

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT NAKAWA
MISC CAUSE NO.49 OF 2013

KAYUMBA EMILE OGANE

t/a Ets OGANECOMPANY :.....: APPLICANT

VERSUS

COMMISSIONER CUSTOMS

UGANDA REVENUE AUTHORITY :.....: RESPONDENT

Before: **HON.MR.JUSTICE WILSON MASALU MUSENE**

RULING

This Application was filed by Notice of Motion under Section 98 of the Civil Procedure Act Cap 71 and Order 52 Rule 1 and 2 of the Civil Procedure Rules SI 71-1 and Sections 18, 20, 78, 220,221, and 223 of the East African Customs Management Act 2004 (Rev.2009).

It was seeking orders that:

1. A Release Order and Possession be granted to the Applicant in respect of Transit Cargo Ivory 832 piece at Nakawa ICD for transshipment against the Respondent.
2. The Uganda Police Force, Uganda Wildlife Authority, and all other authorities in Uganda give effect to the release Order.
3. Costs of the Application.

The grounds in support of this Application are stated in the affidavit in support of the Application and rejoinder filed in court dated 3/12/2013 and 13/12/2013 respectively and the grounds briefly are that:-

1. That the Applicant is the licenced owner of the cargo which he exported from Goma North Kivu Democratic Republic of Congo comprising of 832 pieces of Ivory through Bunagana Border Post transiting through Uganda lawfully a board MotorVehicle Reg. No. CGO N6816AB19.
2. The Applicant appointed transport agents to transit the said Cargo who without his knowledge secured other means of transport from Ken Freight Forwarders and a different container from Ocean Freight (East Africa) Ltd in Bweyogerere and the same was wrongfully retained by the Respondent's officers to date.
3. The Applicants Cargo was wrongfully seized while in transit and the Applicant has submitted his lawful claim of the cargo from the Respondent to no avail and is thus holding it unlawfully.
4. The Applicant has suffered loss of delivery time of the Cargo to Mombasa.
5. That it is in the interests of justice that this application be granted.

The Respondent filed 2 affidavits in reply sworn by Nkwasire Mponooka Julius and Lillian Babirye respectively and a supplementary affidavit sworn by Charles Tumwesigye.

M/s Geoffrey Nangumya & Co. Advocates represented the Applicant, while the Respondent was represented by Mr. Kitaka Farouq and Benard Olok.

The Applicant's counsel M/S Geoffrey Nangumya & Co. Advocates proposed basically two issues which were adopted by the other side to wit;

1. Whether the continued seizure of the Applicants Cargo is lawful.

2. Whether the Applicant is entitled to the remedies sought.

Counsel for the Applicant submitted that it is not disputed that the Applicant is the owner of the Cargo/goods that is 832 pieces of ivory and that the said cargo /goods were seized from transporters by the Respondent's officers. Counsel for the Applicant further submitted that this Application was brought under **Section 20, 18(2), 216(4)(b) and 223 of EACMA** which

provide for dealing in restricted goods in transit in East African Customs Management Act. He submitted that part B (8) and (11) provides for Ivory and the subject herein, and provisions of release of seized goods to the claimant by court.

Counsel for the Applicant defined **“Restricted goods”** in the East African Customs Management Act 2004 (as revised) as;

“Any goods the importation, exportation, transfer, or carriage coastwise of which is prohibited, save in accordance with any conditions regulating such importation, exportation, transfer or carriage coastwise and any goods the importation, exportation, transfer or carriage coastwise for which is in any way regulated by or under customs laws”,

Section 20 of the East Africa Customs Management Act provides that good in transit shall not be expressly prohibited or restricted in any order under this Act prohibiting or restricting importation of goods and shall be duly re-exported within such time and subject to conditions as the Commissioner may specify.

Counsel for the Applicant therefore reiterated that the Applicant’s goods in issue are therefore not prohibited as alleged by the Respondents in their various affidavits in reply.

The Applicant further stated in his affidavit in rejoinder that his transport agents transited through the Customs Post at Bunagana Border with DRC and this evidence is not challenged or uncontroverted. And without his knowledge the transporter and owner of motor vehicle Registration No. CGO 6816A B19 decided to deal with Ocean Freight (East Africa) Ltd. to proceed to Mombasa and the documents of origin and custom from Bunagana border post were left with the said new transporter but instead one Lillian Babirye a sales manager of Ocean Freight (East Africa) Ltd. swore an affidavit in reply to this application admitting that one Owino Odhiambo booked 2 (two) containers and returned to him one container 1 x 40 feet loaded and the other 1 x 20 feet empty and the said Lillian Babirye says that she communicated to the Respondent who brought the customs enforcement team and police to find sacks concealed with 822 pieces of ivory.

The Applicants averments that his goods were through the Customs Border Post at Bunagana is not disputed nor controverted. And the averments that his transport agents left the documents at ocean Freight (East Africa) Ltd is also not controverted by the said Lillian Babirye the officer of Ocean Freight (East Africa) Ltd. who dealt with the Applicants goods but she only claims that one Owino Odhiambo never came back to claim for the goods yet they claimed to know him as to belong to Silver Shipping Ltd. based in Mombasa she does not state whether she called Owino Odhiambo again or what happened to him thereafter. Therefore the loss of the Applicants Customs documents for the goods in issue from Bunagana Border Post between the Applicants transporter, the alleged Owino Odhiambo, Ocean Freight (East Africa) Ltd. and Ken Freight Forwarders left the Applicants goods with no documentation before they were allegedly voluntarily handed over to the Respondents.

Counsel for the Applicant contended that the Applicant goods entered the country lawfully through the Customs Border Post with proper documents until the transporter mismanaged the transit process without the knowledge or consent of the Applicant or his agent or managers. Counsel for the Applicant further submitted that on 3/12/2013, the Applicant claimed for the release of the seized goods from the Respondent but the same was not availed to him. The affidavit in support of the Application shows that he is the lawful owner of the ivory and attached is an authorisation certificate of the origin of the ivory as Annexure "A", the English translation filed in court record including a valid licence, certificate authorizing the Applicant to collect only trophies and culled animals up to 4000 kilograms of ivory restricted from certain areas in Congo DRC outside national parks and game reserves.

The Applicant also attached the proof of payment of the required fees for the licence and export licence as well as the Applicants National Identity card No. **5-93-N46075M** in Democratic Republic of Congo. All this evidence is not challenged or rebutted by the Respondent's office nor Uganda Wildlife Authority which swore an affidavit in opposition of this Application.

Counsel for the Applicant further submitted that the onus of proving the place of Origin of any goods or lawful importation shall be on the person claiming anything seized. Section 223 of the East African Customs Management Act.

In the instant case, the Respondent attached on the affidavit in reply sworn by Nkwasiro Mponooka Julius Annexure "B" a copy of Cargo receipts indicating that the Applicants goods were delivered to the Respondents Custom warehouse for safe custody. And there is no seizure notice issued by the Respondent in respect of the goods and no statements in the affidavit_in reply_that indicates that the Applicants goods are under seizure or at all. All this shows that the goods are for the Applicant.

Counsel for the Applicant further submitted that the affidavit in reply of Charles Tumwesigye in paragraph 5, 7, 8, 9, 10, 11, 12 and 13 as it is not true that the Uganda Wild Life Act Cap 200 is applicable to goods in transit, and the citation of the United Nations Convention on International Trade in Endangered Species of fauna and flora (CITES) whose resolutions have not been availed to court do not prohibit collection and dealing in ivory from culled and elephants dying natural death which cannot be said to be under preservation.

The Respondent by way of reply adopted the Applicants issues for determination but structured 5 questions to resolve issue No. 1 whether the continued seizure of the Applicant 832 pieces of ivory is lawful. The Respondent asserted that the seizure of the Applicant's ivory was legally justified and therefore lawful. Counsel further submitted that the 832 pieces of ivory were not declared to customs by the Applicant hence being uncustomed goods. Counsel relied on **Section 2(1) of the East African Community Customs Management Act 2004 (as amended)** which defines uncustomed goods to include;

".....Dutiable goods on which the full duties due have not been paid, and any goods, whether dutiable or not, which are imported, exported or transferred or in any way dealt with contrary to the provisions of the customs laws"

Counsel for the Respondent further submitted that the Applicant flouted the entire legal and procedural requirement for transiting the goods through Uganda. The Respondents Counsel further submitted that the ivory in issue was not in transit through Uganda but it is smuggled ivory, an illegal import and therefore uncustomed goods in so far as it is both restricted and prohibited good under the EACCMA. Counsel further submitted that the conditions necessary for goods to qualify as transit goods were not complied with as provided for under **Regulation 104 (Sub regulation 1-12) of the EACCMA Regulations 2006**. And therefore the absence of

the proper transit document as required by the law ,the Applicant cannot be said to have had goods in transit.

He added that the goods were not declared to customs administration. And the rationale for the above reply is that the ivory was already in Kampala having by passed Customs control at Bunagana by the act of concealment. The learned Counsel further submitted that there was no chance had it not been the Sales Manager of Ocean Freight (East Africa Ltd.), Lillian Babirye at Kenfreight who suspected theft of the company's containers and alerted the Respondent's enforcement agencies.

Counsel for the Respondent further submitted that, the action of the Applicant of smuggling the ivory to Uganda was unlawful at all material times with respect to the ivory in issue and courts cannot blatantly sanction an illegality. Counsel for the Applicant cited the case of **Makula International Ltd. vs. His Eminence Cardinal Nsubuga and Anor;** (1982) HCB 11,At page 12, Court of Appeal stated:

"... A court of law cannot sanction what is illegal and illegality once brought to the attention of the court, overrides all questions of pleadings, including any admissions made thereon ..."

The Applicants Counsel filed submissions in rejoinder. He submitted that the Respondent's contention that the 832 pieces of ivory were not declared to customs is a glaring attempt to conceal the mystery surrounding how the Applicants goods ended up in the custody of the Respondent ICD, and actually the Respondent has not at all rebutted or even attempted to rebut the Applicant's contention that the ivory was declared to customs officials at Bunagana Border Post while in transit and transported in Motor Vehicle Reg. No. **CGO 6816 A B19.**

He added that the Respondent cannot be heard to state that the goods were uncustomed since the Respondent has full control of the records at the customs entry post at Bunagana Border and DRC and has not refuted that the goods and the motor vehicle in question were never declared to customs. And the Onus of disproving the fact that goods were customed has not been discharged by the Respondent.

Counsel for the Applicant cited the case of **SEBULIBA (VS) COOPERATIVE BANK (1982) HCB 129,** where it was held that the burden of proof in civil cases lies on the person who asserts

or alleges and that the other party can only be called upon to dispute or rebut what has been proved by the party alleging.

In the instant case, the Applicant stated that he transported goods through Bunagana Customs Border Post on Motor Vehicle Reg. No. **CGO 6816 AB19** in transit to Mombasa with all documentation of transiting the goods. And the Respondent does not dispute the fact that the Motor Vehicle and the Applicants goods being in Kampala were from DRC, but denies the fact that the goods were declared to customs officials.

He quoted **Section 113 of the Evidence Act Cap 6 enjoins this honorable court to presume the existence of any fact which it thinks likely to have happened, regard being had to common course of natural events, human conduct and public and private business in their relation to the fact of the particular case. And Section 3 of the Evidence Act Cap 6 provides that court may presume a fact and regard that fact as proved unless it is disproved.**

I have carefully considered to the submissions of both parties. I entirely agree with the submissions of Counsel for the Applicant that the Respondent has not rebutted the Applicant's contention that the ivory was declared to customs officials at Bunagana Boarder Post while in transit. Records to the contrary should have been produced from Bunagana.

The other factor is that the Applicant appointed an authorised agent, Mr. Ocaya David to handle the goods. Once the power of Attorney was legally granted, then it cannot be said as urged by the Respondents that the same legally granted Power of Attorney was to hide the Applicant from the hands of Criminal Law.

Since no Criminal charges were preferred against the Applicant, then this Court rejects that contention. And so I reiterate the earlier position that goods in transit are not subject to customs control in Uganda.

S.66 of the Wild Life Act referred to by Counsel for the Respondent refers to any person who imports or re-exports or attempts to import or re-export. In the present circumstances, the 832 pieces of Ivory were clearly in transit, from outside Uganda in the Democratic Republic of Congo and destined for Mombasa, Kenya another Republic.

In my view therefore, once the pieces of ivory were not destined for Uganda, then they could not be treated as uncustomed goods. And S.20 (1) of the East African Community Customs and Management Act applies to goods **which are not from Uganda and which are not destined to Uganda** like in the present situation.

The goods in the present case were in this Court's finding in transit which were reported to the officers of the Respondent to Kampala at the Respondent's licenced ICD which is a customs area for purposes of verification. It is in this regard that this Court doubts the information of Lilian Babirye to the effect that whereas she was the manager of Ocean Freight (East Africa Ltd, the owner of the containers and trucks which were carrying the Applicant's ivory, she did not know how the undocumented ivory was loaded and brought to the inland container depot (ICD) at Bweyogerere. That is a contradiction which is resolved in favour of the Applicant. It should be the transporters to be penalized for any mishap under S.26 of the EACCMA other than seeking to have the goods of the Applicant which were clearly in transit to be forfeited. In my view, the case of **Makula International Ltd Vs Cardinal Nsubuga & Another** is in applicable as there was no illegality on the part of the Applicant whose agent delivered the goods to the Respondent's customs Area with intent to transit it to Mombasa.

Lastly, Counsel for the Respondent submitted that the Applicant admitted to the concealment of the goods and therefore made the goods uncustomed. And that its seizure was lawful. With respect, and from the submissions of Counsel for the Applicant, it is in my view a question of interpretation of English. The concealment was in reference to the material used to secure the identity of the ivory from a naked eye of robbers but it was not used in the context of not notifying or not informing.

The submission by Counsel for the Respondent that the seizure was lawful because of concealment is in the circumstances rejected. **In Uganda Revenue Authority Vs Congo Tobacco Ltd. [HCT-00-CC-CA-03-2006]**, Justice Kiryabwire as he then was in dismissing an appeal by Uganda Revenue Authority against an order of release of goods seized in transit, quoted Section 216 (2) of the E.A.C.M.A it provides:-

“Where the Commissioner fails within the period of two months either to require the claimant to institute proceedings or the Commissioner fails to institute

proceedings in accordance with subsection (1) then such a thing shall be released to the claimant.”

In the present case, the goods have been wrongfully seized for two months and therefore it is a proper case where goods should be restored to the Applicant for transshipment in transit under Sections 20 and 72 of the EACCMA.

The ruling of Justice Kiryabwire as he then was is equally applicable in the circumstances of this case. I reject the submissions by Counsel for the Respondent that the ivory in question be forfeited to the State.

I further invoke the provisions of S.33 of the Judicature Act and order that the goods restored to the Applicant be protected from further impounding or seizure by any other organ or Institution in Uganda including the Uganda Wild Life Authority officials. The property of foreigners in transit from neighbouring countries lawfully identified and declared must be protected by the Courts.

ISSUE 2 Whether the Applicant is entitled to the remedies sought?

The Applicant having fully made out his case by proving ownership of the goods which is not rebutted, that the goods are lawfully from his custody in transit and that the Respondent is holding on to the goods other than dealing with them as such and authorizing the goods to proceed as they are not subject to the laws governing goods whose origin is Uganda and there is no evidence shown to court that the goods are not what the Applicant states to be.

I accordingly Order:

1. The Immediate release of the transit cargo, 832 pieces of ivory, now lying at Nakawa to the Applicant Kayumba Emile Ogane.
2. The Respondent to re-export the same out of Uganda as it was on transit.
3. The Uganda Police force and Uganda Wild Life Authority and all other authorities to give effect to the release order.

4. Each party to meet their own costs as the goods in question are in transit.

.....

WILSON MASALU MUSENE

JUDGE

24/02/2014