

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCCS NO. 218 OF 2012

LEAF TOBACCO AND COMMODITIES

UGANDA LIMITED:.....:PLAINTIFF

VERSUS

COMMISSIONER OF CUSTOMS, UGANDA REVENUE AUTHORITY

MASTERMIND TOBACCO (K) LIMITED:.....:DEFENDANTS

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

J U D G M E N T:

Leaf Tobacco & Commodities Uganda Limited the Plaintiff herein sued the Commissioner of Customs Uganda Revenue Authority herein called the 1st Defendant for a declaration that the 1st Defendant's act of permitting the importation to and or through Uganda of any product under the Plaintiff's "Supermatch" trademark into South Sudan is illegal, an injunction restraining the 1st Defendant from permitting the importation into and or through Uganda into South Sudan of any product under the Plaintiff's "Supermatch" trademark, general damages and costs of the suit.

The Plaintiff and Leaf Tobacco and Commodities Southern Sudan hold the trademark and exclusive Supermatch commercial territorial rights both in Uganda and Southern Sudan, **Exhs. P1 and P3.**

The background to the suit as discerned from the pleadings is quite straight forward. The Plaintiff is a company dealing in cigarettes under Supermatch trademark in Uganda. It also associates itself to Leaf Tobacco and Commodities Southern Sudan which also deals in cigarettes

The Plaintiff in this case essentially strives to protect its market in Uganda and that of Leaf Tobacco and Commodities Southern Sudan.

The Plaintiff claims that since it holds exclusive commercial territorial rights for Uganda the 2nd Defendant Mastermind Tobacco Kenya Limited who joined the case later on should not be allowed by the 1st Defendant to transit Uganda with goods carrying the brand of Supermatch into Southern Sudan.

The Plaintiff also contends that the 1st Defendant should stop the goods from transiting Uganda into Southern Sudan. In a bid to protect her market Leaf Tobacco and Commodities Southern Sudan sued Mastermind Tobacco Southern Sudan and Mastermind Tobacco Company Kenya Limited, obtained judgment against them and when they appealed Leaf Tobacco and Commodities Southern Sudan proceeded to obtain an injunction from the Supreme Court against them preventing them from use of the trademark name Supermatch in their commercial activities.

That notwithstanding this injunction, Mastermind Tobacco Kenya Limited continues to use the trademark “Supermatch” and to deliver “Supermatch” cigarettes into Southern Sudan. The Plaintiff also alleges that the said importation into Southern Sudan of Supermatch by Mastermind Tobacco Kenya Limited was being aided by the 1st Defendant to transit Uganda into Southern Sudan.

She contends that it was the obligation of the 1st Defendant to take cognizance of the injunction obtained by Leaf Tobacco and Commodities Southern Sudan and stop the 2nd Defendant from delivering Supermatch brand cigarettes into Southern Sudan.

For those reasons, the Plaintiff sought the orders earlier mentioned in this judgment.

The Defendants denied responsibility and liability. The 1st Defendant averred that its duty was to administer Customs services and smuggling but this duty did not include prevention of unfair trade practices. In its Written Statement of Defence the 1st Defendant admitted that the Plaintiff was the holder of a trademark and exclusive commercial territorial rights in Uganda.

It also agreed that the Supermatch and Yes trademark was registered in the name of Leaf Tobacco and Commodities Southern Sudan Limited. The 1st Defendant also admitted and

recognized that there was a legal battle between the Plaintiff and Mastermind Tobacco Kenya and an injunction stopping the 2nd Defendant from using Supermatch trademark in Southern Sudan.

Furthermore, that the Plaintiff had indeed notified her that the only products permitted to enter Southern Sudan were those under the Plaintiff's trademark Supermatch.

Lastly, the 1st Defendant admitted that in spite of the notification, they escorted the products belonging to the 2nd Defendant to the exit point of Uganda and Southern Sudan and handed them over to Southern Sudan Customs.

The Defendants however denied ever receiving any official communication on the matter from the Government of South Sudan. The 1st Defendant however contended that it was only responsible for administration of Customs services in Uganda which was collection of revenue and facilitation of legitimate trade. That it was therefore mandated to prevent smuggling. That it was a legal requirement to allow Kenya goods to transit in compliance with Principle IV of the United Nations Convention on Transit trade between land locked states. That since the 2nd Defendant had a Sudanese import license, the 1st Defendant was obliged to escort them and hand them over to South Sudan Customs Management.

The 1st Defendant further denied ever facilitating smuggling.

The 2nd Defendant denied liability and averred that the Trademark dispute between the Plaintiff and themselves was an ongoing matter and it was the Law courts in South Sudan which were best suited to resolve them

That their importation of Supermatch into South Sudan was an accepted matter by the South Sudan authorities and the importation was officially processed by the South Sudan Customs. That the companies importing her cigarettes were licensed by the Government of South Sudan and merely transited through Uganda.

The issues as agreed by the parties for trial were;

1. Whether the Plaintiff has a cause of action against the 2nd Defendant?
2. Whether the 1st Defendant in permitting the importation into and /or through Uganda any product under the Plaintiff's Supermatch Trademark into South Sudan was lawful?

3. What remedies are available to the parties?

As to whether the Plaintiff has a cause of action against the 2nd Defendant can be found in the pleadings. What amounts to cause of action was clearly defined in **Narotham Bhatia & Hematini Bhatia v Boutique Shazin Ltd CACA No. 16 of 2009** the Court of Appeal quoted with approval a passage in Mulla's Code of Civil Procedure that;

“A cause of action means every fact which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words it is a bundle of facts which, taken with the law applicable to them give the plaintiff a right to claim a relief against the defendants. It must include some act done by the defendant since (in) the absence of such an act, no cause of action can possibly accrue.....the cause of action must be antecedent to the institution of the suit”.

The issue before this court involves legality of importation into and or through Uganda into South Sudan of any product under the Plaintiff's "Supermatch" trademark. The prayers sought by the Plaintiff include among others a permanent injunction restraining the 1st Defendant from permitting the importation of any product under the Plaintiff's "Supermatch" trademark into or through Uganda. It is alleged by the Plaintiff that the 2nd Defendant is illegally transiting Supermatch cigarettes through Uganda and that some of it ends in Uganda.

It is the Plaintiff's claim that she has exclusive rights to trade in Supermatch brand cigarettes and that the 2nd Defendant's act of bringing cigarettes into Uganda was a wrong that gave right to the Plaintiff to claim a relief. A decision in respect of this matter would affect the operations of the 2nd Defendant.

From the foregoing, the presence of the 2nd Defendant would be required not only to protect her interests but to enable court adjudicate the matter before it.

The Supreme Court in **Departed Asians Property Custodian Board v Jaffer Brothers Ltd Civil Appeal No 9/1998**, citing the English case of **Amon V Tuck & Sons Ltd (1956) ALL E**

R p.273, decided that a party may be joined in a suit, not because there is a cause of action against it, but because the party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter.

I find that the 2nd Defendant's presence is necessary in this suit.

Turning to whether the 1st Defendant in permitting the importation into and /or through Uganda any product under the Plaintiff's Supermatch Trademark into South Sudan and whether such permission is lawful it is the Plaintiff's contention that the 1st Defendant's act of escorting Supermatch cigarettes through Uganda is actively assisting the 2nd Defendant in smuggling the cigarettes in complete violation of a Court order in South Sudan.

In reply, the 1st Defendant's Counsel submitted that she permitted the Supermatch brand cigarettes to transit Uganda into South Sudan by licensed persons. She further contended that she has never permitted importation into Ugandan market such products for domestic consumption.

Furthermore, when the High Court of Uganda stopped the importation through Uganda in an interim, and by temporary injunction orders, the 1st Defendant stopped permitting transit of Supermatch cigarettes. That in the absence of the injunction, it would have been in order to allow the goods to transit.

Having listened to the evidence of the Plaintiff's witnesses, the main complaint of the Plaintiff is that the cigarettes that were destined for Southern Sudan and were rejected bounced back into Uganda and killed the Plaintiff's market.

Secondly, that some of the cigarettes which were imported, destined for Southern Sudan were dumped in transit and remained in Uganda. During cross- examination PW1 stated that the aggrieved party when cigarettes go to South Sudan is Leaf Tobacco and Commodities Southern Sudan. PW1 added that if the cigarettes went to South Sudan and did not bounce back to Uganda, the Plaintiff would have no right to complain.

Asked by Court who the rightful Plaintiff would be PW1 answered;

“ Is Leaf Tobacco Southern Sudan.”

He gave the reason for the suit that;

“Because there is proof that these cigarettes are coming back and they kill our market.”

On whether it was illegal to transit cigarettes through Uganda to South Sudan PW1 replied;

“To pass here is not illegal but to sell in Southern Sudan is illegal because you have no trademark in Southern Sudan.”

Asked whether the Plaintiff have the right to use the Supermatch trademark in South Sudan PW1 replied;

“Not in Southern Sudan unless if Southern Sudan gives us permission.”

Asked further on the illegality of transiting Supermatch goods PW1 replied;

“To transit here has no problemto transit no, there is no illegality.”

From the answers given by PW1, it seems clear that their complaint in the bigger part is against the sale of Supermatch in Southern Sudan. It is also clear that the complaint is no longer on the transit because PW1, who was in the top management position of the Plaintiff testified saying that transiting was lawful. That the unlawfulness only commenced with importation into and sell of Supermatch branded cigarettes in Southern Sudan.

It seems from the proceedings that the Plaintiff wanted to use the Southern Sudan Court orders in Uganda and that Uganda Revenue Authority should enforce the Southern Sudan Court orders.

In my view that is not how Foreign Judgments are enforced. They could be enforced here only after registration through a court proceeding which was not done. No wonder when PW1 was asked whether the judgments and orders of the Supreme Court of South Sudan would be enforced here, he replied;

“The order was enforceable only in South Sudan.”

In one of the letters to the 1st Defendant’s Counsel, the Plaintiff seems to suggest that the 1st Defendant was expected to enforce the Court order. He wrote in **Exh P8**;

“Our client have since liaised with the office of the Director General for South Sudan Customs and Excise who has since issued a directive to all their border points to the effect that it is only Leaf Tobacco and Commodities Southern Sudan Ltd who are genuinely allowed to import Supermatch cigarettes in Southern Sudan.”

From the above it is clear that the Southern Sudan Customs had control over the Supermatch to enter or not to enter Sudan at the border Customs points.

The 1st Defendant admits that it escorted the cigarettes to the border points and handed them to Customs. It wrote in **ExhP8** dated 29th September 2011;

“The measure we have introduced is to escort the Consignments of Supermatch cigarettes to Southern Sudan and hand them over to South Sudan Customs who are in a better position to enforce the order.”

It is clear from **ExhP8**, dated 27th September 2011 that the directive to stop the smuggling of Supermatch was given to the Customs border points of South Sudan.

The 1st Defendant in escorting the Supermatch and handing it over to the authorities that were directed to stop the importation of Supermatch into Southern Sudan could not have done better. For the 1st Defendant to impound Supermatch destined to South Sudan, required a reciprocal arrangement in which both countries would agree on what to do with the cigarettes in transit. In my view this is in line with section 10(3) of the East African Community Customs Management Act which provides;

“Subject to reciprocal arrangements agreed upon by the Commissioner, the Commissioner may request from, or furnish to, the competent authorities of a foreign state any information, certificate, official report or other documents in order to prevent, investigate or suppress offences against the laws applicable to the importation or exportation of goods into or from the territory of such foreign state.”

The provision envisages a reciprocal arrangement between Uganda and South Sudan on how to suppress offences perpetrated by smugglers or other offenders in the two sister states. In this case the Defendant chose to hand them over to South Sudan Customs which had been directed, as **Exh P8** shows, by their Director General for South Sudan Customs and Excise to put into effect the Court order.

In my view handing them over to South Sudan Customs Service was the best they could do in the circumstances. In any case PW1, told court that transiting the cigarettes was not illegal.

There is no evidence to suggest that after the 1st Defendant had handed over to South Sudan Customs, they played another role. On the contrary, whenever the Plaintiff complained of illegal cigarettes in the country the 1st Defendant was always present to help track down the culprits. This is seen in the evidence of PW2 when asked whether Uganda Revenue Authority Customs was helpful he replied;

“URA was helpful because whatever information was shared, URA made an intervention. And the last intervention is when we carried out a search in Mityana.”

PW2 testified that the 1st Defendant even prosecuted some of those arrested. This position was maintained under re-examination.

From the evidence therefore the 1st Defendant committed no illegality by escorting and handing over cigarettes to South Sudan Customs who had been directed by their own country to deal with the matter. The evidence instead depicts the 1st Defendant as a vigilant and willing fighter against smuggling and I find them not liable in any form.

The Plaintiff also alleged that the 2nd Defendant used to dump cigarettes into the Ugandan market. Going by the evidence, cigarettes were found to have been smuggled into Uganda. What was however lacking by way of evidence was that it was the 2nd Defendant who smuggled them into Uganda.

During cross-examination PW1 when asked whether they had proof against the 2nd Defendant as a smuggler said they did not have. Asked whether he had evidence on cigarettes exported to South Sudan being smuggled back into Uganda, he said he did not have any in the court at that

moment. But that since there was Supermatch in the country and it was a product of Kenya, it must have come from Southern Sudan.

From the evidence on record therefore, there was no proof that the 2nd Defendant smuggled cigarettes into Uganda. For those reasons I find the allegation against them not proved.

The sum total is that the Plaintiff has failed to prove the allegations against the Defendants and the suit is hereby dismissed with costs.

Dated at Kampala this 21st day of March 2019.

HON. JUSTICE DAVID WANGUTUSI

JUDGE