THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS CAUSE NO 14 OF 2014

KAWUKI MATHIAS}.....APPLICANT

VS

COMMISSIONER GENERAL

UGANDA REVENUE AUTHORITY}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant filed an originating Notice of Motion under section 98 of the Civil Procedure Act for orders that the Applicant's 1Ft x 20' container number ESPU2027680 of imported cargo comprising of AEROSOFT Sandals be immediately released to him and for costs of the suit.

The grounds of the application are that the Applicant is the importer and consignee of cargo in the aforementioned container containing the aforementioned the goods. Secondly the container arrived in Kampala on 18th of January 2014 and has since been held by the Respondent at Maina Internal Container Depot (ICD) together with containers of similar goods of other importers pending the determination by the Respondent of revised tax rates to be levied on the goods. Thirdly following the determination of the tax rate the Applicant's tax payable on the goods was assessed at Uganda shillings 43,542,708/= whereupon he proceeded and cleared the same. Fourthly after clearing the taxes the Applicant was issued with a release document but the container was intercepted by Uganda Revenue Authority officers at the Internal Container Depot for reasons which were not communicated to him. Fifthly the Applicant appealed in writing to the Commissioner for customs who has to date neither released the container nor assigned any reason for the continued retention of the container. Sixthly while goods continued to accumulate demurrage charges they are also in danger of been tampered with, damaged, or alienated or otherwise disposed of by the Respondent. Lastly the continued retention of the Applicant's goods is wrongful and unlawful and contravenes the Applicant's constitutional right against arbitrary deprivation of property as enshrined in article 26 of the Constitution of the Republic of Uganda.

The application is supported by the Applicant's affidavit which confirms the facts outlined in the notice of motion. Attached to the affidavit is annexure "D" which is the letter of appeal and is dated 12th of May 2014 and was received by Uganda Revenue Authority on the 12th of May 2014. The appeal is addressed to the Commissioner Customs Department Uganda Revenue

Authority and signed by the advocates of the Applicant. The assessment notice was printed on 8 February 2014. The Applicant's application was filed on the 19th of May 2014 and was issued by the registrar the same day.

At the hearing of the miscellaneous cause, the Applicant was represented by Counsel Augustine Twesigire while the Respondent was represented by Counsel Angela Nairuba Mugisha.

The Respondents Counsel objected to the suit on the ground that the Applicant's suit is prematurely instituted, bad in law and ought to be dismissed. She contends that the Applicant should have exhausted the procedures provided for under the **East African Community Customs Management Act** before filing the application.

Section 230 (1) of the **East African Community Customs Management Act, 2004** provides for appeals from a decision of a Commissioner under section 229 of the **East African Community Customs Management Act, 2004** to the Tax Appeals Tribunal established under section 231. Section 19 (1) of the **Tax Appeals Tribunal Act** provides for review of taxation decisions and the tribunal may exercise all powers and discretion conferred by the relevant taxing Act on the decision maker. They may in writing either affirm or vary the decision or set it aside.

In the present case the Applicant failed to take advantage of the procedure provided for under the **East African Community Customs Management Act, 2004.** The law is settled in the case of **Classic Automart Limited vs. Commissioner Customs URA MA 30 of 2009** where Hon. Justice Kiryabwire Geoffrey agreed and re-echoed the words of Bamwine in **Micro Care Insurance Ltd vs. Uganda insurance Commission MC 30 of 2009** and upheld a preliminary objection on account of the application being brought prematurely and he struck it out with costs. In that case the Respondent had raised a preliminary objection on similar grounds that the application was prematurely filed and for not having exhausted appeal procedures under section 231 of the **East African Community Customs Management Act, 2004.** Further in the case of **R vs. Chief Constable of Merseyside Police Ex parte Calveley and Ors [1986] 1 All ER 257** at 263, Lord May LJ held that where parliament has provided by statute appeal procedures as in taxing statutes, it will be rarely the case that court will allow a collateral procedure to be used. He further made reference to the decision of Lord Scarman in **Preston vs. IRC [1985] 2 All ER 237** at page 330.

Counsel submitted that the Applicant ought to have first have exhausted all the procedural requirements before filing this application. Finally in **Ashmore Vs. Corporation of Lloyds 1992 All ER 486 at 488** Lord Roskill held that unjustified shortcuts to a judge's docket should be eliminated. She prayed that the unjustified shortcut like the Applicant's application should be eliminated by dismissing it with costs.

In reply the Applicant's Counsel submitted the issue of first exhausting remedies under the **East African Community Customs Management Act, 2004,** is not applicable because the action

complained of by the Applicant was not taken by the Respondent in compliance with or pursuant to the **East African Community Customs Management Act, 2004.** The Act does not provide for arbitrary confiscation of an importers cargo.

Section 230 of **East African Community Customs Management Act, 2004** as submitted only applies where there has been a decision and the aggrieved party wants to appeal the decision. In this case there was no decision to be appealed against. If there is a decision it has to be made and communicated. No where does the Act provide for arbitrary confiscation of importers cargo. The application is premised on the ground that no reason was given for the confiscation. The Act provides for an appeal to the Tax Appeals Tribunal. The Applicant is not dissatisfied with a decision relating to tax matters. The issue of tax does not arise and there is no way he could have appealed to the Tax Tribunal. Section 19 (1) of the **Tax Appeal Tribunal Act** is about a taxation decision.

The Applicant wrote to the Commissioner customs but the Commissioner did not advance any reasons for confiscation of the Applicant's property. Had he done so, the Applicant would have considered the option of appeal. The cases cited by the Respondent's Counsel do not apply to the Applicant's case and the preliminary objection ought to be overruled with costs.

In rejoinder the Respondents Counsel submitted that section **214 (1) East African Community Customs Management Act, 2004** provides that where goods are seized or in the case of the officer effecting seizure, he or she shall give reasons therefore within one month. With reference to the affidavit in reply, the Applicant wrote to the Respondent on 12th of May 2014 demanding for the consignment. On 19th May 2014 the Respondent replied giving the reasons for confiscation. The Act provides for 30 days within which the Commissioner should make and communicate his or her decision. 30 days have not yet elapsed and the application is premature and ought to be dismissed with costs.

Ruling

I have carefully considered the Applicants application, the affidavit evidence, the submissions of Counsel and authorities cited.

The question before the court is whether this action can be maintained on the ground that it is premature, the Applicant having failed to utilise and exhaust the procedures provided for under the **East African Community Customs Management Act, 2004.**

Before launching into the issue as submitted by Counsel, I must observe that this Miscellaneous Cause was filed under section 98 of the **Civil Procedure Act** which saves the inherent powers of the court. **Section 98 of the Civil Procedure Act** provides as follows:

> "Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

Section 98 of the **Civil Procedure Act** does not enable the filing of an original application or suit because it merely saves the inherent powers of court which powers may be exercised under existing civil proceedings to make necessary orders for the ends of justice or to prevent abuse of the process of the court. This is not an application to make any necessary order or to prevent abuse of the process of court in a pre-existing civil proceeding.

The Applicant's application was made by way of Notice of Motion under the provision presumably of **Order 52 of the Civil Procedure Rules** which prescribes the procedure by notice of motion though it was not cited. The Applicant's application is by definition an originating motion because it purports to commence an action in the High Court when there is nothing pending before the court. It is not an interlocutory application but purports to be an original action commencing proceedings. Ordinarily an originating motions or originating chamber summons is prescribed by statute as the procedure for commencing an action in a court of law. An action can only be commenced in court in a manner prescribed as envisaged under the Civil Procedure Act.

The manner of institution of suits is defined by **section 19 of the Civil Procedure Act** which provides as follows:

> "Every suit shall be instituted in such manner as may be prescribed by rules."

This section is very explicit that every suit shall be commenced in such manner as is prescribed by rules. The Applicant has not indicated which rule prescribes the commencement of an action by notice of motion. Ordinarily **Order 52 of the Civil Procedure Rules** deals with notices of motion and is often taken to be for purposes of interlocutory applications. In fact **Order 4 rules 1 (1) of the Civil Procedure Rules** provides that:

> "Every suit shall be instituted by presenting a plaint in the court or such officer as it appoints for this purpose."

The rule strongly suggests that actions in courts of law are commenced by presenting a plaint to the prescribed officer appointed for that purpose. Exceptions to commencement of an action in the High Court by way of a plaint under **Order 4 rule 1 (1) of the Civil Procedure Rules** have to be prescribed by enactment which prescribes the procedure for commencing an action in the court. Other modes of commencement of actions are provided for by the **Civil Procedure Rules.** I will consider the provisions in more detail. Section 19 of the **Civil Procedure Act** merely provides that a suit may be instituted in any manner prescribed. **Section 2 of the Civil Procedure Act** defines a suit as all civil proceedings commenced in any manner prescribed. The word *prescribed* is also defined by the section 2 of the **Civil Procedure Act**. It means *prescribed*

by the rules. The conclusion on this point is that an action has to be commenced in court in the manner prescribed by the rules or other statutory provision.

It is ordinarily necessary to cite the rule which prescribes how a particular civil proceeding commenced. Common law emphasises the fundamentally of the procedure for the commencement of proceedings. Non-compliance with the rules for commencement of proceedings is normally fatal. Suits are instituted under order 4 rules 1 of the Civil Procedure Rules by presenting a plaint to the court or such officer as the court appoints. A suit may be presented under **Order 36** by summary procedure (Specially endorsed plaint). A suit is originated under Order 37 by Originating summons by executors, administrators, trustees under deed or instrument, and any other person as creditor, devisee, legatee, heir or cestui que trust (beneficiary), legal representative of a deceased person or representative of any of them by assignment. Petitions in Company matters are made under **Order 38** for certain causes or matters specified therein. It also provides that certain specified causes or matters may be commenced by motion or summons.

Other categories of suits are commenced under statutory provisions which prescribe the mode or manner of commencement of an action in court.

Generally non-compliance with the procedure for commencement of civil proceedings has been held to be fatal to the action in some cases decided prior to promulgation of the Constitution of the Republic of Uganda 1995.

In the case of **Nakito & Brothers limited vs. Katumba [1983] HCB 70** an application for a temporary injunction was made by notice of motion when there was no suit pending and it was held that non-compliance with the rules made the suit a nullity. I.e. a plaint had first to be first presented to commence any civil suit or action. In the case of **St Benoist Plantations Ltd versus Felix [1954] 21 EACA 105** Court of Appeal observed that there was no procedure in East Africa for originating motions and there is only provision prescribed in the Civil Procedure Rules for originating summonses. They observed that Originating Motions are a procedure imported from the UK. In the case of **Masaba versus Republic [1967) EA 488** proceedings were commenced by a document entitled notice of motion but were in fact chamber summons in form and substance and Sir Udo Udoma CJ held that the procedure under rules 3 and 4 of the **Civil Procedure (Fundamental Rights and Freedoms) rules 1963** provided for commencement of proceedings by originating motion. An application by chamber summons was incompetent and a nullity. (I.e. wrong procedure for commencement of an action was fatal in that case). **In Boyes vs. Gathure [1969] EA 385** an application for extension of a caveat was made to the High Court under section 57 of the Registration of Titles Act of Kenya by chamber summons. There was an objection at the appellate level that an application entitled as "chamber summons" was incompetent since a chamber summons was an interlocutory application and cannot originate or commence proceedings. It was held that an Act that provided for an application by summons refers to an originating summons. The essence of the cases are that notices of motions and

chamber summons are for interlocutory applications and cannot commence civil proceedings or suits unless specifically prescribed by the law under which they are made in which case they are originating summonses or motions. The above decisions are consistent with the provisions of section **19 of the Civil Procedure Act** which provides that civil proceedings are commenced in the manner prescribed by the rules.

The Applicant's application is not an application for judicial review under the **Judicature (Judicial Review) Rules 2009** for an order of mandamus, prohibition or certiorari or for an injunction under rule 3 thereof. Applications for judicial review are made by notice of motion in the form specified in the rules. Furthermore it is not an application for enforcement of fundamental rights and freedoms under **Article 50 of the Constitution**. It is simply an anomaly not prescribed by any rules or statutory provision. To make matters worse, it purports to be a suit seeking the final remedy the Applicant is seeking of releasing goods to the Applicant. In my opinion when Parliament or the Rules Committee prescribes either in an enactment or rules the manner of commencing an action, the prescription is not in vain and has to be complied with. The exercise of the inherent jurisdiction of the High Court under section 14 of the Judicature Act is that it is *subject to law*. Similarly the application of Article 126 of the Constitution of the Republic of Uganda is subject to law and I quote the relevant part of Article 126 (2) of the Constitution for emphasis:

> "(2) In adjudicating cases of both a civil and criminal nature, the courts shall, *subject to the law*, apply the following principles –…
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> (e) substantive justice shall be administered without undue regard to technicalities."

Any inherent powers of the court to administer substantive justice without undue regard to technicalities is subject to law and Parliament or the Rules Committee did not enact or issue those prescriptions about the manner of commencing an action in court in vain. The court ought to apply the rules with due regard to substantive justice as prescribed. As far substantive justice is concerned, an original suit ought not to be tried without the leave of court using affidavit evidence and therefore the application or the suit commenced by way of a notice of motion under **section 98 of the Civil Procedure Act** and seeking to rely on affidavit evidence is incompetent.

That notwithstanding, there was no objection to the procedure adopted by the Applicants/Plaintiff and in any case the court can still direct that the Applicant commences an ordinary action by presenting a plaint and then prove his case. The Respondent's Counsel has however raised preliminary objections on the competence of the suit on other grounds.

I have carefully considered the Respondents objection that the Applicants suit is premature because he has not exhausted the procedure or remedies prescribed by the **East African Community Customs Management Act, 2004**. The crux of the objection is that the Applicant ought to wait for the decision of the Commissioner upon his own letter of objection, objecting to

the respondent's acts or omissions. On the other hand the Applicant has a right of appeal for review by the Commissioner as a person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to customs. The relevant provision is section 229 of the **East African Community Customs Management Act, 2004**

Section 229 of the **East African Community Customs Management Act, 2004** provides as follows:

> "229.-(1) A person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to Customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission.
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> (2) The application referred to under subsection (1) shall be lodged with the Commissioner in writing stating the grounds upon which it is lodged.
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> (3) Where the Commissioner is satisfied that, owing to absence from the Partner State, sickness or other reasonable cause, the person affected by the decision or omission of the Commissioner was unable to lodge an application within the time specified in subsection (1), and there has been no unreasonable delay by the person in lodging the application, the Commissioner may accept the application lodged after the time specified in subsection (1).
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> (4) The Commissioner shall, within a period not exceeding thirty days of the receipt of the application under subsection (2) and any further information the Commissioner may require from the person lodging the application, communicate his or her decision in writing to the person lodging the application stating reasons for the decision.
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> (5) Where the Commissioner has not communicated his or her decision to the person lodging the application for review within the time specified in subsection (4) the Commissioner shall be deemed to have made a decision to allow the application.
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> (6) During the pendency of an application lodged under this section the Commissioner may at the request of the person lodging the application release any goods in respect of which the application has been lodged to that person upon payment of duty as determined by the Commissioner or provision of sufficient security for the duty and for any penalty that may be payable as determined by the Commissioner."

The section caters for applications by way of an appeal by a person directly aggrieved by the action or omission of a commissioner or customs official on matters relating to customs. The provision is not confined to grievances arising from a taxation decision only but is wide enough to cover any act or omission relating to customs which include the impounding of goods by customs officials or any taxation decision. An application for review has to be made within 30 days of the act or omission complained about.

An application for review has to be lodged with the commissioner and must state the grounds for the application. The decision of the commissioner has to be communicated within a period not exceeding 30 days. Where the commissioner does not communicate her decision within the period stipulated, she is deemed to have granted the application.

The Applicant made a peculiar argument that there was no decision to appeal from. It must be noted that any person directly affected by a decision or omission of the Commissioner or any other officer may lodge an application for review. **Section 229 (1) of the East African Community Customs Management Act, 2004**, does not provide that the decision or omission of the Commissioner or any other officer on matters relating to customs has to be in writing. The impounding of goods is obviously based on the decision of a customs officer to impound the goods and does not have to be communicated to the importer before it qualifies to be a decision subject to an application for review under the provisions of section 229 (1) (supra). The Respondents Counsel submitted that under **section 214 (1) of the East African Community Customs Management Act, 2004** where goods are seized or in the case of the officer effecting seizure, he is required to give reasons for doing so within one month. Section 214 (1) is reproduced here under:

> "214.-(1) Where anything has been seized under this Act, then, unless such thing was seized in the presence of the owner of the thing, or, in the case of any aircraft or vessel, of the master thereof, the officer effecting the seizure shall, within one month of the seizure, give notice in writing of the seizure and of the reasons to the owner or, in the case of any aircraft or vessel, to the master:"

The evidence of the Applicant in the affidavits in support of the application is that the goods in the container arrived in Uganda on 18 January 2014 and was held together with containers of similar goods. The Applicant was assessed for taxes and proceeded to pay taxes. He was issued with a release document which he proceeded to present at the ICD when URA officers intercepted the container without any explanation. In paragraph 7 he deposes that he appealed to the Commissioner for customs in writing but the Commissioner has not released the container to him or assigned any reason for its continued retention. The letter relied upon is annexure "D" which I have had occasion to read. Annexure "D" is a letter written by the Applicant's lawyers dated 12th of May 2014. The letter reflects the state of facts and there is no need to refer to other evidence about whether the application of the Applicant in the court is premature. It writes as follows:

> "We represented Mr. Kawuki Mathias the importer of 1 x 20ft container No. ESPU2027680 which is held at Maina Freight ICD, Kampala.
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> The container had been retained for four months by URA together with those of other importers pending determination of the new values (recently adjusted from US$ 0.45 to US $1.2).

Following the determination of the new values our client went ahead and cleared all the taxes where after he was issued a Release for the Container. Surprisingly however the container was intercepted by Revenue Officers at the ICD on the ground that he has a Demand Notice issued to him by URA.

Our client has never received any URA Demand Note nor is he aware of any.

Our instructions are to request your esteemed office to intervene in the matter so that our client's containers can be released to him.

We thank you for your usual co-operation."

The Commissioner is obliged to make a response within 30 days of receipt of such an application. Annexure "D" shows that the application was received by the assistant Commissioner for Trade on the 12th of May 2014. 30 days from the 12th of May expires in June 2014. The Applicant's application to the Court was filed on the 19th of May 2014, seven days after receipt by the Commissioner of the application of review on the 12th of May 2014. On that basis the Applicant's application is premature.

The second basis of objection is that the **East African Community Customs Management Act** prescribes a specific procedure for the Applicant to follow. That procedure is for the Applicant to apply for review to the Commissioner under section 229. Where the Commissioner renders a decision, the Applicant as an aggrieved person has a right of appeal to the Tax Appeals Tribunal under section 231 of the **East African Community Customs Management Act, 2004**. The High Court enjoys appellate jurisdiction from decisions of the Tax Appeals Tribunal under the **Tax Appeals Tribunal Act cap 345** laws of Uganda. **Section 27 of the Tax Appeals Tribunals Act** provides that a party who is aggrieved by a decision of the Tax Appeals Tribunal may appeal to the High Court. Finally appeals to the High Court are made on questions of law only.

In the premises I agree with the last point in objection. The first point of the application being premature is rendered unnecessary because the High Court enjoys appellate jurisdiction under the procedures even if an appeal is subsequently filed. It does not enjoy original jurisdiction. Of course I agree that that by the time the Applicant filed this application, the Commissioner had not yet rendered a decision and the application in any case, though made in the wrong forum, was premature.

On the last point of objection, there are statutory provisions on how and by which authority tax matters are to be handled and the High Court should not exercise its inherent original jurisdiction because it enjoys appellate jurisdiction from decisions of those bodies. The cases cited of **R v Chief Constable of the Merseyside Police, ex parte Calveley and others [1986] 1 All ER 257 and Ashmore v Corp of Lloyd's [1992] 2 All ER 486** House of Lords were relied on by the Respondent's Counsel for the proposition that where the law prescribes a special procedure and forum, it should be exhausted before filing an action in court. I have found one of the cases to be

directly relevant to the objection and is to the effect that where a specific procedure have been provided for, parties should exhaust that procedure or other remedies before filing an action in Court. In **R v Chief Constable of the Merseyside Police, ex parte Calveley and others [1986] 1 All ER 257 May L.J**. held at 263 as far as is relevant that:

> "I respectfully agree with the Divisional Court that the normal rule in cases such as this is that an Applicant for judicial review should first exhaust whatever other rights he has by way of appeal. In **Preston v IRC [1985] 2 All ER 327 at 330, [1985] AC 835 at 852** Lord Scarman said:
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> > 'My fourth proposition is that a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge; it is not an appeal. *Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision*.'" (Emphasis added)

Though the case dealt with applications for judicial review, the principle embodied in it is relevant. The principle is that where Parliament has prescribed a procedure for reviews or appeals before another judicial or quasi judicial body, the court should not allow another process to be used to attack the decision. In Uganda the **Constitution of the Republic of Uganda in article 152 (3)** provides that Parliament shall make laws to establish tax tribunals for purposes of settling tax disputes. The High Court should not usurp the powers of the tribunals prescribed by Parliament for the settling of tax disputes. Unless it is necessary to invoke the inherent jurisdiction of the High Court, the prescribed procedures with statutory timelines should be adhered to. In the premises the objections of the Respondent's Counsel to the Applicant's suit have merit and are sustained. The Applicant's application is in the premises struck out with costs.

Ruling delivered in open court the 30th day of May 2014

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Counsel Twesigire Augustine for the Applicant

Counsel Nakku Mwajuma for the Respondent

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

30TH May 2014