

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO 1174 OF 2016
(ARISING FROM CIVIL SUIT NO 336 OF 2012)
IN THE MATTER OF AN APPLICATION FOR REVIEW
AKIPHAR PHARMACEUTICALS LTD}APPLICANT
VERSUS
THE COMMISSIONER GENERAL CUSTOMS,
UGANDA REVENUE AUTHORITY}.....RESPONDENT
BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA
RULING

The Applicant is who is the Plaintiff in the main suit commenced this application under section 82 of the Civil Procedure Act for review of the judgment entered in favour of the Applicant on 19th August, 2016 on the ground of mistake or error apparent on the face of the record. Secondly, it is for costs of the application to be provided for. The grounds of the application contained in the notice of motion are as follows:

1. The Applicant instituted civil suit number 366 of 2012 against the Respondent for a declaration that the Respondents auction of the Applicants 6990 beds of sugar was unlawful, recovery of Uganda shillings 800,000,000/=.
2. The honourable court rightly decided that the sale of 1000 bags on 12th November, 2010 by public auction and the sale of 5990 bags on 29 November, 2010 in a private treaty was in breach of sections 57 (2) of the East African Community Customs Management Act (EACCMA)

3. The Court rightly held, among other orders, that the Applicant's sugar was not lawfully auctioned by the Respondent because it was auctioned in breach of the statutory provisions that were relevant.
4. Upon the above declaration of the auction being in breach, the honourable court awarded the current market price of 736 bags of sugar as special damages.
5. The award by the honourable court was entered in error apparently on the face of the record because the evidence on record and reasoning of the court was that the actual unaccounted for bags of sugar were 6990 bags.
6. Due to the foregoing reasoning, the award ought to have been for 6990 bags of sugar instead of 726 bags of sugar.
7. It is just and equitable that the judgment is entered in favour of the Applicant on 19th August, 2016 is reviewed on account of mistake or error apparent on the face of the record.
8. It is in the interest of substantive justice that the application is granted.

The application is supported by the affidavit of Rogers Mugambwa, the Managing Director of the Applicant which repeats the grounds of the application as far as the filing of the suit is concerned and adds that the claim of Uganda shillings 800,000,000/= was equivalent to US\$350,000 for 350 tons of sugar. At the material time a ton of sugar cost US\$1000. Judgment of the court was delivered on 19th August, 2016 wherein the court rightly decided that the sale of 1000 bags on 12th November, 2010 by public auction and the sale of 5990 bags on 29th November, 2010 in a private treaty was in breach of section 57 (2) of the EACCMA. The court further correctly held among others that the Applicant's sugar was not lawfully auctioned by the Respondent because it was auctioned in breach of the statutory provisions that were relevant. Save upon the declarations of the auctions being in breach the honourable court awarded the current market price

of 726 bags of sugar as special damages that the award was entered in error which is apparent from the face of the record because evidence and the reasoning of the court was that the actual unaccounted for bags of sugar were 6990 bags. For that reason the award ought to have been for 6990 bags of sugar instead of 736 bags. In the premises, it is just and equitable that the judgment entered in favour of the Applicants on 19th August, 2016 is reviewed on the ground of mistake or error apparent on the face of the record. On the basis of advice of his lawyers Messieurs Birungi, Barata & Associates he deposed that this is a proper case for review under Order 46 of the Civil Procedure Rules.

The affidavit in reply is that of Barbara Ajambo Nahone, a Litigation Officer in the Legal Services and Board Affairs Department of Uganda Revenue Authority. She raided the application and the affidavit in support and deposed that the Respondent was dissatisfied with the decision of this court and filed a notice of appeal on 25th August, 2016. Secondly, she contends that there was no error apparent on the face of the record as the basis of the award of the market price of 736 bags of sugar as special damages to the Applicant was the evidence of exhibit P9 and exhibit P11 in which the Applicant acknowledged that the Respondent had accounted for 6254 bags of sugar. Furthermore the Applicant also acknowledged receipt of a residual sum of Uganda shillings 130,880,462/= from the Respondent which was made after requisite duties and fees had been deducted. At the hearing the Applicant did not challenge the deductions made by the Respondent. Consequently she contends that the affidavit in support of the application is devoid of any sufficient facts from which the court can adjudicate on the merits of the application and the affidavit should be disregarded and the application dismissed with costs.

The court was addressed in written submissions. At the hearing of the application Counsel Martin Banza represented the Applicant while the Respondent was represented by Counsel Christa Namutebi.

Submissions the Applicant's Counsel

Learned Counsel for the Applicant submitted that the Applicant Company instituted Civil Suit No. 336 of 2012 against the Respondent for declaration that the Respondent's auction of the Applicant's 6990 bags of sugar was unlawful and for recovery of Uganda shillings 800,000,000/= (Eight Hundred Million Shillings

Only). The submissions are that in a judgment delivered on 19th August, 2016 court rightly decided that the sale of 1000 bags on 12th November, 2010 by public auction and the sale of 5990 bags on 29th November, 2010 in a private treaty was in breach of **Section 57 (2) of the EACCMA** and that the Applicant's sugar was auctioned in breach of the statutory provisions that were relevant. Counsel submitted that upon the above declarations of the auction in breach, the Court awarded the current market price of 736 bags of sugar as special damages which is the Applicant's basis of its application for Review of the said award which was entered in error apparent on the face of the record because the evidence on record and the reasoning on Court was that the actual unaccounted for bags of sugar were 6990 bags.

Just like the right of appeal an order in review is a creature of statute which must be provided for expressly and in considering an application for review court exercises its discretion judicially as was held in the case of **Abdul Jafar Devji vs. All RMS Devji [1958] EA 558**. The remedy of review is provided for by section **82 of the Civil Procedure Rules** and **Order 46 of the Civil Procedure Rules**. The grounds for review were outlined in the case of **FX Mubuuke vs. UEB High Court Misc. Application No.98 of 2005** and include the following. A mistake or error apparent on the face of the record; discovery of new and important evidence which after exercise of due diligence was not within the Applicant's knowledge or could not be produced by him or her at the time when the decree was passed or the order made and any other sufficient reason exists.

The Applicant's evidence is that the Respondent had sold all the 6990 bags of sugar unlawfully and hence ought to refund all proceeds she had recovered from the impugned auction process since the Respondent actually admitted to having sold all the 6990 bags of sugar. He also submitted that it's on record in the Applicant's evidence in chief that the accountability that was made by the Respondent in the year 2014 was only a partial refund of Uganda shillings 130,880,462/= which sums were alleged to have been the balance of proceeds from the auction and the apparent accountability for only 6254 bags of sugar as referred to in the Applicant's Exhibits No. PE 7, PE 8, PE 9, PE 10 and PE 11 were formal communications during reconciliations of the actual sums due which depicted a variance of 744 bags of sugar which wasn't explained. He further submitted that the Applicant's Exhibits No. 13, 14 and 15 made a clear explanation that the Respondent sold 6254 bags and recovered Uganda shillings. 609,953,000/= of which only Uganda shillings. 130,880,462/= was

refunded given the Court's declaration that the auction was unlawful. Counsel submitted that the Respondent was to refund the full auction proceeds (less the Uganda shillings. 130,880,462/= which had already been refunded) and the market price for 736 bags of sugar which were not accounted for both as special damages. He further submitted that it is in the interest of justice that review is allowed to the extent that the order of refund was actually in reference to 6990 bags unlawfully auctioned and not in reference to only part of the 6990 bags sold. In regard to this Counsel cited the case of **Edison Kanyabwera vs. Pastori Tumwebaze SCCA No. 06/04 [2005]2 EA 87** where "error or mistake apparent on the face of the record" was defined to mean an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on record. The error may be one of fact, but it is not limited to matters of fact and includes error of law'

He further submitted that the order sought is not in any way prejudicial to the Respondent and prayed that Court be pleased to grant the order for review of the Judgment entered in favour of the Applicant on 19th August, 2016 and award costs of this application to the Applicant.

Submissions of the Respondent's Counsel

In reply, the learned Counsel submitted that the Applicant's argument that the award was entered in error apparent on the face of the record because the evidence on record and reasoning of the Court was that the actual unaccounted for bags of sugar were 6990 is misconceived. He submitted that at page 32 and 34 of the judgment court noted that auction of the sugar by the Respondent was not null and void or illegal as the Respondent was entitled under the East African Community Customs Management Act of 2004 to do so. Learned Counsel submitted that court noted that the Applicant acknowledged receipt of Uganda shillings 130,880,465/= from the Respondent being the balance of the proceeds from the sale of 5990 bags of sugar after offsetting taxes and other lawful impositions under the EACCMA and the Applicant did not challenge the lawfulness of the taxes and charges imposed on the proceeds by the Respondents.

Counsel also submitted that the Applicant having acknowledged receipt of the said monies and not contested the taxes and charges thereto imposed is estopped from claiming a sum for the whole 5990 bags. He cited the case of

Harrison vs. Wells, (1966) 3 All ER 524 in the Court of Appeal where Salmon W observed that the rule of estoppels was founded on the well-known principle that one cannot approbate and reprobate.

He further submitted that the court was very clear on the evidence brought by the Applicant before it in regard to how many bags were accounted for to which PE9 and PE11 acknowledged that the Respondent had accounted for 6254 bags of sugar. Learned Counsel further submitted that the court in coming to its conclusion noted that the Applicant never adduced additional evidence concerning the claim of Uganda shillings 800,000,000/= to which the only accountability adduced was Exhibit P15 indicating that it had an additional Uganda shillings 19,027,624 with the Respondent. Learned Counsel further submitted that the application is devoid of any sufficient facts from which court can adjudicate on any merits as there is no error apparent on the face of the record and prayed that the application be disregarded and application dismissed with costs.

Submissions in rejoinder

In rejoinder Counsel submitted that it's the Applicant's submission that the holding on page 23 of the judgment ought to have led to an order that the Respondent pay the Applicant the actual value of the sugar unlawfully auctioned. He submitted that it was the unequivocal evidence of both the Applicant and Respondent's witnesses that the Applicant's sugar had been cleared for re-export and that not only did the Respondent breach the statutory provisions of the East Africa Community Customs Management Act, but the Respondent actually auctioned 6990 bags of sugar that were meant for re-export. He submitted that the Respondent/ Respondent did not make accountability for the full consignment of 6990 bags of sugar and hence ought to have refunded all proceeds of the sale of the whole consignment. It is the Applicant's further submission that, the 736 bags of sugar cannot be separated from the consignment as they were stored as one consignment.

The terms upon which the Applicant accepted and acknowledged receipt of Uganda shillings 130,880,465/= was conditional and the Applicant's PE No. 11 was very clear about the circumstances upon which the Applicant received the said sums. He submitted that the subject accountability referred to in the exhibit P 11

was by letter detailing the proceeds of the sale of 6254 bags of sugar, but the Applicant never received the said proceeds save for the amounts acknowledged. The Applicant's claim for the whole proceeds of the auction, inclusive of all taxes and other charges unlawfully levied, was unequivocal both in his out-of-Court communications and at trial which assertions were not disputed by the Respondent either at that time of receipt of the letter or at trial. The legal principles of estoppels, approbation and reprobation do not apply in the instant circumstances and the cases cited by the Respondent are distinguishable as the facts and circumstances were totally different as such the doctrine of estoppels cannot prevail as an answer to a claim that an act done by a statutory body was ultra vires. He relied on the case of **Pride Exporters Limited vs. Uganda Revenue Authority High Court Civil Suit No. 563 of 2006** where Hon. Justice Geoffrey Kiryabwire held that estoppels cannot hold if what a statutory body did was ultra vires.

He submitted that it is established law that estoppels cannot be pleaded as a bar overriding a statutory duty or obligation and in the instant case, the Respondent's argument that the doctrine of estoppels bars the Applicant from seeking the balance of the auction proceeds after acknowledging receipt of Uganda shillings 130,880,465/= assumes that the law permits the Respondent to collect the taxes from the auction of the Applicant's 6990 bags of sugar which were meant for re-export. He submitted that if the law does not enable the Respondent to collect any taxes from the unlawful sale of the Applicant's sugar as it is in the instant matter, then to argue estoppels is not necessary as such it is the Applicant's submissions that the Respondent's argument of approbation and reprobation is distinguishable and thus misconceived.

He further submitted that the doctrine of election, as defined in the case of **Benjamin Scarf vs. Alfred Jardine (1882) 7 Appeal Cases 361**, is distinguishable on the grounds that the facts and circumstances in the instant matter are different. In this case the Applicant did not have two remedies to choose from, as his claim for the full proceeds of the unlawful auction was unequivocal; the Respondent, by remitting a portion of the auction proceeds, was not acting on any promise or representation that the Applicant would abandon his whole claim upon receipt of Uganda shillings 130,880,465/=; and as clearly depicted in the communications between the parties, the Applicant's receipt of the aforementioned sums was conditional and thus equivocal. He submitted that the Respondent has failed to

demonstrate the manner in which it would be prejudiced by the grant of this application, and to demonstrate that the depicted error was not manifest or self-evident and does not require an examination or argument to establish the same. As such this application was made bona fide and it is in the interest of justice that Court grants this application.

Ruling

I have duly considered the Applicant's application for review of the judgment dated 19th of August 2016 on the sole ground that there is a mistake or error apparent on the face of the record. The Respondent's answer to the application is simply that there is no mistake or error apparent on the face of the record. While the Applicant moved under section 82 of the Civil Procedure Act, the ground of the application is under Order 46 rule 1 (1) (b) of the Civil Procedure Rules which provides inter alia that a person considering himself or herself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred may apply on the ground of some mistake or error apparent on the face of the record, or for some other sufficient reason for review of the judgment to the court which passed the decree or made the order. On the other hand section 82 of the Civil Procedure Act permits any person considering himself or herself aggrieved by a decree or order from which an appeal is allowed by the Civil Procedure Act but from which no appeal has been preferred to apply for a review of the judgment to the court which passed the decree or made the order and the court may make such order on the decree or order as it thinks fit. The Respondent lodged a notice of appeal on the 25th of August 2016 intending to appeal against the whole judgment and the issue is whether an application for review may be made where an appeal has been preferred. Order 46 Rule 1 (2) provides that a party who is not appealing from a decree or order may apply for review of the judgment notwithstanding the pendency of an appeal by some other party. The Applicant in this application has not appealed and is entitled to file an application for review.

The controversy in this application is not about the scope of rules of procedure or law for applications for review on the ground of mistake or error apparent on the face of the record. The judicial precedents referred to by the learned Counsels on

this issue are not controversial or in dispute. The only question for consideration is whether there is indeed an error or mistake apparent on the face of the record.

The Applicant's grievance is that it instituted a suit for declaration that the Respondent's auction of the Applicant's 6990 bags of sugar was unlawful, and for recovery of **Uganda shillings 800,000,000/=**. The court having decided that the sale by public auction of 1000 bags on 12th November, 2010 and by private treaty of 5990 bags on 29th November, 2010 was in breach of section 57 (2) of the East African Community Customs Management Act, 2004 (EACCMA) awarded the current price of 736 bags of sugar as special damages.

Consequently the Applicant's contention is that the award of the court was entered in error apparent on the face of the record because the evidence on record and the reasoning of the court was that the actual unaccounted for bags of sugar were 6990 bags. It follows that the award ought to have been for 6990 bags of sugar instead of 736 bags of sugar.

I have accordingly read through the judgment of this court. Judgment was delivered on 19th August, 2016. The findings of the court in the judgment include the fact that the Applicant imported 706 tons of sugar which were tagged by the Respondent for auction and upon the Applicant's appeal to the Respondent, 356 tons was released to the Applicant and re – exported. However, the Respondent unlawfully sold 6990 bags of sugar out of the consignment. The court found that the sale was conducted by the Respondent in breach of statutory provisions of the EACCMA, 2004. At page 28 of the judgment court noted that part of the Applicant's sugar was released after the letter of the Respondent dated 17th December, 2010. Subsequently, the Applicant's lawyers complained to the Assistant Commissioner Litigation that the Respondent had only accounted for 6254 bags which suggest the amount of sugar held. They wanted accountability for an additional 724 bags which would bring the total to 6998 bags of sugar. What the court awarded was the difference between 6990 bags of sugar and 6254 bags of sugar amounting to 736 bags. The money realised from the sale of sugar was **Uganda shillings 609,953,000/=** and the Respondent paid to the Applicant only an amount of **Uganda shillings 130,880,462/=** out of the proceeds of the auction. The Applicant acknowledged the sum.

In paragraph 3 of the plaint the Applicants action is for recovery of **Uganda shillings 800,000,000/=** arising out of unlawful auction or sale of the Applicant's sugar, interest at commercial rate, general damages and costs of the suit.

The court consequently considered whether the Applicant is entitled to the remedies claimed. In the judgment it is noted that the Applicant prayed for an award of special damages of **Uganda shillings 800,000,000/=** as the fair market value for the Applicant's 350 tons of sugar auctioned by the Respondent. The Applicant's Counsel also prayed for general damages and for costs on account of the conduct of the Respondent's officials causing damage and injury to the Applicant. The court considered the issue of remedies between pages 30 and 37 of the judgment and noted that it was established that only 6990 bags of sugar were sold or auctioned by the Respondent and the Applicant acknowledged in writing an account that had been made for 6254 bags out of that amount. So 736 bags were not accounted for and the court held that the Applicant is entitled to special damages for the market price of 736 bags of sugar each containing 50 kg. The Applicant was therefore awarded special damages for 736 bags of sugar.

Secondly, with regard to the declaration sought that the Respondent unlawfully auctioned the sugar the court issued a declaration that the Respondent 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 days' notice before auction and by failing to sell 5990 bags of sugar by public auction.

Furthermore, the court took into account the accountability of the Respondent dated 17th of May 2013 exhibit PE 8 that **Uganda shillings 609,953,000/=** was realised from the sales. The review of evidence also shows that the Applicant's lawyers complained about the partial accountability. The Respondent offered to pay the Applicant **Uganda shillings 130,880,462/=** being the balance of the auction money after offsetting what it called taxes and other lawful impositions under the EACCMA, 2004. There was a submission that those who bought the sugar also paid taxes on it. So the Applicant's Counsel prayed for all proceeds of the sale. It was agreed that the accountability related to 5990 bags and the proceeds of 1000 bags sold through public auction had been omitted consequently the Respondent invited the Applicant to liaise with the office of the Assistant

Commissioner Customs for a refund of **Uganda shillings 19,027,624/=**. The court held that this was the additional amount the Applicant was entitled to. At page 36 the court came to the conclusion that the Respondent was entitled under the EACCMA, 2004 to auction the Applicant's sugar and the Applicant only proved that the procedure for doing so under the EACCMA, 2004 was not followed. Any taxes and charge imposed by the Respondent were not challenged as unlawfully charged.

The substance of the application for review is that the court ought to have awarded the market value of 6990 bags of sugar and not special damages for the bags not accounted for in the correspondence between the parties.

I have carefully considered the Applicant's claim and the substance of the review is that the court ought to have awarded **Uganda shillings 800,000,000/=**. It is admitted that the sugar had been sold and taxes imposed. To the extent that the Respondent imposed taxes and charges which were not disputed under the East African Community Customs Management Act by applying to the Commissioner for review of the decision or omission under section 229 (1) thereof, there is no error apparent or mistake apparent on the face of the record when the court took into account the charges deducted by the Commissioner of customs from the proceeds of the sale by the Respondent. These charges and taxes were not contested and the court held so at pages 35 - 36 of the judgment as follows:

“In a letter dated 22nd of July 2014 exhibit P11 the Applicant's Counsel argued that those who bought the sugar from the Respondent also paid taxes on top of it. They prayed for all the proceeds of the sale. Additional information provided indicates that the Respondent sold between the 12th and 15th of November 1000 bags of sugar. On 18th August 2014 in exhibit P12 the Respondent wrote to the Applicant's lawyers informing them that a reconciliation exercise was in its final stages and the result thereof would be communicated in due course. The Applicant's lawyers repeated the demand by letter to the Respondent 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 Respondent wrote to the managing director of the Applicant indicating that the comprehensive reconciliation

was conducted to determine whether the Applicants 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 Applicant was not entitled to any more payment.”

The substance of the claim therefore is that the Applicant is entitled to the re-export value of the sugar which had been unlawfully auctioned. It was the finding of the court that the Respondent was entitled to auction the sugar but did not follow the procedure to do so. However, the Applicant had been given permission to re-export the sugar. There was an error in ordering special damages for 736 bags of sugar. The correct order should have been the difference between the sum of **Uganda shillings 609,953,000/=** realised from the sales and **Uganda shillings 800,000,000/=**. Taxes and charges were imposed and the Applicant was paid the balance of **Uganda shillings 130,880,462/=** from the **Uganda shillings 609,953,000/=**. It follows that the correct award was not special damages for 736 bags of sugar but the difference between the Applicant’s claim and the amount at which the sugar was auctioned or sold by private treaty.

In the premises the judgment is reviewed to the extent that it was erroneous to decree the current market price of 736 bags of sugar when the court found that all the bags of sugar were sold by the Respondent. The bags were not all accounted for properly to the Applicant and there was an omission to account for 736 bags of sugar.

In the premises the decree and judgment for the market price of 736 bags of sugar is reviewed and substituted with a sum of **Uganda shillings 190,047,000/=** being the difference between the Applicants claim of **Uganda shillings 800,000,000/=** and what this sugar had been sold for at **Uganda shillings 609,953,000/=**. The sum of **Uganda shillings 190,047,000/=** carries interest at the URA statutory rate of 2% per month from November 2010 till payment in full (I read the year as 2013 when this ruling was read and discovered the typographical error when proof reading. This ruling is accordingly corrected on the motion of the Court under section 99 of

the Civil Procedure Act to read the year of the auction which is November 2010).
The application succeeds with costs.

The rest of the awards remain as decreed.

Ruling delivered in open court on 10th March, 2017 and signed on 13th March 2017

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Counsel Mugarura Jotham for the Applicant

Counsel Namutebi Christa for the Respondent

Rogers Mugambwa Director of Applicant in court

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

Christopher Madrama Izama

Judge

10th March 2017 and signed on 13th March 2017