

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

CIVIL SUIT NO. NO. 196 OF 2019

AFRIGLOBAL COMMODITIES DMCC:.....: PLAINTIFF

VERSUS

COMMISSIONER GENERAL

UGANDA REVENUE AUTHORITY :.....: DEFENDANT

BEFORE: HON. LADY JUSTICE ESTA NAMBAYO

RULING

AFRIGLOBAL COMMODITIES DMCC (hereinafter referred to as the plaintiff) brought this matter against the Commissioner General -Uganda Revenue Authority (hereinafter referred to as the defendant) for tortious liability in negligence, causing the plaintiff economic loss and willful or negligent acts. He sought for orders of special damages, general and punitive damages, interest on special damages of 18% p.a from the date of release of the goods until payment in full, interest on general and punitive damages of 18% p.a from judgment date until payment in full and costs of the suit.

The brief background of this case is that the plaintiff is a Chemical distributions and logistics Company incorporated in the United Arab Emirates, while the defendant is a statutory body corporate established under the laws of Uganda responsible for enforcing, assessing, collecting, and accounting for the various taxes imposed in Uganda. In 2016, Orbit

Chemical Industries Uganda Ltd, ordered and obtained goods on credit from Jiangsu Good Harvest Wein Agricultural Co. Ltd for USD 291,840. In the transaction Orbit Chemical Industries Limited (Orbit Kenya) was presented as a buyer. Orbit Uganda was indicated as the Consignee on the Bill of Lading while Orbit Kenya was the notify party on the Bill of Lading. When Orbit Uganda failed to pay, a demand was made to Orbit Kenya. It turned out that Orbit Uganda had misrepresented to the plaintiff as being part of Orbit Kenya. Orbit Kenya made clarifications to the Plaintiff that Orbit Kenya was not the same entity or related to Orbit Uganda. Orbit Kenya notified the defendant of this fraud by Orbit Uganda.

On the 18th July, 2018, the defendant received 3 consignments. The Plaintiff had sold to Orbit Kenya with Orbit Uganda as the consignee or notify party. Having been notified previously by Orbit Kenya of some fraud by Orbit Uganda, the defendant's official notified Orbit Kenya about the goods. Orbit Kenya replied that they had no office in Kampala and that Orbit Uganda were fraudsters. They requested the defendant not to release the goods. The defendant's official, Mr. Kaboyo with whom Orbit Kenya was communicating, promised not to release the goods until investigations were done. Mr. Kaboyo advised Orbit Kenya to file their complaint officially. In the turn of events Mr. Kaboyo, released one consignment of the goods on the 19th July, 2018 just the next day after communication with Orbit Kenya, to Orbit Uganda and before investigations were carried out. On the 23rd of July, 2018 Orbit Kenya wrote to the Commissioner General of the

defendant complaining about the conduct of the Mr. Kaboyo and requested that the remaining containers should not be released. Mr. Kaboyo went ahead to release the remaining goods on the 13th and 15th August, 2018 respectively to Orbit Uganda. The plaintiff believes the defendant owed him a duty of care since it was reasonably foreseeable that the importers of the goods were fraudsters, hence this suit.

The defendant on the other hand denies liability and claims to have released the goods basing on the standard customs procedures.

When the matter came up for hearing, Counsel Kutesa Derek appeared for the plaintiff while Tony Karungi was for the defendant. Counsel Karungi indicated to court that they intended to raise Preliminary Objections and prayed for directives on filing submissions on the intended Preliminary objections. Submissions were filed.

Counsel for the defendant raised the following Preliminary Objections:

- 1. This Court does not have the original jurisdiction to entertain this matter as the original jurisdiction is vested with the Tax Appeals Tribunal (TAT).***
- 2. The plaint does not disclose a cause of action against the defendant.***

I have looked at the submissions and the evidence on court record.

Preliminary Objection

In the case of *Mukisa Biscuit Manufacturing Co Ltd Vs. West End Distributors Ltd [1969] EA 696*, a preliminary objection was defined as one which: *"consists of a point of law which has been pleaded, or which arises by clear implication, and which if argued as a preliminary point, may dispose of the suit.* The court further stated that:

"A preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".

I will now look at the preliminary Objections in the order of their presentation.

Preliminary Objection No.1

Counsel submitted that this Court does not have the original jurisdiction to entertain this matter. The original jurisdiction is vested with Tax Appeals Tribunal (TAT). He explained that the plaintiff's claim is for negligence and causing the plaintiff economic loss pursuant to **Section 17 of the East African Community Customs Management Act, 2004 (EACCMA)** as seen under paragraphs 3 and 10 of the plaint which is an admission that the actions or omissions being challenged are tax decisions of the Commissioner Customs of URA and the law relied on by the plaintiff being the EACCMA. Counsel went on to explain that the tort of negligence is

provided for under **Section 17 of the EACCMA** as stated under the plaint, hence making it a tax dispute. He submitted that **Section 252 of the EACCMA**, provides that the Act shall take precedence over domestic laws of the Partner States, while **Section 229(1)** provides that a party aggrieved by the decision or omission of a Commissioner or any other officer in matters relating to custom, should apply for review and the said review is before the Tax Tribunal as provided for under **Section 230(1) of the EACCMA**. He went on to explain that **Section 231 of the EACCMA** provides for the establishment of the tax appeals tribunal for the purpose of hearing appeals against the decisions of the Commissioner under **Section 229**.

Counsel cited the case of *Uganda Revenue Authority Vs Rabbo Enterprises (U) Ltd and Mt. Elgon Hardwares Ltd SCCA No.12 of 2004*, as a leading case on jurisdiction in taxation disputes, where it was held that;

"The proper procedure therefore is that all tax disputes must be lodged with Tax Appeals Tribunals and only taken before the High Court on appeal."

He also relied on the case of *Sunova International Ltd Vs Uganda Revenue Authority HCMA No.169 of 2018*, where Lady Justice **Henrietta Wolayo** relied on the case of *URA V Rabbo Enterprises and Mt. Elgon Hardwares Ltd (supra)* and stated that;

"The court held that the Tax Appeals Tribunal was the forum of first instance whenever a tax dispute arose and the High Court sits in appeal from the decisions of the Tax Tribunal as prescribed by Section 27 of the Tax Appeals Tribunal Act. It was held that there is merit in the preliminary objection that the suit is prematurely in the High Court"

In the case of Case ***Kawuki Mathias versus Commissioner General, URA MC No. 14 of 2015*** Counsel submitted that Justice Madrama held

"that S.229 of the EACCMA caters for applications by way of appeal by a person directly aggrieved by the action or omission of a commissioner or customs official on matters relating to customs. The provision is not confined to grievances arising from a taxation decision only but is wide enough to cover any act or omission relating to customs."

Counsel prayed that this court finds that it does not have jurisdiction to handle this dispute and dismisses the matter from this court so that the case is taken before the right forum.

In reply, Counsel for the Plaintiff submitted that the defendant did not appreciate the nature of the case. Paragraph 3 of the plaint pleads two separate causes of actions to wit;

- (i) Tortious liability in negligence causing economic loss; and

- (ii) Willful or negligent acts of the defendant pursuant to Section 17 of the East African Community Customs Management Act, 2004.

Counsel contended that none of the above causes of action can be said to be tax decisions, yet the case of ***Uganda Revenue Authority v Rabbo Enterprises (U) Ltd & Anor*** (*supra*), as cited by the defendant makes it very clear that it is only tax disputes whose court of first instance is the Tax Tribunal. The section provides that;

"... all tax disputes must be first lodged with the Tax Appeals Tribunal and only taken to the High Court on Appeal."

In regard to the above case, Counsel submitted that it is not applicable to this case because the cause of action is not a tax dispute but a tort, a common law cause of action. The contention against the defendant under paragraph 5 of the plaint, is that the defendant owed a duty of care to the plaintiff, not to release the goods after being forewarned of the fraud which is not a tax claim.

In ***Uganda Revenue Authority v Rabbo Enterprises (U) Ltd & Anor*** (*supra*), court stated that;

"... the dispute between the parties arose out of an attempt by URA to use power granted to it by statute to enforce payment of what the tax body perceived as taxes owed by the respondent. On the other hand, the respondent denied liability."

In such circumstances there was need to resolve the dispute. What would be adjudicated would be whether or not the respondent in fact and in law owed tax to URA. This question would have to be resolved before an ancillary question would be determined; whether a statutory lien existed over the goods, whether URA was using the law of seizure appropriately. The said questions involve interpretation of tax law, they hinge on the question whether or not the respondent owed tax to URA. Whether or not an entity owes tax money involves tax assessment and tax decisions. Even where URA is found to have erred in its assessment and subsequent decisions, such error does not amount to a tort."

Relating to the circumstances of the case before this Court, it was Counsel's contention that no question of tax interpretation is involved when determining the common law cause of action.

The plaintiff is not asserting any rights as a tax payer and no question arises as to whether the plaintiff owed the defendant any taxes and there was no tax assessment or decision made in relation to the plaintiff, hence no tax dispute arises in relation to the first cause of action.

In conclusion, Counsel submitted that since the common law of tort does not involve tax dispute or assessment, the Tax Appeal Tribunal does not have any jurisdiction over it.

Ruling

I have read the pleadings, submissions and the law relied on by both Counsel. I note from the pleadings that the plaintiff believes that the defendant owed him a duty of care since it was reasonably foreseeable that the importers of the goods were fraudsters. This information was brought to the attention of the defendant who went ahead to release the goods. The defendant claims to have released the goods basing on the standard customs procedures.

The plaintiff's claim is that the defendant was negligent. This is brought under the common law tort of negligence. The 2nd claim is brought under **Section 17 of the East African Community Customs Management Act, 2004** which provides that:

“where any loss or damage is occasioned to any goods subject to Customs control through the willful or negligent act of a Commissioner or an officer, an action shall lie against the Commissioner or such officer in respect thereof”.

From the above, it is my view that the goods came under control of the defendant subject to the customs procedures and controls. I believe this is the reason why the plaintiff brought a claim against the defendant under **s.17 of the EACCMA**. The dispute is not concerned with any assessment, demand or refusal to pay taxes but with the circumstances under which the defendant released goods to Orbit Uganda. The Plaintiff claims to have suffered loss as a result of the defendant's act. Under s.17 of the EACCMA,

the plaintiff can sue the defendant. What this Court has to determine is whether a complaint under s.17 EACCMA should first go the TAT.

S. 229. (1) of the EACCMA provides that:

(1) A person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to Customs shall within thirty days of the date of the decision or omission lodge an application for review of the decision or omission.

(2) The application referred to under subsection (1) shall be lodged with the Commissioner in writing stating the grounds upon which it is lodged.

(3) Where the Commissioner is satisfied that owing to the absence from the Partner State, sickness or other reasonable cause, the person affected by the decision or omission of the Commissioner was unable to lodge an application in the time specified in subsection (1), and there has been no unreasonable delay by the person in lodging the application, the Commissioner may accept the application lodged after the time specified in subsection (1).

Counsel for the defendant has relied on the case of **Kawuki Mathias versus Commissioner General URA MC No. 14 of 2014** where Hon. Justice Madrama; J (as he then was) observed in reference to the above provision of the law that:

“The section caters for applications by way of an appeal by a person directly aggrieved by the action or omission of a Commissioner or customs official on matters relating to customs. The provision is not confined to grievances arising from a taxation decision only but is wide enough to cover any act or omission relating to customs...”

In this case, Mr. Kaboyo an officer from the defendant was notified of the anomalies in the transaction. He decided to release the 1st consignment to Orbit Uganda. When Orbit Kenya wrote to the Commissioner General, URA, protesting the release of the consignment and requesting that the remaining two consignments should not be released, Mr. Kaboyo went ahead to release the consignments on grounds that the goods were fully cleared and paid for by Orbit Uganda following the standard customs procedures.

It is not in dispute that the issues in this case do not concern tax matters. The issues are concerned with the actions and or omissions of the officer of the defendant (Mr. Kaboyo) which makes S. 229. (1) of the EACCMA applicable. I agree with the holding of Justice Madrama that the provision is not confined to grievances arising from a taxation decision only but is wide enough to cover any act or omission relating to customs. All that I would add to the holding of Justice Madrama is that the application is not by way of appeal but application for review. I think it was slip of a pen to say appeal.

The right procedure is for the Plaintiff to file an application for review before the Commissioner General, Uganda Revenue Authority under S.229(1) and 229(3) of the EACCMA. S.229(1) is couched in mandatory terms.

I have considered Article **126(2)** of the constitution which provides that:

(1) In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles—

(2) substantive justice shall be administered without undue regard to technicalities. The word **subject to the law** is very crucial here. The law here is **S. 229 of the EACCMA** which provides that:

(1) A person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to Customs shall within thirty days of the date of the decision or omission lodge an application for review of the decision or omission.

There are subsequent provisions catering for aggrieved parties who have not applied for review within a period of 30 days.

In Desai v. Warsama (1967) EA 351 it was held that:

“lack of jurisdiction goes far beyond any error, omission, or irregularity nor can it be regarded as a mere technicality.....”

In Umar Asuman v. Olila Moses HCCR No. 1/2006 Musota, J. observed that: ***“Jurisdiction of courts is a creature of statute”***

I entirely agree. In this case jurisdiction lies with the Commissioner first and foremost under S. 229 of the EACCMA.

In view of the above, I would allow this preliminary objection and on this ground alone I would go ahead to dismiss this suit with orders that each party bares its own costs.

I so order,

ESTA NAMBAYO

JUDGE

26/3/2020