

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

**MISCELLANEOUS APPLICATION NO 94 OF 2016**

**(ARISING FROM CIVIL SUIT NO 104 OF 2016)**

**MASAKA CONSTRUCTION CO. LTD}.....APPLICANT**

**VS**

**UGANDA REVENUE AUTHORITY}.....RESPONDENT**

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

**RULING**

The Applicants application is brought under section 98 of the Civil Procedure Act cap 71 laws of Uganda and order 41 rule 1 of the Civil Procedure Rules and all enabling provisions of the law. It is for a temporary injunction to restrain the Respondents whether by themselves or their respective officials, representatives, and assignees, servants and agents or authority from disposing off and/or destroying the suit property described as Agricultural Chemicals, Glyphosate Salt 480 G/L in the quantum of eight containers under the seizure order and possession of the Respondent and which the Respondent advertised for disposal and/or destruction on 19 January, 2016 until the hearing and disposal of the main suit. The Applicant also prays for costs of the application to be provided for.

The grounds of the application are firstly that the Applicant filed HCCS 104 of 2016 which is still pending before the court with a high probability or chances of success. Secondly the Respondent on 19 January 2016 advertised for disposal by destruction the suit property. Thirdly if the application is not granted, the Applicant shall suffer irreparable damages. Fourthly it is averred that the balance of convenience lies in favour of the Applicant. Fifthly it is averred that if the application is not granted, the main suit will be rendered nugatory. Lastly the Applicant avers that it is just and equitable that the application is granted.

The application is supported by the affidavit of Masembe John, one of the directors of the Applicant Company. The facts in the deposition of Masembe John follow. The Applicant by an agreement dated 4<sup>th</sup> of December 2015 purchased eight containers containing 7400 drums of Glyphosate IPA Salt 480 G/L SL from Orbit Chemical Industries Ltd at Uganda shillings 400,000,000/= and a copy of the agreement is annexed. The Respondent was then informed of the purchase according to a copy of the letter attached. The Respondent disregarded the Applicant's communication and on 19 January 2016 advertised in the goods for disposal and/or destruction. Following the advertisement the Applicant filed the main suit which has a high likelihood of success. Mr Masembe John advances the contention that if the application is not granted, the Applicant shall suffer irreparable damages which cannot be atoned for by an award of damages as the suit goods would have been destroyed to the Applicant's detriment. The grant of the application would not prejudice the interest of the Respondent. The balance of convenience lies in favour of the Applicant by virtue of her legal interests in the suit property. He further asserts that it is in the interest of substantive justice that the order is granted.

The Respondent opposed the application and filed an affidavit in opposition. The affidavit in reply is that of Monica Mpairwe an advocate in the Legal and Bonds Customs Department of the Respondent. In the deposition she maintains that the Applicant does not have locus standi to institute the suit as it is not the legal owner of the goods in issue. Secondly Messieurs Orbit Chemical Industries did not have the right and title to pass on the goods in issue to the Applicant. Thirdly the Applicant did not inform the Respondent about the sale and as such deliberately hid away from the truth pertaining to the goods in issue. Fourthly the Respondent avers that the importation and dealing in the said product in issue is restricted and Messieurs Orbit Chemical Industries Ltd contravened the law when it failed to obtain the permission from the relevant authority to import the goods in issue. Following the contravention of the law by the importer, the Respondent held that the goods were forfeited and as such has powers to deal with them in any manner as prescribed by customs laws. The Applicant does not have a bona fide arguable case for consideration on the merits before the court. The Applicant seeks to alter the status quo in respect of the suit goods without the tax payment and without regard to the procedure for importing restricted goods which should be rejected. The Respondent shall suffer substantial and irreparable loss that cannot be atoned by damages since the Applicant is not in a financial position to compensate the Respondent in the case the main suit is determined in the Respondents favour. The Respondent is a financially stable organisation and in the event that it loses this suit, it can compensate the Applicant. The dictates of natural and substantive justice require the Applicant's application for orders of the temporary injunction to be refused.

When the application came for hearing Counsel Kasadha David represented the Applicant while Counsel Baluku Ronald represented the Respondent. The court was addressed in written submissions.

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*^\*~?+: maXimum728securityx 2016 style*

The facts in this matter are as taken from the affidavit in support of the application above and that in reply and they do not need to be repeated.

Nonetheless the Applicants case as submitted by Counsel is that by agreement dated 4<sup>th</sup> of December 2015 it purchased eight containers containing 6400 g of Glyphosate IPA Salt 480 G/L from Orbit Chemical Industries Ltd at Uganda shillings 400,000,000/= and by letter the Respondent was informed. The Applicant was surprised when the Respondent seized and retained consignment on 19 January 2016. The information is contained in the New Vision newspaper advertisement where the property is for disposal by way of destruction hence the application seeking a temporary injunction. Counsel submitted that the court is empowered to grant a temporary injunction to ensure the ends of justice to the parties. He submitted on what the import of section 38 of the Judicature Act cap 13 is. The grant of a temporary injunction is at the discretion of the court and as was emphasised by Lord Diplock in **American Cyanamid versus Ethicon Ltd [1975] 2 WLR 316, [1975] AC 396** that the grant of a temporary injunction is a remedy that is both temporary and discretionary. Secondly section 64 (c) of the Civil Procedure Act Cap 71 allows the court to grant an injunction to prevent the ends of justice being defeated. Similarly Order 41 rule 1 (b) of the Civil Procedure Rules gives the court power to grant temporary injunction when the property in dispute is in danger of being wrongfully disposed off. The Applicant's Counsel relies on the principles applied by the courts in considering an application for a temporary injunction by the Court of Appeal in **Giella versus Cassman Brown and Company Ltd (1973) EA 358**. This is that there is a prima facie case or triable issues raised in the application. Secondly the Applicant will suffer irreparable damage that cannot be compensated by an award of damages if the application is not granted. Where the court is in doubt on the first two principles the application is decided on the balance of convenience. *Decision of Hon. Mr. Justice Christopher Madrama Izama \*^\*~?+: maXimum728securityx 2016 style*

Counsel also relies on the case of **David Luyiga versus Stanbic Bank (U) Ltd High Court Miscellaneous Application Number 202 of 2012** for the said principles.

As far as the prima facie case is concerned the Applicant's case is that it purchased the suit property which was seized by the Respondent with intent to dispose of or destroy the same. In the premises he submitted that the Applicant filed a suit that is pending determination by this court with a high chance of success. The Applicant clearly demonstrated that she has an interest in the property in issue and has never given her consent and there is no lawful justification for the destruction of the property whatsoever. On the face of it there is a triable issue worth considering in the main suit. On the other hand the Respondent by affidavit dated 4 April 2016 denies the title of the Applicant and challenges their locus standi to bring the suit. Counsel submitted that this assertion itself is such a triable issue as to how the importer of goods or a purchaser can be precluded from enjoying the goods and whether it is necessary for the consent of the Respondent to be obtained before the disposal of the goods. These issues are reflected in the affidavit of the Respondent and can only be resolved if the main suit is heard.

As far as irreparable damage is concerned the Applicants Counsel relies on the case of **Kiyimba Kaggwa versus Hajj Nasser Katende [1985] HCB 43** for the meaning of irreparable injury which is injury that is substantial or material and that cannot be adequately compensated for in damages.

It is proven that the Respondent ran an advertisement to destroy the property the subject matter of the suit. Given the current scarcity and extremely high cost of agricultural chemicals in the country, it is almost impracticable for the Applicant to get compensation or find readily available alternative quality chemicals if the property in issue has been alienated or destroyed by the

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*~\*~?+: maXimum728securityx 2016 style*

Respondent. Counsel relied on the case of **Godfrey Sekitoleko and 4 others versus Seezi Peter Mutabazi and two others [2001 – 2005] 3 HCB 80**. It was held in that case inter alia that in exercising its jurisdiction to protect legal rights to the property from irreparable or serious damage pending the trial, the court does not determine the legal rights to property but merely preserves it in its actual condition until the legal title of ownership can be established or declared. In the premises the Applicants Counsel contends that the Applicant will suffer irreparable injury if the application is not granted for the main case is entertained.

As far as the balance of convenience is concerned learned Counsel for the Applicant submitted that it favours the Applicant who stands to lose valuable property in which he invested large amounts of money and as such the court should be pleased to grant the application pending determination of the main suit in which all issues will be determined. The Respondent is only interested in the disposal of the goods although she was complaining that the Applicant wants to alter the status without a tax payment. The Applicant has always been ready and is willing to pay taxes and take its goods but was always let down by the Respondent hence the filing of the suit. The balance of convenience in this respect favours the Applicant who will lose more if the goods are disposed off unjustifiably. In the premises the Applicants Counsel prays that the application is granted with costs.

In reply the Respondent's case is that the goods in issue are still under customs control and the Applicant without enquiring from the Respondent purchased eight containers as contained in the claim. The goods were imported by Messieurs Orbit Chemicals Ltd without following the procedure of importation of restricted goods. The Respondent on 3 February 2016 advised the

Applicant to seek indemnification from Messieurs Orbit Chemicals Ltd and the Applicant being dissatisfied with the Respondent's advice filed this suit.

As far as a prima facie case is concerned the Respondent's Counsel submitted that there is no prima facie case with a probability of success and the Applicant's suit is vexatious. The main suit and the application are premised on two issues namely whether the Respondent lawfully forfeited the goods in issue; and whether the Respondent is bound by the earlier release of 11 containers to Messieurs Orbit Chemicals Ltd. Respondents Counsel relies on the definition of restricted good under section 2 of the East African Community Customs Management Act 2004. Furthermore section 18 (2) of the East African Community Customs Management Act provides that the goods specified in part B of the second schedule are restricted goods and the importation thereof, save in accordance with any conditions regulating their importation, is prohibited. Furthermore section 4 (1) of the Agricultural Chemicals (Control) Act provides that no person shall import into Uganda any agricultural chemicals unless that chemical has been registered and labelled in accordance with regulations made under the Act and conform to the standard specified in such regulations. In addition section 210 (b) of the EACCMA provides that any restricted good which are dealt with contrary to any conditions regulating their importation, exportation or carriage coastwise shall be liable to forfeiture. The goods in issue are restricted goods and the importer did not follow the law for importation of the same. Part B of the second schedule specifically paragraph 1 clearly shows that the goods in issue are restricted goods. The implication is governed by the Agricultural Chemicals (Control) Act. Because the importer did not follow the law regulating their importation of restricted goods, the Respondent lawfully forfeited the goods in issue.

The Respondent is not bound by the earlier release of 11 containers of Messieurs Orbit Chemicals Ltd. The Respondents Counsel relies on the judgment of this court in **Kampala Nissan Uganda Limited versus Uganda Revenue Authority Civil Appeal Number 7 of 2009**. It was held that disobedience to a statute enacted in the public interest and couched in mandatory language in terms of what it commands to be done renders anything done in disobedience of the statute null and void ab initio. The Applicant cannot rely on the fact that 11 containers were released to Messieurs Orbit Chemicals Ltd despite not following the law for them to claim the release of the goods in issue. In the premises the Applicant has not established a prima facie case and the application ought to be dismissed with costs.

### **Irreparable injury**

The Respondent's Counsel submitted that the Applicant would not suffer irreparable damage that cannot be compensated by an award of damages. Under paragraph 4 (c) of the Plaintiff, the Applicant contends that it purchased the goods in issue from Messieurs orbit chemical industries Ltd and went ahead to attach the sale agreement. Under the sale agreement specifically paragraph 3 thereof it was agreed that in case of the dispute relating to performance of the agreements, the parties would go to an arbitrator and if it failed, the aggrieved party would sue the other to obtain a remedy. The Applicant further claims general damages from the Respondent in paragraph 3 (d) of the Plaintiff. In the case of **Victor Construction Works Ltd versus Uganda National Roads Authority High Court Miscellaneous Application Number 601 of 2010**, Honourable lady justice Helen Obura noted that the prayers in the Applicant's Plaintiff in the main suit as indicated include general damages for breach of contract as well as compensatory damages. The court would be in the position to evaluate all the heads of damage and award what



would be adequate to compensate the Applicant in the event that it becomes the successful party. Given the status of the Respondent as a statutory body, it would be in a position to pay the damages so awarded. In the premises the second test for the grant of a temporary injunction has not been met as the Applicant can be compensated by Messieurs Orbit Chemicals Ltd or in the alternative the Respondent which is a statutory body is in a position to pay any damages if ordered so to do.

### **Balance of convenience**

It is the Respondent's case that the balance of convenience favours the denial of a temporary injunction order. Counsel relied on the case of **Victor Construction Works Ltd versus Uganda National Roads Authority High Court Miscellaneous Application Number 61 of 2012** where it was held that the balance of convenience favours a refusal to grant an interlocutory injunction and or damages suffered by the Applicant arising from the alleged breach of contract if proven, would be adequately compensated by an award of damages. The Respondent's Counsel submitted that the Applicant's claim can be atoned for by an award of damages and as such the court should hold that the balance of convenience favours the Respondent and not the Applicant. In the premises the application should be dismissed with costs to the Respondent.

### **In rejoinder**

The Applicant's Counsel submits that the Respondent clearly concedes that the Applicant purchased the goods, the subject matter of the suit. There is evidence of the Applicant's interest in the goods which he seeks to protect from this honourable court and once interest is

established, it ousts the issue of locus standi by the Applicant to bring the suit as alluded to by the Respondent.

Section 4 of the Agricultural Chemicals (Control) Act has no bearing on the beneficiary and in this case the purchaser who is the Applicant and the Respondent's submissions should be disregarded. Notwithstanding that submission the Agricultural Chemicals (Control) Act and section 15 thereof provides for the penalties in instances where it is established that the importer contravened the important procedural steps and forfeiture or seizure is not among them. Consequently the Respondent's Act of seizure of the Applicant's goods is unlawful.

Furthermore the Applicant's Counsel submitted that the Agricultural Chemicals (Control) Act and section 10 thereof mandates The Inspector from the Ministry of Agriculture to seize agricultural chemicals but not the Respondent which is the tax body for the government. Furthermore there is no expert report from the Ministry of agriculture upon which the Respondent can base its decision to seize the Applicant's goods and therefore the action of the Respondent is not sanctioned by any law and she cannot find the refuge under section 2 of the East African Community Customs Management Act 2004 or even the Agricultural Chemicals (Control) Act to punish the Applicant and frustrate the Applicant's interest in the goods and the willingness of the Applicant to pay taxes.

The Applicant's Counsel further submitted that the sole obligation of the Applicant in respect of the goods seized is the proof of purchase which is not disputed by the Respondent and to clear the assessed taxes. The continuance of the unlawful seizure of the goods denies the citizen who is the end-user the right of access and enjoyment of the agricultural chemicals which is scarce on

the market and it hampers government efforts to collect taxes from imported goods since the Applicant is ready and willing to pay the taxes due.

Finally the Applicant's Counsel submitted that the Respondents should not divert the court from the purpose for which an order of a temporary injunction is issued by the court. The issues as to whether the import of the goods in question comply with the Act and procedural steps or not and as to whether the Applicant who is the Respondent concedes to have purchased the same, has locus or not are issues to be settled in the main suit by leading evidence. The order sought merely seeks to preserve the status quo until the determination of the issues raised in the main suit.

### **Ruling**

I have carefully considered the application together with the affidavit evidence for and against as well as the submissions of Counsel and the law cited. This application does not have any controversy as to the principles applied by the courts in assessing whether to issue an order of a temporary injunction or not. The basic principles are considered in the case law and particularly the Court of Appeal sitting at Kampala and judgment of Spry VP in **Giella v Cassman Brown & Co Ltd [1973] 1 EA 358** at page 360 when he said that:

*“First, the granting of an interim injunction is an exercise of judicial discretion and an appellate court will not interfere unless it be shown that the discretion has not been exercised judicially (Sargent v. Patel (1949), 16 E.A.C.A. 63).*

The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the

Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420.)”

As far as the first condition for the grant of an interlocutory injunction is concerned, some judicial officers proceed from the premises that the Applicant must show an arguable case and that a final pronouncement should not be made on the facts or the merits of that arguable case. On the other hand it can be shown that there is a prima facie case with a probability of success. In the case of **American Cyanamid Company Ltd versus Ethicon Ltd [1975] 2 WLR 316** Lord Diplock apart from formulating the first condition as the disclosure of an arguable case which merits judicial consideration put the flip side of that condition to be the consideration of whether the Applicant’s case is not frivolous or vexatious. This involves the court in going beyond the pleadings to consider the evidence as well. Consequently the first consideration is whether there is a prima facie case or an arguable case which merits serious judicial consideration and that the action by its disclosure in the pleadings and affidavit evidence is not frivolous or vexatious. Lord Diplock furthermore considered the intermediate position where an interim injunction is sought on the basis of contested facts in the affidavit evidence and where a final decision on the facts ought to await a final judgment upon hearing the evidence which may be subjected to cross examination. I have considered the observations of Lord Diplock that since the 19th century the granting of a relief by interlocutory injunction had been subjected to an undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the Plaintiff was not entitled to restrain the defendant from doing what he was threatening to do. He further held that the object of the interlocutory injunction is to

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*^\*~?+: maXimum728securityx 2016 style*

protect the Plaintiff against injury by violation of his right for which it could not be adequately compensated in damages recoverable in the action if the uncertainty was resolved in his favour at the trial. Finally the Plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from having been prevented from exercising his own legal rights for which it could not be adequately compensated under the Plaintiffs undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial.

The judicial precedents cited advance the same principles as in the case of American Cyanamid versus Ethicon (supra). However a careful perusal of the judgments does not espouse a clear undertaking by the Plaintiff/Applicant to indemnify the defendant in the event that the suit is dismissed but the defendant had been restrained by an interim order from doing what he sought to do.

In the facts and circumstances of this case the Plaintiff bought the goods from Messieurs Orbit Chemical Industries Ltd and the agreement thereof is dated 4<sup>th</sup> of December 2015 and it is not in dispute or contentious. It is very explicit in Annexure "C" to the affidavit in support and clause 1 (b) of the agreement that the consignment at the time of the sale agreement was apparently pending tax clearance at the Uganda Revenue Authority by the importer who is the seller of the consignment. In any case it was under customs control. It is provided that the buyer who is the Applicant shall effect payment as assessed by and to Uganda Revenue Authority and demurrage in this respect of the consignment. All related documents to the consignment were handed over to the buyer immediately upon the signing of the agreement. In a letter dated 29<sup>th</sup> of January 2016 the advocates of the importer Messieurs Orbit Chemical Industries Ltd wrote to the

Commissioner Customs Department, Uganda Revenue Authority on the subject of a plot to dispose of 8 containers of agricultural chemicals, Glyphosate Salt 480. The Commissioner was written a letter about an advertisement by Uganda Revenue Authority in the Daily New Vision dated 29<sup>th</sup> of January 2016 at page 19 notifying the general public of an intention to forfeit and dispose of consignment in the form of agricultural chemicals namely the subject matter of the suit. The lawyers wrote that Orbit Chemical Industries Ltd no longer had an interest in the goods because it had been sold to the Applicant. The letter was copied inter alia to the Inspector General of Government; the Minister of Agriculture; the Applicants; the Assistant Commissioner, Field Services; the Customs Internal Audit Department and the Commissioner General Uganda Revenue Authority. Additionally in a letter dated 1<sup>st</sup> of February 2016 the Applicant wrote to the Permanent Secretary Ministry of Agriculture for inspection of the consignment. They notified the said Permanent Secretary that they had bought 8 containers of agricultural chemicals, the subject matter of the application. They requested the office and Uganda National Bureau of Standards to carry out an inspection of the above goods which are chemicals with a limited time before expiry. Also attached to the Applicant's application is a board resolution authorising Messieurs Orbit Chemical Industries Ltd to sell the goods to the Applicant who will be required to pay all incidental tax assessments for clearance. Only one payment had been made for one container out of the eight containers according to the resolution.

Against this background I have carefully considered the Respondent's affidavit in reply. The first ground raised is whether the Applicant has locus standi to institute the suit because she is not the legal owner of the goods in issue. The submission is that the importer did not have the right and title to pass on the goods in issue to the Applicant. The Applicant did not inform the Respondent before the sale and as such deliberately hid away from the truth concerning the goods in issue.

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*^\*~?+: maXimum728securityx 2016 style*

Primarily the Respondent asserts that importation and dealing in the product is restricted and the importer contravened the law when it failed to obtain the requisite permission from the relevant authority to import the goods in issue. Following the contravention of the law, the Respondent confiscated the goods which were now forfeited goods and as such the Respondent has powers to deal with them in any manner prescribed by customs laws.

On the basis of that contention the issue is whether the Respondent has a prima facie case with a probability of success. Or whether there is an arguable case which merits serious judicial consideration in the sense that the action is not frivolous or vexatious. The Respondent's submission is that the goods are restricted goods according to the definition of restricted goods under section 2 of the East African Community Customs Management Act 2004. Secondly importation of goods specified in Part B of the Second Schedule of the East African Community Customs Management Act are prohibited as stipulated by section 18 (2) thereof. Furthermore the Respondent contended that under section 4 (1) of the Agricultural Chemicals (Control) Act, the importation was prohibited because it had to be registered, packed and labelled prior to the importation as specified in the regulations. Finally the Respondent contended that under section 210 (b) of the EACCMA, 2004 the goods were forfeited. The Respondent's case is that the importer did not follow regulations for importation of restricted goods and the goods were forfeit to Uganda Revenue Authority on that ground. Lastly on those premises the first condition for the grant of a temporary injunction has not been satisfied and the application should be dismissed.

On the other hand the Applicant's case is that the Respondent seized the goods with intent to dispose of them yet the Applicant purchased the goods from the importer and has an interest in them. Furthermore in rejoinder the Applicant has locus standi because it bought the goods.

Furthermore that penalties provided for under the Agricultural Chemicals (Control) Act do not include forfeiture or seizure of the goods.

I have carefully considered the controversy as to whether there is a prima facie case established. For the moment there is no controversial fact about the fact that the Applicant purchased or has a sale agreement in which it purported to purchase the goods, the subject matter of the application, from Messieurs Orbit Chemical Industries Ltd. By public notice advertised on 19th January 2016 Uganda Revenue Authority gave notice of forfeiture of agricultural chemicals. The notice shows that the Commissioner Customs notifies the general public and any persons who imported 8 containers (the subject matter of the application) of forfeiture of the goods. The notice indicates that importation of the agricultural chemicals was in contravention of section 3 of the Control of Agricultural Chemicals Act Cap 29 laws of Uganda and section 18 of the East African Community Customs Management Act, Part B of the Second Schedule thereto.

I have carefully considered the submissions on the law and the following are my conclusions. Section 2 of the East African Community Customs Management Act, 2004 defines "restricted goods" to include "goods the importation, export, transfer, or carriage coastwise, of which is prohibited except in accordance with any conditions regulating such importation, exportation, transfer, or carriage coastwise and any goods the importation, exportation, transfer or carriage coastwise, of which is in any way regulated by or under the customs laws".

Secondly section 18 (2) of the East African Community Customs Management Act provides that the goods specified in Part B of the Second Schedule are restricted goods and importation thereof, except in accordance with any conditions regulating their importation, is prohibited.



Last but not least section 210 (b) of the East African Community Customs Management Act, 2004 provides that any restricted goods which are dealt with contrary to any conditions regulating their importation, exportation or carriage coastwise, is liable to forfeiture under the East African Community Customs Management Act.

In the main suit the Applicant's suit is for declaration against the defendant/Respondent that the Plaintiff is the rightful owner of the suit goods and secondly the suit is for an order that the defendant's seizure and detention of the Plaintiff's goods is illegal. The Plaintiff/Applicant also seeks a permanent injunction to restrain the defendant, her agents, employees, assignees, and successors in title from disposing of the suit goods.

In the application itself and in the documents attached in support of the Applicant's claim to ownership, the Applicant undertook to pay the taxes on the goods. However the provisions upon which the Respondent seized the goods are statutory provisions which deal with importation of restricted goods and the right of seizure and not failure to pay taxes. The East African Community Customs Management Act provides the procedure for handling the situation. It is explicit from the public notice attached to the application that a public notice was given in accordance with the East African Community Customs Management Act, 2004 that the goods had been forfeited under section 210 and shall be disposed of as prescribed under section 212. In ground (b) of the chamber summons the Applicant avers that the Respondent on 19 January 2016 advertised for disposal by destruction the said goods. Secondly in paragraph 5 of the affidavit in support of Masembe John it is deposed that on 19 January 2016 the Respondent advertised the said goods for disposal or destruction.

Summons to file a defence was issued on 15 February 2016 and the Plaintiff's suit had been filed on 11 February 2016. Because the purchaser of the goods who is the Applicant undertook to pay taxes on the goods, it is apparent that the goods were still under customs control by the time a sale agreement was executed on 4 December 2015. The seller undertook to hand over all documents relating to the consignment. The seller is the importer of the goods and is Messieurs Orbit Chemical Industries Ltd. The Applicant could only have inherited (if any) the rights of the seller of the goods who imported them as far as taxes are concerned. The Applicant cannot purport to be liable for the contravention of the law making the goods restricted goods. For the moment the question of ownership of the goods is not material in this application except to consider the Applicant's right to an injunction.

The court can proceed from the premises that the Applicant by virtue of the sale agreement apparently had authority to deal with the goods and therefore locus standi to handle any tax matter that is pending in respect of the goods with the Commissioner Customs Uganda Revenue Authority provided the issue is about taxes due and owing. The question of ability of willingness to pay taxes does not answer the problem posed by seizure and forfeiture of goods for contravention of a law.

I have further noted that the sale agreement the Applicant relies on was registered under instrument number 1397 on 1 February 2016 with the Registry of Documents, Uganda Registration Services Bureau. The board resolution of the importer was also registered on the same day. Correspondence with Uganda Revenue Authority attached to the application was served on 1 February 2016 (the letter dated 29<sup>th</sup> of January 2016 written on behalf of the

importer). This was after the notice issued on 19 January 2016 to the general public under the quoted provisions of the East African Community Customs Management Act (EACCMA).

It is my further holding that the fact that the goods are restricted goods is not in controversy. The controversy is whether the goods should be dealt with by the Ministry of Agriculture or Uganda Revenue Authority and whether the Applicant has locus standi. It is also apparent from the application that the Applicant has sought inspection of the goods by the Ministry of Agriculture. Nonetheless customs laws are applicable to restricted goods irrespective of which authority is responsible for licensing or authorising importation of restricted goods. In any case the Applicant may serve on the Respondent permission by the relevant authority clearing the goods for consideration. The contravention the Commissioner deals with is contravention of the customs law which is the community law of East Africa.

Under section 214 (1) of the EACCMA procedure on seizure is provided for. Upon seizure of the goods, the officer seizing the goods is required to within one month give notice in writing and reasons therefore to the owner or the master of the vessel as the case may be. Where notice has been given, the thing seized shall be detained by the Commissioner to be dealt with in accordance with the Act. The Commissioner has powers to permit the thing to be delivered to the person making the claim referred to as the claimant subject to the claim and giving security for payment of the value of the thing as determined by the Commissioner in the event of condemnation of the thing. There is no need for notice where the goods are seized in the presence of the owner or where the owner is prosecuted for commission of an offence making the importation of prohibited or restricted goods an offence.

Where notice of the claim has been lodged in accordance with section 214 of the EACCMA, the Commissioner may within a period of two months from the receipt of the claim by notice in writing to the claimant require him or her to institute proceedings for recovery of the thing or goods within two months of the date of notice or the Commissioner may himself or herself institute proceedings for condemnation of such thing. Where the Commissioner has not instituted proceedings within the prescribed period, such things shall be released to the claimant. The above provision does not however apply to restricted or prohibited goods.

An exception to the general rule to release the thing seized is found under section 216 (2) of the EACCMA which provides that if the thing is prohibited goods or restricted goods which has been imported or carried coastwise or attempted to be exported in contravention of the EACCMA, the thing shall not be released to the claimant and may be disposed of in such manner as the Commissioner may direct. In other words restricted goods shall not be released to the claimant but dealt with by the Commissioner in the manner provided for under the East African Community Customs Management Act. The provisions for institution of proceedings for the recovery of the goods are inapplicable to prohibited or restricted goods. In fact in this application there is no controversy about the fact that the goods seized are restricted goods subject to the Control of Agricultural Chemicals Act cap 29 laws of Uganda.

As a matter of fact the notice issued by the Commissioner clearly provides that the importation of the agricultural chemicals was in contravention of section 3 of the Control of Agricultural Chemicals Act cap 29 laws of Uganda and section 18 of the East African Community Customs Management Act, Part B of the Second Schedule thereto. The notice further writes that the act constitutes an offence under section 200 of the EACCMA. Section 200 of the EACCMA

prescribes the offence of importing or carrying coastwise any prohibited goods or any restricted goods contrary to any conditions regulating their importation or carriage coastwise of such goods whether or not the goods are unloaded. Such a person is liable on conviction to imprisonment for a term not exceeding five years or to a fine equal to 50% of the dutiable value of the goods involved or both.

For purposes of ease of reference section 3 of the Control of Agricultural Chemicals Act Cap 29 laws of Uganda provides as follows:

*“3. Import, export, etc. of agricultural chemicals.*

*(1) No person shall import into or sell in Uganda any agricultural chemical unless that chemical has been registered, packed and labelled in accordance with regulations made under this Act and conforms to the standards specified in the regulations.*

*(2) No person shall export or re-export out of Uganda an agricultural chemical unless he or she has complied with the requirements specified in the regulations made under this Act.”*

I do not agree with the argument of the Applicant’s Counsel that it is the Ministry of Agriculture which can implement the provisions of the Control of Agricultural Chemicals Act Cap 29 laws of Uganda. I also do not agree that the penalties prescribed by the control of Agricultural Chemicals Act are the only penalties to be applied in case of the commission of an offence under section 3 thereof. The East African Community Customs Management Act is additional to any law regulating the importation or exportation of goods and creating fences for breach of the regulations or rules governing the importation and exportation of the goods. Provided the goods

are defined as prohibited or restricted goods under the enactment, the East African Community Customs Management Act apply to it for purposes of dealing with the goods as they arrived in the country. Any person who contravenes such an enactment may in addition to a prosecution under section 200 of the EACCMA also be charged by the law regulating the importation or exportation of the goods such as under section 3 of the Control of Agricultural Chemicals Act Cap 29 laws of Uganda.

In the premises an action commenced to challenge the powers of the Commissioner to issue the notice is misplaced. Secondly the person who committed the offence is the person who imported into the country the goods in contravention of the relevant enactment. Such a proceeding ought to be taken against Messieurs Orbit Chemical Industries Ltd and the argument that the Applicant has no locus standi has to be put in its proper context. The Commissioner is already dealing with the issue under the provisions of the East African Community Customs Management Act. Messieurs Orbit Chemical Industries Ltd who is the importer is not even a party to this action. The East African Community Customs Management Act, 2004 overrides domestic legislation. Section 253 of the East African Community Customs Management Act, 2004 provides as follows:

*"This Act shall take precedence over the partner states laws with respect to any matter to which its provisions relate."*

Because under the enactment of the East African Community Customs Management Act, 2004, powers are being given to the Commissioner to deal with the restricted or prohibited goods in the manner in which the Commissioner dealt with the subject matter of this suit, the question is whether this is a proceeding envisaged under the EACCMA? First of all it is not a criminal

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*~\*~?+: maXimum728securityx 2016 style*

proceeding before a court of competent jurisdiction in a partner state. Secondly it is not a proceeding for condemnation of the goods as envisaged by section 216 (1) of the East African Community Customs Management Act, 2004. As noted above section 216 (2) of the EACCMA, 2004 makes it an exception to the rule to institute proceedings for condemnation of goods imported to have an action to have the thing condemned or released to a claimant. The EACCMA explicitly provides that such goods shall not be released to the claimant but may be disposed of in such manner as the Commissioner may direct. The matter is therefore under the powers of the Commissioner. Last but not least this suit is not for judicial review of the acts of the Commissioner.

The condemnation of the thing under the EACCMA is liable to the restoration orders of the Council. Section 218 clearly provides that where the thing has been seized under the Act, the Council may, whether or not the thing has been condemned, direct that the thing be released and restored to the person from whom it was seized or to the owner, upon such conditions as the Council may deem fit. Because the matter did not proceed as a proceeding for the recovery of the thing seized by the Commissioner as envisaged by section 216 (1) of the EACCMA, 2004, the Applicant's application is frivolous on the following grounds:

1. Goods were seized for having been imported in contravention of the Control of Agricultural Chemicals Act which makes it an offence for the importer to import the condemned goods and not the Applicant. The importer could not transfer its liability under section 3 of the Control of Agricultural Chemicals Act, cap 29 laws of Uganda by sale of the goods to the Applicant. To that extent the proceedings envisaged in the EACCMA and particularly the provisions reviewed above are for proceedings between

the importer or the person in whose possession the goods have been seized and the Commissioner. The Applicant however is a claimant by virtue of having purchased the goods when the goods are still liable to be dealt with by the Commissioner. For that reason the Applicant is not a proper party in proceedings under the East African Community Customs Management Act which takes precedence over domestic legislation.

2. The suit filed is not a suit envisaged under section 216 (1) of the East African Community Customs Management Act upon notice given by the Commissioner to the claimant. Again proceedings of the Commissioner take precedence over the proceedings in this court in the circumstances of this case.
3. The court cannot curtail proceedings commenced under the provisions for forfeiture and redemption of property unless they are brought as envisaged in relation to goods which may or may not be condemned abiding the decision of the court before whom such proceedings have been brought. The matter before the court is not such a proceeding.
4. Finally the remedy of a claimant is to apply to the Commissioner and where appropriate to the Council established under the Treaty Establishing the East African Community for release of the goods under section 218 of the East African Community Customs Management Act. The Applicant may also move against the seller of the goods.



In the premises the Applicant's application falls short of establishing a prima facie case with a high probability of success or an arguable case which is not frivolous or vexatious. The Applicant's application is accordingly dismissed with costs.

Ruling delivered in open court on the 6<sup>th</sup> of May 2016

**Christopher Madrama Izama**

**Judge**

Ruling delivered in the presence of:

Kyogula Hannington for the Applicant

Applicants Director Masembe John is in court

Respondent is not in court

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

6<sup>th</sup> of May 2016