declaratory order or judgement whether consequential relief is or could be claimed or not. The basis of the order of the court is a suit to declare the acts of the Commissioner unlawful. However a declaratory order may be made without reference to the enforcement of the order or indeed without any consequential relief according to the wording of order 2 rule 9 of the Civil Procedure Rules. In those circumstances and having regard to the principles enshrined in article 42 and 28 (1) of the Constitution of the Republic of Uganda, it is my conclusion that the Plaintiff was subjected to unfair treatment by the Defendant's servants through non-compliance with section 145 (3) of the East African Community Customs Management Act. In such circumstances, an award of damages for breach of the Plaintiff's rights is discretionary.

I cannot hold that the Plaintiff does not have a cause of action on the basis of the limitation periods under the EACCMA and the Judicature (Judicial Review) Rules, 2009 having established that the action taken against the Plaintiff was done without regard to the provisions of law. Notwithstanding the fact that the Plaintiff did not assert its rights within the prescribed

*Decision of Hon. Mr. Justice Christopher Madrama*

periods as enabled by the relevant statute and rules of procedure referred to above, the court will move under section 98 of the Civil Procedure Act and article 42 and 28 (1) of the Constitution of the Republic of Uganda to award damages for breach by the Defendant of the duty to act fairly in the suspension of the Plaintiff's licence.

Doing what is reasonable in the circumstances of the case, the damages claimed by the Plaintiff cannot be awarded in the sums claimed. The court has also established from the hard evidence that the suspension of the Plaintiff led to loss of business not only of prospective business but of clientele. The court cannot leave the Plaintiff without a remedy on basis of on the basis of the declarations that the suspension under section 145 of the East African Community Customs Management Act was not warranted in the circumstances. In the premises the Plaintiff is awarded Uganda shillings 30,000,000/= for breach of duty owed to the Plaintiff to be treated justly and fairly and in accordance with the prescription of section 145 (3) of the East African Community Customs Management Act which is the community law. The damages awarded shall carry interest at Bank of Uganda Commercial Rates per annum from the date of filing the suit until the date of judgement. Secondly the Plaintiff is awarded interest at 14% from the date of judgement till payment in full. The Plaintiff is also awarded costs of the suit.

Judgment delivered in open court this 11th day of February 2014

**Christopher Madrama Izama**

**Judge**

Judgment delivered in the presence of:

Oundo David Wandera counsel for the plaintiff

Plaintiff not in court

Golooba Rodney counsel for the defendant

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

11 February 2014