

THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 366 OF 2012

AKIPHAR PHAMACEUTICALS LTD}.....PLAINTIFF

VS

**THE COMMISSIONER CUSTOMS UGANDA REVENUE
AUTHORITY}.....DEFENDANT**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiffs action as disclosed in the plaint is for recovery of Uganda shillings 800,000,000/=, interest at commercial rate, general damages and costs of the suit as well as certain declarations that the acts of the Defendant are unlawful. The Plaintiff alleged that the Defendant carried out an unlawful auction of its sugar. The brief facts alleged are that sometime in early 2010 the Plaintiff imported 706 metric tons of sugar from Swaziland on the ground that the sugar was from a COMESA country and duty-free. However the Defendant's officials informed the Plaintiff that the sugar was liable to tax and the Plaintiff opted to re-export the sugar. Sometime on 15th December 2010 the Plaintiff appealed to the Defendant to stay the auction of the sugar and to be allowed to re-export the sugar. On 17th December 2010 the Defendant replied and allowed a stay of the auction and permitted the Plaintiff to re-export the sugar after paying the requisite fees. However, when the Plaintiff went to retrieve the sugar for re-export, its officials were informed by the warehouse keeper that the sugar had been auctioned by the Defendant. Subsequently the Plaintiff made various demands for the balance of the sale price of the sugar and the Defendant applied on 16th April 2012 and claimed that the Plaintiff ought to have made the claim within one year after the auction and latest by December 2011 and the claim was therefore time barred. The Plaintiff claims that the auction was unlawful. Secondly, that the

Plaintiff's claim was not time barred because it was never notified of the auction and auction status was changed on 17th December 2010.

In the premises, the Plaintiff seeks a declaration that the Defendant unlawfully auctioned off the sugar without following the provisions of section 42 of the East African Community Customs Management Act, 2004. Secondly a declaration that the Plaintiff's claim is not time barred as the notice of the auction was never given to the Plaintiff. The Plaintiff seeks recovery of the subject matter value at market rates, interest, special damages and costs. The Plaintiff prays for additional interest from the date of judgment until payment in full, general damages and costs of the suit.

In the amended written statement of defence the facts are not very controversial. The Defendant avers that in July 2009 the Plaintiff deposited 6990 bags of sugar into the customs warehouse. By October 2010 the Plaintiff had not removed the bags from the warehouse and pursuant to section 42 of the EACCMA; the bags of sugar together with other goods were advertised for auction on 23rd September 2010. On 12th November 2010, 1000 bags of the 6990 bags of sugar were sold off in an auction and the balance of 5990 bags of sugar were sold on 29th November 2010 by private treaties. Thereafter the Plaintiff did not claim the balance of the proceeds until April 2012, 16 months after the auction of this sugar outside the stipulated time within which claims for the balance can be entertained under section 42 of the East African Community Customs Management Act (EACCMA). Furthermore, the Defendant asserts that the sugar was lawfully auctioned. Secondly the Defendant contends that the Plaintiff was notified of the auction in an advertisement which was run in the New Vision newspaper of 23rd September 2010 and in the premises the Plaintiff is not entitled to any damages. Furthermore the auction was lawful under section 42 of the EACCMA. In the premises the Defendant seeks to have the suit dismissed with costs.

In reply the Plaintiff does not deny the advertisement for the auction of goods but contends that he immediately appealed to the Defendant to change the auction status immediately and a letter attached of 15th of December 2010 from the Defendant is the confirmation of the change of status. Furthermore by 1st November 2010 there was available all the 706 metric tons of sugar at a warehouse. Furthermore the auction did not comply with the procedure stipulated under section

42 of the EACCMA since notice is supposed to be given by publication in the Gazette before a public auction can commence. Furthermore the Defendant acted unlawfully under section 57 of the EACCMA by auctioning the sugar after the Commissioner had granted an extension of warehousing in October 2010 as contained in the letter dated 17th of December 2010.

At the hearing of the suit the Plaintiff was represented by Counsels Luwuum Adoch and Banza Martin while the Defendant was represented by Counsels Golooba Rodney and Christa Namutebi.

The Plaintiff called Mugambwa Rogers the Managing Director of the Plaintiff as PW1 while the Defendant called Mr Edward Lule, Supervisor Customs Department of the Defendant as DW1. The court was subsequently addressed in written submissions.

In the address the Plaintiff's Counsel dealt with three issues namely:

1. Whether the Plaintiff's sugar was lawfully auctioned by the Defendant?
2. Whether the Plaintiff's claim is time barred?
3. Whether the Plaintiff is entitled to remedies sought?

Whether the Plaintiff's sugar was lawfully auctioned by the Defendant?

The Plaintiff's contention is that in executing the auction, the Defendants officials violated the express provisions of the East African Community Customs Management Act, 2004 (EACCMA), the general law and principles governing sale by auction among other laws.

The Plaintiff's Counsel submitted that section 42 (1) of the EACCMA provides that where goods have been deposited in the customs warehouse and are not lawfully removed within 30 days after the deposit, the Commissioner shall give notice by publication in the Gazette notifying the public that unless such goods are removed within 30 days from the date of the notice, they shall be deemed to have been abandoned for sale by public auction and may be sold in such manner as the Commissioner may deem fit. The Plaintiff's Counsel relies on the Black's Law Dictionary 7th edition page 1087 for the definition of "notice". It means inter alia, a legal notification required by law or agreement. It includes a definite legal cognizance actual or constructive of an existing right or title. It also means the person has notice of fact or condition of that person. That is if he has received the notice of it, has actual knowledge of it, has reason to know about it, knows

about a related fact, is considered as having been able to ascertain it by checking an official filing or recording. Counsel further relies on the definition of notices in Halsbury's laws of England fourth edition page 92 and paragraph 75 as well as the case of DC R vs. Aylesbury JJ Ex parte Wishbey [1965] 1 All ER 602 for the proposition that the notification of the proceedings or the proposed decision must also be given early enough to afford the persons concerned a reasonable opportunity to prepare representations or put in their own case.

The contention is that the Defendant did not properly follow this procedure in auction of part of the Plaintiff's sugar and hence the auction was unlawful. The Plaintiff's witness admitted that he got to know of the advertisement of his 706 tons of sugar after the advertisement of 28th October 2010. He immediately engaged and subsequently spent a lot of time haggling with the Defendant's officials and further held several meetings with the one Nuwagaba Charles who is the Chairman Auction Committee. Thereafter the Plaintiff acting on the advice of the Commissioner customs wrote on 15th December 2010 to the Defendant requesting for an extension of time in which the sugar would stay at the Defendant's warehouse. The Defendant replied on 17th December 2010 authorising the Plaintiff to change the auction status by paying the appropriate fees which procedure would revert ownership of the cargo to the Plaintiff from the government.

Additionally the Plaintiff relies on the testimony of PW1 that when he was shown the advert by the bond keeper, he went to the supervisor to call off the auction. He was referred to the Commissioner of customs Mr Malinga who in turn called Mr Nuwagaba the Assistant Commissioner and Chairman Auction Committee. Mr Nuwagaba gave him assurances that his sugar was not going to be auctioned. He had 14,120 bags and required a minimum of two weeks to load 14,120 bags and they could only load 1000 bags daily. The Plaintiff's Counsel relies on section 5 of the EACCMA for the submission that the Commissioner customs is responsible for the management and control of the customs including the collection of, and accounting for, customs revenue. Furthermore he relies on the testimony of DW1 that the Commissioner is the accounting officer to the Department, while the assistant Commissioner Field Services is the accounting officer for his division and Auction Committee. He contended that the letter of 17th December 2012 proves that by that time 706 metric tons of sugar was still in the warehouses.

This is also confirmed by the testimony of PW1. He testified that the letter helped him to re-export 356 tons out of the 706 tons tagged for auction.

The Plaintiff's Counsel further contended that the sale of over 6990 bags in an auction cannot go unnoticed or be forgotten by the chairman of the auction committee and the divisions accounting officers. The Defendant has never communicated or ever come up with a contrary position regarding the sale except a mere denial in the amended written statement of defence. If the Defendant knew that this act was erroneously done, the Defendant through the same legally authorised officers would have clarified. The Defendant's position is that the auction advertisement of 28th October 2010 was the advert that was the basis of the auction. Subsequently by amendment the Defendant introduced a new auction advertisement dated 23rd September 2010 to defeat the Plaintiff's bona fide claim. The Plaintiff's Counsel concluded that from the evidence the Plaintiff initially requested for and was actually permitted to re-export its sugar. However before it could put in place logistics necessary for the re-exportation of the sugar, the Defendant sold it under unclear circumstances and in total disregard of the law.

After the sale of the sugar the Plaintiff through Messieurs Mushabe and Company Advocates, by letter dated 16th February 2012 complained to the Defendant that the sugar had been sold by the Defendant's officials through dubious means. The Defendant was requested to furnish accountability of the sale but to no avail. Again on 15th March 2012 the Plaintiff's lawyers wrote another letter to the Defendant requesting for accountability but the Defendant did not respond. The Plaintiff continued the process of demanding accountability and proceeds of the auction even after instituting the suit.

Counsel submitted that section 42 (1) of the EACCMA was not complied with. He submitted that under this section the Defendant is supposed to auction the goods in a warehouse after publication of the 30 days notice in the Gazette. However the Defendant violated the express provisions of the law when on 23rd September 2010 the Defendant published a notice purported to be under the above cited provisions of the law to sell off goods which were in the Defendant's warehouse. The notice provides as follows:

"... all goods that shall remain uncleared at expiry of the 30 days grace period would be sold in accordance with regulation 207 of the East African Community Customs Management Regulations 2006."

This means that the Defendant was supposed to sell the Plaintiffs goods by public auction on or after 23rd October 2012. DW1 testified that the Plaintiff's sugar was among the goods referred to in the notice and a list was to be posted on the notice board of the Customs Business Centre at Nakawa and Crested Towers. The statement is not supported by any evidence to prove that the Plaintiff's sugar was among the goods that were to be auctioned under the publication. The Plaintiff only got to know about the notice after the filing of the amended written statement of defence (the amended written statement of defence was filed on 10th September 2013). Prior to information, the Plaintiff engaged the Defendant's officials on the basis of the advertisement of the 28th October 2010.

The Plaintiff's Counsel submitted that the notice anticipated under the law is to be addressed to the importer who is the person expected to lawfully remove the goods. The Defendant produced the notice of 23rd September 2010 sometime in 2014 well after the Plaintiff had commenced the suit. The Plaintiff had only been notified by the advertisement of 20th October 2010 which led to the subsequent informal and formal negotiations with the Defendants accounting officials and which culminated into the Defendant's letter of 17th December 2010. Counsel relies on the case of **Patrick Kimbareeba versus Uganda Revenue Authority HCCS 753 of 2005** in this case Honourable Justice Geoffrey Kiryabwire held that the Defendant must use due care, skill and diligence when giving notice to taxpayers. By allowing the re-export of the sugar but the Defendant later claiming that the same had been auctioned a month earlier when the sugar was evidently still in the warehouse, it is embarrassing and prejudicial to say the least and cannot be said to amount to a proper auction.

On 25th October 2010 another notice was published in the Daily Monitor publication inviting buyers/bidders to come and participate in a public auction of goods including the Plaintiff sugar that were in the Defendant's warehouse. The auction was to take place on 12th November 2010. In *Patrick Kimbareeba vs. Uganda Revenue Authority* (supra) it was held that the essence of the notice is to give the affected individual an opportunity to make a response time. When the notice

is alleged to have been given the party seeking to rely on the protection of the notice cannot rely on it unless it was brought adequately to the attention of the other party. Additionally the advertisement of September 2010 was a general one while that of October 2010 was a detailed one which mentioned the actual goods.

The Defendant conveniently omitted to adduce evidence of the list of goods alleged to have been placed on its notice board. The auction advertised on 28th October 2010 was supposed to take place on the 29th of November 2010 or thereafter. The Defendant however opted to violate the express provisions of the law when it sold the goods on 12th November 2010 just 14 days after the date of the advertisement in blatant violation of the law. DW1 admitted that the Defendant violated the express provisions of the law when it sold the Plaintiff sugar after a period of 14 days notice contrary to the mandatory 30 days notice provided for under section 42 (1) of the EACCMA, 2004. It therefore cannot be said that the Defendant lawfully auctioned the Plaintiff's sugar.

It is also the Plaintiff's case that the Defendant's action of selling the Plaintiff sugar by private treaty when it had run an advertisement to sell it by public auction makes the sale flawed and unlawful. DW1 admitted abuse of the auction process. He testified that on 29th November 2010, another 5995 of the Plaintiff's sugar were sold by the Defendant in a private treaty. The 30 days notice provided for under section 42 (1) of the EACCMA, 2004 envisages a public auction and not a private treaty. The notice published by the Defendant on 28th October 2010 in the daily monitor was to the effect that the sale of the goods in the warehouse was to be by public auction and not by private treaty.

The Plaintiff's Counsel further submitted that during the whole process of negotiations on the re-export of the Plaintiff's sugar, and even well after the letter of 17th December 2010 no query was raised in the process and the same has not been raised to date. It was therefore surprising that the Defendant went further to carry out a sale which had long been stayed by the actual accounting officers or the person that ought to have been in charge of the whole auction process. In the premises the sale of the Plaintiff's sugar by the Defendant was unlawful and issue number one ought to be answered in the negative.

In reply the Defendants Counsel submitted that the Defendants defence on the facts is that in June 2009 the Plaintiff imported 706 metric tons of sugar from Swaziland and deposited and abandoned them in a customs warehouse for over a year. On 23rd September 2010 the Defendant in a newspaper advert in the New Vision gave notice to all persons to clear their goods out of the customs area by paying the requisite fines, taxes and fees, penalties and charges within 30 days failure of which it would be auctioned. Following the failure of the Plaintiff and other taxpayers to respond to the advertisement, the Plaintiff and other taxpayers goods were deemed to have abandoned their goods in accordance with section 42 (1) of the EACCMA 2004. Indeed the Defendant invited the public to participate in an upcoming auction on 12th November 2010 for the unclaimed goods that were published in the Daily Monitor of 28th October 2010. On 12th November 2010 the Defendant sold 1000 bags of the Plaintiff sugar to the highest bidder at the auction. On 29th November 2010 an additional 5990 bags of the Plaintiff's sugar were sold by the Defendant by private treaty. The Defendant auctioned half the total sugar imported by the Plaintiff. On 15th December 2010 the Plaintiff wrote to the Defendant's Commissioner of customs requesting to be allowed to re-export the remaining sugar. The Assistant Commissioner Field Services in a letter dated 17th of December 2010 granted the Plaintiff permission to re-export the sugar. The Defendant contends that it lawfully auctioned part of the Plaintiff's sugar. Finally in a bid to settle the matter amicably the Defendant by letter dated 10th of October 2013 offered and indeed paid to the Plaintiff Uganda shillings 130,880,462/= being balance from the proceeds of the auction after recovering taxes.

Whether the Plaintiff sugar was lawfully auctioned by the Defendant?

The Defendant's Counsel submitted that 6990 bags of the Plaintiff's sugar were lawfully auctioned. The procedure for the sale of goods that have overstayed in the customs warehouse is found under section 42 (1) of the EACCMA, 2004. Counsel submitted that the provision requires Uganda Revenue Authority to give notice by publishing in the Gazette and not to a particular importer and as such the Plaintiff's interpretation that the Defendant should have communicated to the Plaintiff is misconceived. Secondly Counsel sought to distinguish the decision of the High Court Commercial Division per Honourable Justice Geoffrey Kiryabwire in **Patrick Kimbareeba versus Uganda Revenue Authority HCCS 735 of 2005**. He submitted that the authority is inapplicable on the ground that the facts in the case are different from the facts in the

Plaintiff's case. In that case the Defendant gave notice to the wrong person. In the current case all taxpayers who knew that they had goods which have overstayed in the customs warehouse were given 30 days to clear or risk their goods being declared abandoned. The Plaintiff was aware that his goods were in the customs warehouse and therefore the notice in the newspaper of September 2010 was sufficient. On 23rd September 2010, the Defendant in the newspaper advert exhibit P 20 gave notice to all persons to clear their goods out of the customs areas by paying the requisite fines, taxes, fees, penalties and charges within 30 days failure for which the sale would be auctioned. Subsequently another notice was issued inviting the public for an auction which was to take place on 12th November 2010 and which was published in the Monitor newspaper of 28th October 2010. The Defendant's Counsel submitted that the framing of the two notices is very clear. The first notice calls upon the public to remove any goods that have stayed in the warehouse for more than the required days. It further provided that a list of the goods referred to in the notice was posted at the notice boards of the Customs Business Centre, Nakawa and Crested Towers. The second notice was merely calling upon the public inviting them for an auction following the abandonment of goods by importers who did not take any steps to redeem the goods after the first notice.

The Plaintiff's contention is that its managing director came to know about the advertisement to auction 706 metric tons of sugar from the advertisement of 28th October 2010. Secondly it is submitted for the Plaintiff that the Plaintiff only learnt about the earlier notice after amendment of pleadings by the Defendant. The Plaintiff however consented to the amendment of the Defendant's written statement of defence.

The Plaintiff alleged that he had meetings with representatives of the Defendant who informed him that all the sugar was still in the store and they allowed him to organise funds to re-export it. The only evidence in relation to permission to re-export is exhibit P5 which is the Plaintiff's letter dated 15th of December 2010 and a response thereto by the Defendants officials dated 17th of December 2010 exhibit P6. Exhibit P6 required the Plaintiff to proceed using the authorised procedure to change the auction status by paying appropriate fees. There is no evidence that the Plaintiff paid any requisite fees and in any case the sugar had already been sold.

The issuance of the permission to re-export the sugar does not make the sale of the sugar unlawful because the sugar was sold according to the provisions of the East African Community Customs Management Act and rules made there under. The Defendant's Counsel submitted that it is established law that statutory powers and duties cannot be fettered or overridden by agreement, estoppels, and lapse of time, mistake or such other circumstances. He relied on the case of **Maritime Electronic Company vs. General Dairies Ltd [1937] All ER 748** for this proposition.

The Plaintiff's witness testified that he went to the warehouse and was informed that some of the sugar had already been sold. However he paid the appropriate fees for the remaining sugar and was allowed to re-export it. DW1 made reference to the auction receipts exhibits D1 – 59 as evidence that the sugar was indeed auctioned a month before the Plaintiff made any claim for it and this evidence was not rebutted by the Plaintiff. In the premises the Plaintiff's claim that the Defendant by allowing the re-export of the sugar after it had been sold off a month earlier was prejudicial is unfounded and misguided. The Defendant's Counsel further submitted that there was no formal permission given to the Plaintiff to re-export the sugar by the Defendant's officials prior to that which was expressly given in the letter dated 17th of December 2010. The argument that the Plaintiff made that the Defendant by selling the sugar by public auction and later by private treaty makes the whole sale unlawful is flawed. Rule 207 of the EACCMA Regulations empowers the Commissioner to sell either by public auction or private treaty. The interpretation of section 42 (1) of the EACCMA should be based on the reading of the EACCMA as well as the regulation. Based on the evidence and the law Counsel submitted that the Defendant lawfully auctioned part of the Plaintiff's sugar.

In rejoinder the Plaintiff's Counsel submitted that the Defendant's case is that the sugar stayed in the customs warehouse beyond one year without the Plaintiff making any claim for it. The defence seems to be that the Plaintiff abandoned his goods. However the testimony of PW1 during cross-examination and which has not been rebutted is that he spent over a year haggling with the Defendants officials to allow him to re-export his sugar. He testified that he was in constant contact with two accounting officers of the Defendant's Auction Committee and Multiple ICD Bond Keepers. The Plaintiff acted on a tipoff by multiple ICD Bond keeper that its goods had been targeted for auction. He was shown the advertisement dated 28th of October

2010. He was further given all the assurances by the Defendant's accounting officers that the sugar had been removed from the goods to be auctioned. It was logical that the Defendant's letter dated 17th of December 2010 was issued in the full knowledge of the existence of the Plaintiff's 706 tons of sugar. The Plaintiff maintains that the Defendant's letter of 17th December 2010 was not issued in error as submitted by the Defendants Counsel. The assistant Commissioner Field Services and also the then Chairman Auction Committee was aware about the status of the Plaintiffs goods and it was his duty as the accounting officer. He consequently issued a letter dated 17th of December 2010. He was acting in the full knowledge that he had stayed the subject matter of the suit from auction and any sale that is alleged to have taken place was carried out without following the law and public principles.

With reference to the authority of *Maritime Electronic Company vs. General Dairies Ltd* [1937] All ER 748, the Plaintiff's Counsel sought to distinguish the case on the ground that the facts are distinguishable. The Plaintiff in this case is not trying to enforce the doctrine of estoppels but is seeking declarations on the legality of the auction that was carried out during the subsistence of a stay of the auction order. The illegal auction was aggravated by the absence of the formal 30 days requisite notice. Where the action of the Defendant is illegal, the public body could not be barred by the doctrine of estoppels. However in the current case there is no illegality whatsoever in the Commissioners communication dated 17th of December 2010.

Due to sheer large quantities namely 14,120 bags of sugar the Chairman Auction Committee/Commissioner Field Services could have actually noticed that 6690 bags had been auctioned. It is inconceivable for DW1 who is the supervisor at that time not to have questioned the letter dated 17th of December 2010 when it was copied to his office until when he came to testify in court. The Plaintiff's Counsel further submitted that the auction of the Plaintiff's 6620 bags of sugar would only happen or arise from serious negligence, complacency, recklessness, acquiescence or complicity of the Defendant's officials. I have further considered the other submissions on the same issue.

Resolution of issue number one: Whether the Plaintiff's sugar was lawfully auctioned by the Defendant?

I have carefully considered the pleadings, the evidence adduced and the written submissions of Counsels. The issue is whether the Plaintiff's sugar was lawfully auctioned by the Defendant. While the issue calls for an analysis of the facts, it also flows from a specific statutory provision namely section 42 (1) of the East African Community Customs Management Act, 2004. For a proper juxtaposition of the facts against the law, I will first consider the provisions of the law.

Section 42 (1) of the EACCMA, 2004 provides that:

“Where any goods have been deposited in the Customs warehouse and are not lawfully removed within 30 days after deposit, then the Commissioner shall give notice by publication in the Gazette that unless such goods are removed within 30 days from the date of notice they shall be deemed to have been abandoned to Customs for sale by public auction and may be sold in such manner as the Commissioner may deem fit.”

The proviso to the provision stipulates that perishable goods or animals may be sold by the proper officer without notice either by public auction or by private treaty at any time after deposit in the Customs warehouse. It follows that the provision applies to goods which have been deposited in the customs warehouse. Secondly it applies if the goods are not lawfully removed within 30 days after deposit. Thirdly if they are not removed lawfully within 30 days after deposit, the Commissioner shall give notice by publication in the Gazette that unless such goods are removed within 30 days from the date of the notice, they shall be deemed to have been abandoned customs for sale by public auction. In other words goods deposited have to be lawfully removed within 30 days after deposit. Secondly it is mandatory that the Commissioner shall give a publication in the Gazette notifying that unless the goods are removed within 30 days, they should be liable and are deemed to have been abandoned to Customs for sale. Lastly the provision gives the Commissioner discretionary powers to sell the goods in such manner as the Commissioner may deem fit.

I have further considered section 42 (2) and it provides that the Commissioner may extend the period for the removal of the goods imported by the Partner States Governments or diplomatic mission or aid agencies. In other words, the extension of the period for removal of the goods which can be extended by the Commissioner and which is envisaged under section 42 only

applies to Partner State Governments or diplomatic mission or aid agencies and not to private companies.

The first question that comes to mind is whether this provision is applicable to the Plaintiff's suit. Of course other provisions have to be read for a more complete appreciation of the law governing the deposit of goods. I have therefore considered general provisions relating to warehousing of goods. Section 50 (1) of the EACCMA, 2004 provides that the goods may be warehoused either for home consumption; exportation; removal to another warehouse; use as stores for aircraft or vessels; re-warehousing; removal to an export processing zone; or removal to a free port. Section 57 provides that all warehoused goods which have not been removed from warehousing in accordance with the EACCMA within six months from the date of which they were warehoused may with the written permission of the Commissioner be warehoused for an additional period of three months. This gives a maximum possible period of nine months. The only exception in which the Commissioner may give additional period of re-warehousing beyond nine months is where the goods comprise of wines and spirits in bulk warehoused by licence manufacturers of wines and spirits; or comprise of goods the duty free shop; or comprise of the motor vehicles warehouse by approved motor assemblers and dealers. The power to further extend time after a total of nine months warehousing is not available for sugar.

That notwithstanding section 57 (2) provides that where any goods required to be re-warehoused are not re-warehoused, then they shall be sold by public auction after one months notice of such sale has been given by the proper officer by publication in such manner as the Commissioner may deem fit. The proper officer may without notice either by public auction or private treaty at any time after the expiry of the initial warehousing period where the goods are of a perishable nature, sell the goods.

Coming to the facts of this case, the Plaintiffs action is for recovery of Uganda shillings 800,000,000/= arising from alleged unlawful auction and sale of the Plaintiffs sugar. It is only alleged in the plaint that sometime in early 2010 the Plaintiff imported 706 metric tons of sugar from Swaziland. When is it early 2010? The Plaintiff clearly avers that on 15th December 2010 the Plaintiff appealed to the Defendant to stay the auctioning of the sugar and to be allowed to re-export the sugar. The obvious question is when was the sugar precisely imported and

warehoused which leads to the answer of how long it had been in the warehouse before the facts alleged to give rise to the cause of action arose. Last but not least it is alleged that the Defendant did not follow the provisions of section 42 of the EACCMA 2004 and the Plaintiff seeks a declaration that the Defendant acted unlawfully by auction of the said sugar without following its provisions.

Pursuant to Order 12 rule 1 of the Civil Procedure Rules Counsels of the parties admitted certain facts and documents and raised the main controversy in a joint scheduling memorandum dated 24th of November 2015. The following are the agreed facts:

1. Sometime in July 2009, the Plaintiff imported 6990 bags of sugar from Swaziland.
2. The Defendant sold 1000 bags of the said sugar in an auction and 5990 bags of sugar by private treaty on the 12th and 29th of November 2010 respectively.
3. On 15th December 2010, the Plaintiff Company appealed to the Defendant to stay the auctioning of the sugar and to be allowed to re-export the sugar.
4. When the Plaintiff went to the warehouse storage of the sugar for re-export, it was then informed by the warehouse keeper that the goods were auctioned by the Defendant.

Additionally Counsels admitted all the relevant documents by consent of the parties these include documents in the trial bundle filed on court record on 4th July 2015 and documents tendered in evidence as exhibit P1 – P15 and marked by the Plaintiff. The auction advert of daily monitor 25th of October 2010 was exhibited as exhibit P 16. Warehousing entries were admitted in evidence as exhibits D1 – D19. Public notice for removal and clearance of goods and advertisement in the New Vision of 23rd September 2010 was exhibited as exhibit P20. Auction receipts were tendered as exhibits D21 – 59. Finally an internal memo of the Defendant dated 30th of November 2010 being the release of goods sold in auction was agreed to be exhibited as Exhibit D60.

What is in controversy is whether in November 2010 the Plaintiff's bags of sugar were lawfully sold in an auction? Secondly whether the Plaintiff was lawfully notified of the auction in the newspaper advert dated 23rd of September 2010? Thirdly whether the Defendant acted lawfully in auctioning the Plaintiff's sugar? Fourthly whether the Plaintiff's claim is time barred and whether the Plaintiff made no claim until after 16 months after the auction of the sugar? Lastly

whether on 17th December 2010, Defendant allowed a stay of auction and also allowed the Plaintiff to re-export the sugar after paying the requisite fees?

The first fact that is resolved is that the sugar was imported in July 2009 and therefore by October 2010 the sugar had been in the country for more than one year and three months. The warehousing entries exhibited D1 – 19 show that the goods were declared between July and August 2009.

As noted above the complaint of the Plaintiff is based on the provisions of section 42 (1) of the EACCMA Act. However this provision deals with the deposit of goods in the customs warehouse and which goods are not removed within 30 days after the deposit. More than a year later in September 2010 the Defendant claims that all goods which had spent more than nine months without customs clearance were given notice in the New Vision of 23rd of September 2010. I have duly considered exhibit D 20 which is the New Vision advertisement. It is a public notice run by Uganda Revenue Authority and reads into early as follows:

"The Commissioner customs informs all importers and/or owners of the goods (posted at the notice boards of Customs and Business Centre, Nakawa and Crested Towers) to clear the same out of the respective customs areas by paying the requisite taxes, fees, penalties, fines and charges accruing thereto, within 30 days from the date of this publication.

All goods that should remain uncleared at the expiry of 30 days grace period will be sold in accordance with Regulation 207 of the East African Community Customs Management Regulations 2006."

Regulation 207 (1) of the East African Community Customs Management Regulations 2006 provides that goods may be sold by the Commissioner either by public auction or by private treaty.

In other words, the general public was notified that goods which had been warehoused and which remain unpaid for customs dues for more than 30 days were liable to be sold according to regulation 207 of the EACCM Regulations 2006 after the expiration of 30 days from the date of the publication. The Plaintiff submitted that there is no evidence adduced by the Defendant that the Plaintiff's goods were listed and also posted at the notice boards as specified in the New

Vision advertisement/notice. It is true that DW1 did not come with the list when he came to testify. The notice however is addressed to all persons whose goods had spent more than 30 days in a customs warehouse without customs clearance. It is a question of fact that the Plaintiff's goods had been stored or warehoused by August 2009. The public notice irrespective of the list of goods therefore applied to the Plaintiff if section 42 (1) of the EACCMA Act is applicable. Most importantly the Plaintiff's managing director confessed that he never knew about the advertisement and therefore it follows that he could not have known about any list anyway because the Plaintiff had no actual knowledge of the advertisement which drew attention to the list of goods affected. The public notice however was addressed to all persons whose goods had spent more than 30 days in the customs warehouse without clearance of customs dues.

The second controversy that arises is whether the Plaintiff's goods were caught by the provisions of section 42 (1) of the East African Community Customs Management Act, 2004 in light of the testimony of DW1. DW1 Mr Lule Edward, the supervisor charged with managing the auction exercise. He testified that the Plaintiff warehoused 6990 bags of 50 kg each of sugar in the customs bonded warehouses licensed by URA. The sugar remained in the Defendant's warehouse and, the Plaintiff's full knowledge for a period of over one year. Subsequently the Defendant published the public notice in the New Vision newspaper of 23rd September 2010 and advising all importers with goods which have not been cleared in the respective customs areas to pay the requisite taxes etc within 30 days and have their goods removed. On 28th October 2010 another notice inviting the public to participate in an auction was advertised in the daily monitor newspaper. The auction was to be conducted on 12th November 2010. He testified that 1000 bags of the Plaintiff's sugar were sold on 12th November 2010 to the highest bidders. Secondly on 29th November 2010 another 5990 bags of the Plaintiff's sugar were sold by the Defendant in a private treaty. This amounted to 6990.

Section 47 (1) of the East African Community Customs Management Act 2004 provides that subject to any regulations, goods liable to import duty may on first importation be warehoused without payment in a government warehouse or bonded warehouse. As soon as practicable, the proper officer shall take a particular account of such goods. The testimony of PW1 demonstrates that an account of the sugar was taken by the proper officer and the sugar was assessed as liable 100% to tax. In his written testimony Mr Mugambwa Rogers PW1 testified that sometime in July

2009, the Plaintiff imported 6990 bags of sugar from Swaziland. In paragraph 4 of his witness statement he testified that upon importation of the sugar into Uganda, he was advised by the Defendant's officials that the sugar attracted a high tax and they opted to re-export the sugar. In paragraph 5 of the witness statement he testified that in the process of applying for the re-export of the sugar, he was shown a Daily Monitor newspaper advertisement dated 28th of October 2010 purporting to auction his goods within two weeks. His testimony does not have any information about what happened between July 2009 when he imported sugar and October 2010 when he was shown the daily monitor newspaper advertisement.

Goods which are warehoused for re-export are entered in the customs records under section 50 (1) of the EACCMA Act, 2004. Where goods are warehoused for re-export or home consumption, the provisions of section 42 (1) would not apply to them. Even if the section did, the goods would be caught by the provisions of section 57 (1) of the East African Community Customs Management Act. It is the limitation period of six months within which warehoused goods may be removed. Where warehoused goods have not been removed within six months, the Commissioner may give written permission to the owner permitting the goods to be re-warehoused for a further period of three months. After the expiry of a total period of nine months, the goods shall be sold by public auction after one months notice of such sale has been given by the proper officer by publication in such manner as the Commissioner may deem fit.

With reference to the testimony in cross examination of DW1, he testified that the goods were supposed to stay in the bond for a period of nine months only. His testimony is consistent with the application of section 57 (1) of the East African Community Customs Management Act, 2004. Last but not least and strangely the Plaintiff in the reply to the written statement of defence and paragraph 9 thereof averred that the Defendant acted unlawfully contrary to section 57 of the EACCMA, 2004. Secondly in paragraph 10 thereof the Plaintiff averred that under section 57 of the EACCMA, 2004 the Commissioner can permit goods to be sold by Public Auction after one month's notice of sale by publication. How come the Counsels purport to apply the provisions of section 42 (1) of the EACCMA 2004?

Under section 42 (1) of the EACCMA, 2004, it is mandatory for the Commissioner to give notice by publication in the Gazette if the goods have not been removed within 30 days after deposit.

Secondly, where notice has been given as prescribed; it would have provided that the goods are to be removed within 30 days from the date of notice. If the goods are not removed within the prescribed 30 days, they shall be deemed to have been abandoned Customs for sale by public auction and may be sold in such manner as the Commissioner may deem fit. Had the Defendant moved under section 42, it was up to the Commissioner to determine in what manner the goods should be sold. It is mandatory for the Commissioner to give a notice where the goods have not been removed within 30 days after deposit. After such publication, there is no requirement to further notify the owner of the goods other than to notify the public of a public auction of the goods. On the other hand section 57 (1) prescribes the statutory limit for all warehoused goods which have not been removed from a warehouse in accordance with the EACCMA in six months. It gives the Commissioner power to extend the period of warehousing for an additional three months except in the case of wines and spirits warehoused by a licensed manufacturer of wines and spirits or goods in the duty free shop or new motor vehicles warehoused by approved motor assemblers and dealers, limited additional extension of warehousing time beyond the nine months limit. Under section 57 (2) of the EACCMA after the expiration of a maximum of nine months in the case of goods like sugar, it is mandatory that the goods shall be sold by public auction with the rider that it should be after one months notice of such sale has been given by the proper officer by publication in such manner as the Commissioner may deem fit. In the premises, my humble conclusion is that the Plaintiff's sugar and the auction thereof is governed by the provisions of section 57 (2) of the East African Community Customs Management Act, 2004 and not section 42 (1) thereof. The conclusion is that the mandatory publication is the publication that the goods shall be sold after the public has been notified. In other words it is the statute that commands that the goods to be sold by public auction if they have not been removed within nine months assuming there has been an extension of time of the six months by an additional three months made by the Commissioner. Notwithstanding the unclear evidence as to what exactly happened in the Plaintiff's case, the law can be applied on the presumption that time was extended. In any case the facts are that the goods were sold after a period of more than a year. The provision that the goods which have not been removed within nine months shall be sold by public auction is mandatory. The Plaintiff need not be notified that the goods will be sold. Secondly the written permission to extend the period for an additional three months after the expiry of the six months can only be made after the application of the taxpayer/importer. The

Plaintiff has not adduced any evidence that it applied for extension of time to warehouse the goods beyond the six-month stated that the limitation period prescribed by section 57 of the EACCMA, 2004. In the premises illegality cannot be based on the period before the publication of the intended auction. I will only consider whether there was compliance with the requirements of sale of the Plaintiff's goods because the Plaintiffs goods had overstayed beyond the statutory period limited by section 57 of the EACCMA, 2004. In the premises, there is no need for me to consider exhibit P 20 which is the Defendant's publication in the new vision of 23rd September 2010 giving notice for removal and clearance of goods to the public. In other words section 57 of the EACCMA already prescribed that the goods to be sold and therefore does not need to give notice for removal of the goods.

The Plaintiff's case is that its managing director got to know about the advertisement for public auction of the Plaintiff's goods advertised in the daily monitor newspaper dated 28th of October 2010 exhibit P 16. This was when he was applying for re-export of the sugar according to paragraph 5 of his written testimony. The public notice stipulates that it was the public notice to auction goods in the customs warehouse. It reads that:

"Pursuant to section 42 (1) of the East African Community Customs Management Act 2005 and Regulation 207 of the East African Community Customs Management Regulations 2006, the Commissioner customs informs the general public that there shall be a public auction of motor vehicles and general goods at Nakawa Customs Warehouse.

The items on sale can be viewed from Tuesday, 9th of November 2010 Thursday 11th November 2010 between 8 AM and 5 PM at Nakawa Customs Warehouse and the respective customs gazetted areas as indicated on the Auction List..."

The public notice also notifies the public that the auction date would be Friday, 12th November 2010 between 9 AM and 5 PM. In the written statement of defence (amended) the Defendant advanced that on 12th November 2010 1000 bags out of 6990 bags of sugar were sold off in an auction and the balance of 5990 bags of sugar were sold on 29th November 2010 in a private treaty.

Starting with the period of notice I have already held that section 42 of the East African Community Customs Management Act 2004 was erroneously quoted and purportedly applied by

the Commissioner. This is because under section 42 (supra) notice has first to be given to the importer of the goods before any publication. The notice would require the importer to remove the goods within 30 days after they had stayed in the customs warehouse for 30 days without removal. However the Plaintiffs goods had overstayed and were governed by a different statutory provision namely section 57 (supra). That provision made it mandatory that the goods would be sold by public auction after one months notice of such sale has been given by the proper officer by publication in such manner as the Commissioner may deem fit. So we are not concerned with the manner of publication but with the period of notice. It is an established fact that the goods were sold on 12th November 2010 amounting to 1000 bags of sugar. This was after publication in the Monitor Daily newspaper which publication was acknowledged by the Plaintiff and therefore proved on 28 October 2010. The goods were sold about two weeks later by public auction contrary to section 57 (2) of the East African Community Customs Management Act 2004. On the face of it the Defendant acted in breach of section 57 (2) of the EACCMA as far as the sale of 1000 bags of sugar is concerned.

Secondly the Defendant admitted and pleaded that it sold more sugar on 29 November 2010 in a private treaty. The Defendant sold 5990 bags of sugar. Again this was in breach of section 57 (2) of the EACCMA, 2004 which prescribes the sale to be by public auction.

Lastly the question is whether breach of the mandatory provisions of section 57 (2) of the EACCMA, 2004 makes the sale unlawful? What is unlawful? The framing of the issues and particularly issue number one as to whether the Plaintiff sugar was lawfully auctioned by the Defendant is problematic because of the various meanings of the word unlawful and the legal consequences which apply to the flipside of the issue. I will accordingly consider the word "unlawful" as the opposite of the word "lawful". According to Black's Law Dictionary Eighth Edition page 1574 the word "unlawful" means firstly not authorised by law; illegal. Secondly, it might mean criminally punishable. Thirdly it might mean involving moral turpitude for instance engaging in unlawful activity such as gambling and drinking. Fourthly the definition of "unlawful act" means conduct that is not authorised by law or a violation of a civil or criminal law. The meaning intended by the Counsels in the framing issue one is close to the meaning ascribed to "unlawful act". This is because obviously as I have found above the auctioning of the sugar was done contrary to the civil law as contained in an Act of Parliament that prescribes the

way of performing the act of auctioning sugar or goods which have been warehoused for more than nine months under section 57 of the East African Community Customs Management Act, 2004. In that sense and only restricted to the meaning of breach of statute, the Plaintiff sugar was auctioned in breach of the statutory provisions and therefore being contrary to an Act of Parliament, in that a restricted sense, the auctioning was unlawful. It does not mean unlawful in the sense of breach of the penal provision. The question remains as to what should be done since there was disregard of the mode and procedure for sale of the Plaintiff's sugar. First of all there was breach of statutory provisions as to the period of notice. Secondly there was breach as to the mode of sale which was to be by public auction but part of the sugar was sold by private treaty. The sugar having being sold there are third parties involved not before the court to which the sugar has been sold. Without considering the consequences of non-compliance with section 57 (1) and (2) of the East African Community Customs Management Act, 2004 the first issue which is whether the Plaintiff sugar was lawfully auctioned by the Defendant is answered in the negative. The Plaintiff's sugar was not lawfully auctioned by the Defendant because it was auctioned in breach of the statutory provisions that were relevant.

The second issue is whether the Plaintiffs claim is time barred?

While it is the Plaintiff's Counsel who commenced submissions on this issue, the issue amounts to a preliminary objection to the Plaintiff's claim. The Plaintiff's Counsel submitted that the Defendant ought to have raised a preliminary objection in the earlier stages of the suit and the court would pronounce itself on the matter because this is a practice that is well known in the judicial system. The Plaintiff failed to raise the preliminary objection in time. The Plaintiff's Counsel further contended that the Defendant itself is aware that it pleaded that the suit is time barred and went ahead to acknowledge indebtedness in its letter to the Plaintiff's lawyers dated 10th of October 2013 long after the suit had been filed. In the letter the Defendant's officials acknowledged that it is indebted to the Plaintiff in the sum of Uganda shillings 130,880,462/= which they claimed would be refunded to the Plaintiff. It follows that it is within the Defendant's knowledge that the suit is not time barred. The Plaintiff's Counsel further submitted that the Defendant's assertion under section 42 (5) (b) of the EACCMA is misconceived in so far as the Plaintiffs claim is not premised on seeking the balance from the proceeds of the auction. Counsel contended that the Plaintiff's case is based on the lawfulness of the whole transaction or auction

of the Plaintiff's goods and seeks for compensation for the goods that were unlawfully auctioned by the Defendant. In the premises he prayed that issue number two is answered in favour of the Plaintiff.

On the other hand the Defendant's Counsel submitted that section 42 (5) (b) of the EACCMA provides that after the proceeds of any sale has been applied in accordance with subsection 3, and there is any balance, such balance shall in any other case pay to the order of the goods if he or she makes an application for the payment within one year from the date of the sale. On the basis of the fact that the sugar was sold on the 12th and 29th November 2010 and after it had overstayed in the customs warehouse, the Plaintiff's testimony is that its managing director knew of the sale on 17th December 2010 but only claims for the sugar on 16th February 2012 according to exhibit P3 which is more than a year after the sale. The Plaintiff was required to make the claim if any by 29th November 2011. He contended that the sugar was lawfully auctioned within the provisions of the law and the only sums the Plaintiff was entitled to wear balances from the proceeds of the auction which had to be claimed in accordance with the provisions of the law.

In rejoinder the Plaintiff's Counsel reiterated submissions that the preliminary objection on time bar is misconceived because the Plaintiffs claim is not premised on seeking the balance from the proceeds of the auction but the lawfulness of the entire auction process. The Plaintiff seeks for compensation for the goods that were unlawfully auctioned by the Defendant and therefore issue number two should be resolved in favour of the Plaintiff.

Resolution of issue number two whether the Plaintiffs claim is time barred?

Both Counsels submitted from the second provisions of section 42 of the East African Community Customs Management Act, 2004. I cannot go back to the holding that the said statutory provision is inapplicable to the Plaintiff's situation. Instead I relied on the provisions of section 57 of the EACCMA that is the applicable statutory provision. Consequences flow from specific statutory provisions as well as the law. The Plaintiff's suit is a claim which is defined by the plaint and clearly paragraph 3 provides that it is a suit for recovery of Uganda shillings 800,000,000/= arising from unlawful auction and sale of the Plaintiffs sugar, interest at commercial rate, general damages and costs of the suit. Section 57 (4) of the EACCMA just like section 42(5) thereof limits applications for any balance of proceeds of an auction to a period of

one year from the date of auction of the goods. It provides that after the proceeds of the sale have been applied in accordance with subsection (3), and there is any balance, then such balance shall, if the order of the goods makes application within one year from the date of the sale, be paid to such order, or, in any other case, be paid into the customs revenue.

There is no controversy about the fact that no application was made within one year for the balance of the proceeds of the sale as envisaged by section 57 (4) of the EACCMA or section 42 (5) of the EACCMA. The Plaintiff has a two pronged defence to the objection on the ground of time bar. These defences are taken as alternatives. If the statutory provisions are applicable, then the Plaintiff raises the acknowledgement of liability of the Defendant as a defence.

As far as the acknowledgement is concerned the Plaintiff relies on a letter addressed to the Plaintiff's lawyers dated 10th of October 2013. This letter was admitted by consent of the parties as exhibit P10. It is a letter addressed to the Plaintiff's lawyers Messieurs Birungye, Barata and Associates quoting HCCS 336 of 2012 which is the current suit. It provides in part as follows:

"We have reviewed the case file and this is to notify you that the balance of the proceeds of the auction after setting off taxes and other lawful impositions under EACCMA will be refunded to your client. Our records show that this amount is UGX 130,880,462/= (One hundred thirty million eight hundred and eighty thousand four hundred sixty two).

The position is premised on the effect of our letter of 17th of December 2011 on time limits under the EACCMA and is strictly without prejudice to our primary position regarding the legality of the entire exercise.

Please forward the refund claim for processing to AC – Customs Audit. By copy the above, the assistant Commissioner Customs Audit is notified...."

The letter is based on the premises that the letter of the Defendant dated 17th of December 2010 exhibit P2 was not in favour of the Defendant.

Briefly exhibit P2 refers to an earlier letter of the Plaintiff dated 15th of December 2010 in which the Plaintiff appealed for extension of warehousing period for 706 metric tons of Swaziland sugar in bond for two weeks. The letter was received by the Defendant on 15th December 2010. The letter the Plaintiff wrote that following their meeting with the Defendant namely the

Commissioner Customs Uganda Revenue Authority, it would be grateful for his or her intervention to allow them to re-export the sugar. Accordingly he wrote to the Assistant Commissioner Field Services for an extension of time to put in place necessary logistics to re-export the sugar. The Plaintiff also sought permission to re-export the sugar. In the reply exhibit P2 dated 17th of December 2010 the Defendant inter alia wrote that the warehousing period for the sugar had expired which resulted into tagging it and putting it on the notice board prior to auctioning it. Secondly that the appeal of the Plaintiff to the Commissioner customs was considered and therefore the Plaintiff was advised to proceed with the authorised procedure to change auction status by paying the appropriate fees. That is when the sugar would revert back to the Plaintiff from Government. Furthermore in exhibit P2 the Defendant advised the Plaintiff to liaise with the Supervisor Satellite Station for the issuance of a miscellaneous payment forms for the payment and thereby he would present the receipts to the Supervisor Bonds and the Assistant Commissioner Enforcement for further clearance procedures.

The letter obviously presupposes or gives the impression that the Defendant still had the sugar at the warehouse by 17th December 2010. Yet it is the Defendant's evidence that the sugar had been sold on the 12th and 29th of November 2010. This was sugar amounting to 6990 bags of sugar of 50 kg each. For consistency of facts, it had no sugar amount to 1000 kg which is the equivalent of 20 bags. 6990 bags of sugar is equivalent to about 349 metric tons. In that case what happened to the other balance out of the 706 metric tons?

I have carefully considered the evidence as well as the acknowledgement and particularly in relation to the Plaintiffs claim in the plaint. The Plaintiffs claim as disclosed in paragraph 4 clearly gives the facts that it imported 706 tons of sugar from Swaziland. It gives the impression that the Defendant auctioned off the entire lot. In the written statement of defence the Defendant admits having auctioned 6990 bags of sugar. The Defendant also pleaded in paragraph 5 of the amended written statement of defence that sometime in July 2009 the Plaintiff deposited 6990 bags of sugar into the customs warehouse. In the reply to the written statement of defence and particularly paragraph 6 thereof the Plaintiff alleged that by 1st November 2010 there were still 706 metric tons of sugar at the warehouse of the Defendant. In paragraph 13 of the written testimony PW1 who is the managing director of the Plaintiff testified that he discovered that the Defendant sold 1000 bags of the sugar in an auction and 5990 bags of the sugar by private treaty

on the 12th and 29th of November 2010 respectively. Mugambwa Rogers PW1 and the Managing Director of the Plaintiff was cross examined about notification by the Commissioner customs and assistant Commissioner Field services who was also the chairman auction committee that these groups were not subject to the November 2010 auction. He was informed that his goods had been taken off the auctioned list. And that explains the two weeks he was given expected to load one truck every day. They had 706 tons of sugar. The sugar that was auctioned was only 6990 bags which amounted to about 340 tons. The letter held the Plaintiff to re-export the balance. He further confirmed after the further cross examination about the bags of sugar tagged for auction that about 14,120 bags of sugar which is equivalent to 706 metric tons of sugar had been tagged for auction. He further confirmed that the claim was for only part of that quantity of sugar which is what the Plaintiff claims to have been unlawfully auctioned.

It is clear from the correspondence that part of the Plaintiff's sugar was released after the letter of the Defendant dated 17th of December 2010. PW1 confirmed that about 356 tons were re-exported by the Plaintiff. Subsequently in exhibit P9 in a letter dated 5th of July 2013 the Plaintiffs lawyers complained to the assistant Commissioner litigation that the Defendant had only accounted for 6254 bags which is less than the amount of sugar held. Again in a letter dated 22nd of July 2014 exhibit PE 11 the Plaintiff's lawyers wrote to the Commissioner customs of the Defendant and acknowledged that 6990 bags of sugar were housed in multiple ICD bond. They again claimed that they received an account for 6254 auctioned bags of sugar and wanted accountability for an additional 744 bags which would bring the total to 6998 bags of sugar. In that letter the Plaintiffs lawyers also acknowledged that money realised from the sale was a total of Uganda shillings 609,953,000/= but their client who is the Plaintiff only received an amount of Uganda shillings 130,880,462/=. In other words the Plaintiff has already been paid and acknowledged sums.

Finally the acknowledgement is restricted to the sum of Uganda shillings 130,880,462/= which has already been paid to the Plaintiff. The payment was made after the suit had been instituted and after the acknowledgement.

On that basis the question of time bar has been overtaken by events. While it is true that the Defendant purported to settle a balance of the money for all proceeds of the auction that

proceeded from the premises of auction either under section 42 of section 57 of the East African Community Customs Management Act, the Defendant is barred from raising the question of time bar. In any case the objection would lead to no good since the Defendant has already paid the money it acknowledged as having accrued from the auction of the Plaintiffs sugar. The objection on the ground of time bar is accordingly overruled.

Issue number 3 is whether the Plaintiff is entitled to the remedies claimed?

The Plaintiff's Counsel submitted that the Plaintiff is entitled to general damages and that the quantum of general damages is to put the innocent party as far as money can do so in the same position as if the contract had been performed with reference to the dictum of Lord Wilberforce on the principle for assessment of damages case of **Johnson and another vs. Agnew [1979] 1 All ER 883**. Lord Wilberforce held that the object for an award of general damages is compensatory. The Plaintiff's Counsel also relied on similar principles in **Dharamshi vs. Karsan [1974] 1 EA 41** that the purpose of an award of general damages is restitutio in integrum. Counsel also relies on **British Transport Commission versus Gourley (1956) AC page 185** at page 197. The Plaintiff's Counsel further submitted that the Defendant's conduct was oppressive, inconsiderate and an abuse of its statutory mandate. The Defendant caused inconveniences and economic loss to the Plaintiff.

Furthermore the Plaintiff's Counsel prayed for an award of special damages of Uganda shillings 800,000,000/= being the fair market value for the Plaintiffs 350 tons of auction sugar.

On the other hand and in reply the Defendants Counsel submitted that general damages for costs of the conduct of the Defendant in causing the injury to the Plaintiff that is being compensated for. In those cases the Defendant must be at fault. The Plaintiff failed to show how the conduct of the Defendant caused her loss and inconvenience and therefore is not entitled to general damages. Moreover PW1 acknowledged that he received Uganda shillings 130,880,462/= being the balance of the proceeds of the auction which was the balance after taxes and charges.

With regard to the claim for special damages Counsel submitted that it has to be specifically pleaded and proved to the satisfaction of the court according to the case of **Kyambadde versus Mpigi District Administration [1983] HCB 44**. It must be proved that the loss claimed as special damages was in fact incurred and that it was the direct result of the Defendant's conduct. The

Plaintiff neither pleaded that it suffered loss of Uganda shillings 800,000,000/= nor did it prove it and therefore the claim for special damages should be disallowed.

In rejoinder the Plaintiff's Counsel reiterated earlier submissions that the Defendant's actions or in actions lead to colossal expenses by the Plaintiff and loss of business.

Resolution of the issues on remedies

I have duly considered the rest of the submissions that they do not have to repeat here. On the first issue as to whether the sugar was lawfully sold, it was answered in the negative with the reservations as to the consequence or consequences of failure by the Defendant to give 30 days' notice for publication in terms of section 57 of the East African Community Customs Management Act, 2004 as well as having made a sale by private treaty when the statute commands a sale by public auction.

Generally what is done in contravention of an Act of Parliament cannot be enforced in a court of law. This was the holding in **Bostel Brothers, Ltd versus Hurlock [1948] 2 All ER 312**, where Somervell L.J quotes the principle of law at 312:

“The principle of law relied on was stated concisely and in a form appropriate to the present issue by Ellenborough CJ in *Langton v Hughes* (1 M & S 593, 596): “*What is done in contravention of the provisions of an Act or Parliament, cannot be made the subject-matter of an action.*” (Emphasis added).

In this case however the sale of the sugar by public auction was authorised by section 57 of the East African Community Customs Management Act, 2004. Section 57 (2) (supra) provides that where the goods are not to be warehoused, they should be sold by public auction after one months notice of such sale has been given by the proper officer by publication in such manner as the Commissioner may deem fit. The same section of the EACCMA also provides that the goods would not be warehoused for more than six months. Furthermore additional extension of only three months would be made by the Commissioner upon application of the order of the goods. The Plaintiff only applied more than a year later in December 2010 when the goods had been imported in July 2009. The Plaintiff was in contravention of the law and the Defendant was entitled to auction the goods. The only problem left was that it complied with the imperative to

auction the goods but the Defendant failed to give 30 days' notice and also sold part of the goods by private treaty instead of public auction.

The Defendant therefore did not comply with the procedure and requirement for the sale. The question is whether a statute which uses the imperative word "shall" is mandatory or directory and whether the act done in disregard thereof is void or not. Where the courts hold that a statutory provision is mandatory, anything done in disregard of the statutory provision is null and void and of no legal effect. If the courts find that the provision is directory, then anything done in disregard of the statutory provision can be saved though the officers who disregarded the enactment are culpable. The right of punishment of such officers is with the employer and there is no suit to make them culpable in this court.

In the case of **Cullimore v Lyme Regis Corporation [1961] 3 All ER 1008** at page 1011 Edmund Davis J quotes the principles applied by courts from Maxwell on the Interpretation of Statutes when he said:

“... those general principles are conveniently stated in summary form in Maxwell on Interpretation of Statutes (10th Edition), at p 376:

“It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment ... A strong line of distinction may be drawn between cases where the prescriptions of the Act affect the performance of a duty and where they relate to a privilege or power. Where powers, rights or immunities are granted with a direction that certain regulations, formalities or conditions shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred, and it is therefore probable that such was the intention of the legislature. But when a public duty is imposed and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be

directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative.”

In this case the statute clearly gives a right of sale by public auction to the Defendant under the circumstances. So the sale of the sugar is not null and void or illegal. In fact the statute prescribed that the sale shall be conducted in a particular manner and that specifically it should be preceded by a 30 days publication or notice of the sale. Secondly it is to be done by public auction and not private treaty. In the premises, the statutory provisions can be construed to be directory and the acts of sale of the Plaintiffs sugar is not invalid.

What needs to be assessed is whether failure to comply with the 30 days statutory notice occasioned any damages to the Plaintiff? Secondly whether failure to sell by public auction occasioned any damages to the Plaintiff? The traditional remedy for breach of statute is an award of general damages. Breach of statute is a tort.

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

“breach of a statutory duty created for the benefit of an individual or a class is a tortious act, entitling anyone who suffers special advantages there from to recover such damages against the tortfeasor”

Kennedy L.J. further held that the proper remedy for a breach of statute is an action for damages especially where the statute lays no rule for non-compliance or breach and in appropriate cases an injunction. However damages have to be pleaded and proved. In the case of *Building and Civil Engineering Holidays Scheme Management Ltd v Post Office [1965] 1 All ER 163* proceedings were commenced to recover damages for registered inland postal packets under section 9(2) of the Crown Proceedings Act, 1947 which provided that:

“proceedings shall lie against the Crown under this subsection in respect of loss of or damage to a registered inland postal packet.”

Prior to the above law, no proceedings could be brought against the Postmaster for loss of mail. Lord Denning MR at pages 167 – 168 called this a statutory cause of action under which damages could be assessed based on the same common law principles for assessment of damages. He said:

“I see, therefore, a close analogy between an action for breach of a bailment and this new statutory cause of action against the Post Office; and damages should be assessed on the same footing, save in so far as the statute otherwise provides. At common law in a case of bailment, the general principle is *restitutio in integrum*, which means that the party damnified is entitled to such a sum of money as will put him in as good a position as if the goods had not been lost or damaged. This is subject, however, to the qualification that the damages must not be too remote, that is, they must be such damages as flow directly and in the usual course of things from the loss or damage.”

Similarly the only question here is whether the Plaintiff suffered any loss for breach of statute by the Defendant. Because the act of breach of statute is the tort, the damages flow directly in the usual course from the act. The act was the sale without following the procedure. While the sale was authorised, the question first of all is whether the Plaintiff suffered special damages. I have already established that only 6990 bags of sugar were sold or auctioned by the Defendant. The Plaintiff in writing acknowledged that an account had been made for 6254 bags out of the amount. The Plaintiff’s lawyers claimed 744 bags. 6990 bags by matters 6254 bags give a total of 736 bags of sugar which were not accounted for. I agree that special damages have to be pleaded and specifically proved. The Plaintiff claimed Uganda shillings 800,000,000/= for unlawful auction of its bags. It claimed that it had imported 706 metric tons of sugar. The suit was filed on 20th August 2012. Subsequently the Plaintiff acknowledged and agreed that part of the 706 metric tons of sugar were released to it. The Plaintiff further agreed with the Defendant that the Defendant only sold 6990 bags of sugar. Out of these the Plaintiff proved that there was an account of only 6254 by the Defendant.

736 bags are not accounted for and the Plaintiff is entitled to special damages for the market price of 736 bags of sugar with each bag containing 50 kg of sugar. Valuation is at the date of

judgment and the Plaintiff is awarded the current market price of 736 bags of sugar as special damages.

The Plaintiff seeks a declaration that the Defendant unlawfully auctioned off the sugar does not flow the provisions of section 42 of the EACCMA 2004.

In light of the resolution of issues number 1 and 2 a declaration issues that the Defendant did not adhere to the provisions of section 57 (2) of the EACCMA, 2004 and acted in breach of it by failing to give a 30 day's notice before auction and by failing to sell 5990 bags of sugar by public auction.

I decline to issue a declaration to the effect that the Plaintiffs claim is time barred because it was overtaken by the event of the Defendant paying some balance out of the proceeds of the auctioned sugar.

With regard to general damages, general damages are at the discretion of the court. I have taken into account the fact that the Defendant was entitled to sale the sugar. The Plaintiff did not prove what loss it suffered by the breach of statute by failure to give 30 day's statutory notice before the auction and by selling the sugar by private treaty. I have carefully considered the correspondence adduced by the Plaintiff. The accountability of the Defendant dated 17th of May 2013 exhibit PE 8 shows that by public auction on the 12th and 15th of November 2010 the Defendant sold 264 bags of sugar. On 29 November 2010 the Defendant sold 5990 bags of sugar. The total number of bags of sugar sold is 6254. The partial accountability demonstrates that 609,953,000/= Uganda shillings was realised from the sales. In exhibit P9 the Plaintiff's Counsel Birungyi, Barata & Associates complained that there was a partial accountability. 736,000 bags of sugar were not accounted for. In exhibit P10 the Defendant offered to pay the Plaintiff Uganda shillings 130,880,462/= being the balance after offsetting what it called taxes and other lawful impositions under the EACCMA. In a letter dated 22nd of July 2014 exhibit P11 the Plaintiff's Counsel argued that those who bought the sugar from the Defendant also paid taxes on top of it. They prayed for all the proceeds of the sale. Additional information provided indicates that the Defendant sold between the 12th and 15th of November 1000 bags of sugar. On 18th August 2014 in exhibit P12 the Defendant wrote to the Plaintiff's lawyers informing them that a reconciliation exercise was in its final stages and the result thereof would be communicated in due course. The

Plaintiff's lawyers repeated the demand by letter to the Defendant dated 20th of November 2014 and received on the same day for the full purchase price of the auctioned sugar. On 20th December 2014 in exhibit P 14 the Defendant wrote to the managing director of the Plaintiff indicating that the comprehensive reconciliation was conducted to determine whether the Plaintiffs claim were tenable. They wrote that 6990 bags of sugar worth sold through public auction and private treaty in November 2010. Having made all deductions of all charges, the residual sum of Uganda shillings 130,808,462/= was the balance that was paid through the lawyers Messieurs Birungyi Barata & Associates in October 2013 and the Plaintiff was not entitled to any more payment.

In a letter dated 25th of February 2015 and marked exhibit P 15 the Defendant again wrote to Messieurs Birungyi, Barata & Associates informing the Plaintiff's advocates that the accountability giving the balance of Uganda shillings 130,880,462/= concerned the sale of 5990 bags through private treaty under the proceeds of the additional 1000 bags sold through public auction had been inadvertently omitted from the accountability. They therefore advised the Plaintiff's Counsel to liaise with the office of the Assistant Commissioner Customs and Audit to facilitate refund of Uganda shillings 19,027,624/= being the residual balance inclusive of 10% bond charges arising from the sale of 1000 bags of sugar. They also attached an annexure of the accountability. The Plaintiff never adduced additional evidence concerning the claim for a total of Uganda shillings 800,000,000/=. The only accountability adduced is exhibit P 15 indicating that the Plaintiff had an additional sum of Uganda shillings 19,027,624/= with the Defendant. In other words this was the only additional amount the Plaintiff was entitled to. The Defendant's charges and taxes which were deducted have not been challenged. DW1 testified that the Plaintiff was not entitled to any more refunds/payments.

If this amount of Uganda shillings 19,027,624/= has not yet been refunded to the Plaintiff, the same shall forthwith be refunded to the Plaintiff by the Defendant.

Having come to the conclusion that the Defendant was entitled under the EACCMA, 2004 to auction the Plaintiff's sugar, the Plaintiff only proved that the procedure was not followed. Any taxes and charges imposed by the Defendant have not been challenged as unlawfully charged. In any case the procedure for challenging any unlawful or excessive charges would be by way of an

application for review of the Commissioners decision within thirty days of the decision or omission under section 229 of the EACCMA, Act 2004. A person dissatisfied with a decision of the Commissioner upon review is entitled to lodge an appeal to the Tax Appeals Tribunal within 45 days of the decision.

In the premises the Plaintiff would be awarded general damages for any inconveniences caused due to the failure of the Commissioner to follow the procedure and mode of sale prescribed by section 57 of the EACCMA, Act 2004. The Plaintiff is awarded Uganda shillings 15,000,000/= as general damages under this head.

Under section 27 of the Civil Procedure Act costs usually follow the event unless the court otherwise for good reason orders. The Plaintiff was justified in filing this suit and part of it was settled after the suit had been filed. The Plaintiff is accordingly awarded costs of the suit as the successful party.

Judgment delivered in open court on the 19th of August 2016

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Mugarura Jotham appearing with Martin Banza for the Plaintiff

Rogers Mugambwa Plaintiffs MD in Court

Barbara Ajambo Nahone for the Defendant

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

19th August 2016