

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA,
[COMMERCIAL DIVISION]
MISCELLANEOUS APPLICATION NO 397 OF 2011,
(ARISING OUT OF CIVIL SUIT NO 004 OF 2011 (OS))**

TESTIMONY MOTORS LIMITED (Suing by representative action) APPLICANT

On behalf of numerous importers of used motor Vehicles

And on its own behalf

VERSUS

THE COMMISSIONER CUSTOMS}

UGANDA REVENUE AUTHORITY}RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA

RULING

The Applicant's application is for review and setting aside of my earlier ruling refusing to grant leave to issue an originating summons against the Respondent delivered on the 24th of June 2011. The application was lodged under order sections 82 and 98 of the Civil Procedure Act, section 33 Judicature Act and order 46 and order 48 (52) rules 1 and 2 of the Civil Procedure Rules.

The grounds of the application are that:

1. The decision of this court dated 24th June 2011 was based on a mistake apparent on the face of the record that Civil Suit No. 004 of 2022 (OS) was not an action for enforcement of the provisions of the East African Community Customs Management Act in Uganda which it was.

2. There is an error apparent on the face of the court record with regard to this Honourable Courts Jurisdiction in the matter.
3. Sufficient cause exists for the review of the order made by this honourable court on the 24th of June 2011 in respect of Civil Suit No. 004 of 2011 (OS).

The application is supported by the affidavit of Brian Kabayiza an advocate practising with Messrs Muwema & Mugerwa Advocates and Solicitors. He avers inter alia that the court declined to issue an OS on the ground that it lacked jurisdiction to determine the questions framed in the OS. Secondly that the application was an application for enforcement of the East African Community Customs Management Act 2004 (Hereinafter referred to as EACCMA) and not interpretation as held by the court. That the East African Court of Justice which was held to be the proper court to interpret the Act is not a court seized with jurisdiction to determine the questions framed in the OS. Instead it is the National Courts of Uganda which have jurisdiction in the matter.

At the hearing of the application learned Counsel Terrence Kavuma addressed the court on behalf of the Applicant.

The address of learned counsel to the court is that the application is an ex parte application which seeks orders that this court reviews its order in OS No. 4 of 2011 where the court declined to issue an OS to the Respondent. The proceedings in that matter were ex parte. By necessary implication this application to review the order of the court is also made ex parte.

The error referred to in the application is found at page 7 second paragraph line 10 of the ruling of the court where it is held:

“However this interpretative jurisdiction does not involve deciding questions involving controversy as to the proper meaning of any particular provision which may be in dispute. The interpretation of the High Court should be limited to questions of enforcement of the Act.”

Counsel contended that the OS does not dispute any provision of the EACCMA. The OS seeks the interpretation of the 4th Schedule of the EACCMA vis a vis the actions of the Commissioner customers in disregarding the transaction method of

customs valuation for second hand vehicles. Consequently counsel contended that this constituted an error of fact apparent on the face of the record.

The applicant seeks to enforce the EACCMA against the Commissioner Customs. The other error relates referred to in the application is at page 8 of ruling of the court that the plaintiff should refer the claim to the East African court of Justice. Article 27 of the Treaty clearly sets out the jurisdiction of that court and restricts the court's jurisdiction to claims of interpretation of provisions of the treaty. OS No. 4 of 2011 does not make any reference to the treaty and as such the East African Court of Justice does not have jurisdiction based on the EACCMA. With respect to the entities or bodies capable of being respondents under the treaty for the establishment of the East African community, article 30 clearly sets out entities that are capable of being respondents in the East African Court of Justice. The Commissioner Customs appointed under the EACCMA is not such an entity.

In the East African Court of Justice case of **Modern Holdings (EA) versus Kenya Ports Authority Ltd Reference No. 1 of 2008**, the court clarified on who are the entities capable of being respondents in the EAC Court of Justice. Counsel quoted page 10 of the judgement:

- Article 30 makes provision for reference by natural and legal persons;
- Who is resident in a partner state;
- In respect of the legality of any act, regulation, directive, decision, or action of a partner state or an institution of the community;
- On the grounds that such an act, regulation, decision or action is unlawful or is an infringement of the provisions of this treaty.

Article 9 (2) contains the following definition of institutions of the Community:

“the east African development bank, the lake Victoria fisheries organisation and surviving institutions of the former east African community which are defined as follows on page 10 of the treaty:

“surviving institutions of the former east African community” means the East African Civil Aviation Academy, Soroti, the East African Development

Bank, the East African School of Librarianship and the International University Council for East Africa.”

KPA is definitely not amongst the institutions of the community created under article 9 (2), or a surviving institution of the east African community appearing on the above list. As such KPA is not one of the respondents envisaged under article 30 of the treaty.

KPA is an authority created under section three of the KPA act as a statutory body with perpetual succession, a corporate seal and power to sue and be sued in its corporate name. It was created by the Republic of Kenya, a partner state, and not by the summit. The “summit” means the summit established by article 9 of the treaty. Members of the summit consist of heads of state of government of partner states. The mere fact of rendering the nature of the services it renders at Mombasa Port, namely, serving the East African Partner States and citizens, does not Ipso Facto make it an institution of the community. In order to qualify as service under article 9 (2) of the treaty, the service must be such a service created by the summit.”

The crux of the Applicant’s case is that if the Commissioner Customs is not capable of being a Respondent, OS No. 4 does not claim infringement of a provision of the treaty the applicant cannot have recourse to the East African Court of Justice. As such this court has jurisdiction to grant the remedies sought in OS No. 4 of 2011.

Learned counsel further submitted that the Commissioner Customs is within the jurisdiction of the High Court and the actions complained of are within the jurisdiction of the court. Furthermore, article 139 of the Constitution gives the High Court unlimited original jurisdiction in all matters and causes in Uganda and such appellate and other jurisdiction as may be conferred by the Constitution or other law. He contended that the said jurisdiction can only be ousted by a constitutional amendment to article 139 and there has been not such amendment so far.

I have carefully read through the proceedings in the application sought to be reviewed and considered the submissions of counsel. In the OS the Applicant had sought interpretation of questions of law namely:

1. Whether the directive of the Commissioner Customs Uganda Revenue Authority to unilaterally suspend the operation of the transaction value method set out under section 122 of the 4th schedule of the East African Community Customs Management Act, No. 5 of 2004 with regard to used motor vehicles is lawful.
2. Whether the plaintiffs are entitled to an account and a refund of monies illegally collected by the defendant from the 20th day of April, 2010 onwards, pursuant to the said directive of the Commissioner Customs Uganda Revenue Authority.

The second question follows and can only be answered if the first question is answered in the applicants favour and would be a pursuit of consequential orders following from the alleged illegality. The question framed is whether the Commissioner of Customs has powers to suspend the transaction value method of assessment of customs duty on imported used vehicles as set out under section 122 of the 4th Schedule of the EACCMA 2004. The contention of counsel is that the High Court has jurisdiction to answer this question and in any case the Commissioner Customs cannot be a Respondent in the East African Community Court of Justice.

In my previous ruling I held at page 7 thereof as follows:

“Section 220 of the Act deals with enforcement of the provisions of the Act but does not apply to questions as to interpretation of the Act. As far as enforcement is concerned, national courts of competent jurisdiction have jurisdiction and should freely exercise the same. Section 253 of the Act is sufficient to show that the Act is treaty law and its provisions prevail over national laws. For purposes of consistency, questions as to interpretation of the Act should be left to the organs of the East African Community Treaty so that the enactment has a uniform application. Obviously for purposes of

enforcement, the High Court of Uganda reads and interprets the East African Community Customs Management Act 2004. However this interpretative jurisdiction does not involve deciding questions involving controversy as to the proper meaning of any particular provision which may be in dispute. The interpretation of the High Court should be limited to questions of enforcement of the Act.”

The first matter for me to resolve is whether the court was wrong on a question of mixed law and fact as to whether the questions sought to be interpreted involved interpretation of the East African Community Customs Management Act as opposed to enforcement. The word “interpretation” here means determination of any controversy as to the meaning, effect or purpose of a provision of the EACCMA. Is the question of whether the Commissioner of Customs has power to suspend the operation of the transaction value method specified in section 122 and the 4th schedule of the East African Community Customs Management Act, a question of enforcement or interpretation? This question involves testing the powers of the Commissioner under the Act. Under section 2 (1) of the EACCMA, the word “Commissioner”, means “Commissioner of Customs appointed under section 5 of this Act”. Section 5 gives powers to the Commissioner so appointed. It provides:

“5.

(1) There shall be appointed, in accordance with Partner States’ legislation, a Commissioner responsible for the management of Customs by each of the Partner States and such other staff as may be necessary for the administration of this Act and the efficient working of the Customs.

(2) The Commissioner shall be responsible for the management and control of the Customs including the collection of, and accounting for, Customs revenue in the respective Partner State.

(3) The Commissioner may authorize any officer to exercise any of the powers conferred by this Act upon the Commissioner subject to such limitations as the Commissioner may impose.

(4) An officer appointed to any permanent office or employment in the Customs shall, on his or her appointment thereto, make and subscribe

before a magistrate or a commissioner for oaths, a declaration in the form set out in the First Schedule.”

Jurisdiction of the national courts under the East African Community Customs Management Act is conferred under section 220 (1) which provides that all civil proceedings shall be filed and determined in accordance with the provisions of the relevant procedural legislation in the Partner States. Under section 221, proceedings are brought by or against the Commissioner. Section 220 (1) is reproduced for ease of reference. It provides:

“220. (1) Without prejudice to the powers of any other court of competent jurisdiction, a prosecution for an offence under this Act may be heard and determined before a subordinate court; and where any such court hears and determines the prosecution it shall have jurisdiction to impose any fine or any sentence of imprisonment which may be imposed under this Act on a person convicted of the offence:

Provided that all proceedings of civil nature shall be filed and determined in accordance with the provisions of the relevant procedural legislation in the Partner State.”

I agree with the applicants counsel that the High Court of Uganda has unlimited original jurisdiction over all matters and causes in Uganda. This powers read together with section 220 (1) of the East African Community Customs Management Act gives the court jurisdiction in this matter involving Community Legislation. However, as to whether the questions sought will involve interpretative jurisdiction as opposed to enforcement jurisdiction is a matter on the merits of the Originating Summons. I therefore do not have to determine whether the East African Community Court of Justice is the appropriate court for purposes of reviewing my earlier decision. Such a controversy is on the merits. On the face of it, the questions sought in the OS are for application inter alia of section 122 of the 4th Schedule of the East African Community Customs Management Act, 2004. My discretion at this stage is limited to whether the originating summons should be issued against the Respondent by answering the question whether leave to issue the OS was previously refused on erroneous grounds in my earlier ruling.

I am satisfied that leave to issue the OS in my earlier ruling was refused on erroneous grounds which are apparent on the face of the record. The error relates to the conclusion of the court relating to its mandate to determine the question under section 220 (1) of the East African Community Customs Management Act. Consequently and without determining any other questions submitted on in the application for review, the prayer of the applicant to review the order of court dated 24th of June 2011 is granted. An originating summons is hereby issued in Civil Suit No. 004 of 2011 as prayed.

Ruling delivered in open court the 14th of October 2011.

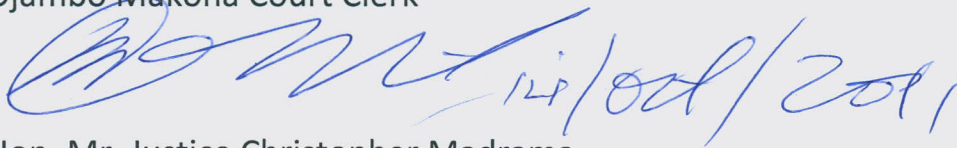


Hon. Mr. Justice Christopher Madrama

Ruling delivered in the presence of:

Terrence Kavuma for the applicant,

Ojambo Makoha Court Clerk



Hon. Mr. Justice Christopher Madrama