



- a) The Applicant is the owner of the vehicle above named, that is the subject of the main suit.
- b) The Applicant imported the said vehicle and deposited it with URA Customs Bond at URA Headquarters Nakawa on 21<sup>st</sup> August 2017 for purposes of tax clearance of import duties.
- c) Barely a month after being deposited with the Respondent, the vehicle was featured in the Daily Monitor Newspaper of 13<sup>th</sup> September 2017 as one of the cars that were smuggled into Uganda from the United States of America, which was not true.
- d) The vehicle was blacklisted and impounded for over two years based on the erroneous conclusion that it had been smuggled from the United States of America.
- e) During the period the vehicle has spent in the Respondent's custody, it has been grossly damaged whereby the ignition key was lost, the windscreen was shattered, the front bull guard was broken, and the general condition of the car was in a deplorable state due to wear and tear.
- f) The Applicant therefore brought the main suit against the Respondent in negligence and for compensation in damages and inconvenience suffered.
- g) The Respondent had, however, communicated to the Applicant that the former was going to auction the vehicle as it had spent a long time in the Respondent's park yard.
- h) During the pendency of the main suit, there is a likelihood of the Respondent disposing of the vehicle to the detriment of the Applicant.
- i) The main suit has a strong prima facie case with a high chance of success and the Applicant will suffer irreparable damage that

cannot be adequately compensated if the Respondent is not restrained.

- j) The balance of convenience lies in favour of the Applicant.
- k) It is in the interest of justice that the temporary injunction be issued against the Respondent to maintain the status quo pending determination of the main cause.

The Respondent opposed the application vide an affidavit in reply deponed to by **Donald Bakshaba**, an advocate and employee with the Legal Services and Board Affairs Department of the Respondent. Briefly, the deponent averred as follows:

- a) The current documentation for the vehicle in issue shows a different owner, not the Applicant.
- b) The photograph of the motor vehicle that appeared in the Daily Monitor Newspaper was neither taken nor published by the Respondent, there was no specific reference to the vehicle or its owner in the article and the article was not published by or at the instance of the Respondent.
- c) The vehicle was deposited at customs warehouse as a result of failure of the importer to (pay) customs duties and fees, and the allegations as to blacklisting are unfounded and fabricated.
- d) The Applicant neglected and abandoned his motor vehicle by failing to honour his statutory obligations and now seeks to benefit from his omission. As such the main suit is a waste of court's time given that the Applicant seeks to gain from snubbing statutory obligations at the time they fell due.

- e) The vehicle has been warehoused beyond the statutory timeline and, pursuant to the law, the Commissioner Customs is mandated to auction any goods warehoused beyond the statutory limit.
- f) No further extension of the warehousing period for the said vehicle was permissible by law and, by operation of the law, the vehicle was now property of the Commissioner Customs. As such, the Respondent is statutorily entitled and mandated to auction the said vehicle.
- g) The main suit was bound to fail given that by operation of the law, the vehicle was forfeited and the suit is based on an attempt to benefit from disregard of statutory obligation.
- h) It is in the interest of justice that the application be denied.

The Applicant did not file any affidavit in rejoinder.

At the hearing, the Applicant was represented by Ms. Belinda Nakiganda while the Respondent was represented by Mr. Bamwerinde Barnabas. Both Counsel made and filed written submissions which I have reviewed and considered in the course of the resolving the issue before the Court.

### **Issue for determination by the Court**

One issue is up for determination by the Court, namely:

**Whether the Applicant has satisfied the conditions for grant of an order of a temporary injunction.**

### **Resolution by the Court**

Let me begin with the preliminary points of law raised by the respective Counsel in their submissions.

I will start with the matters raised by Counsel for the Applicant in their submissions in rejoinder. Counsel for the Applicant submitted that the Respondent had not filed an affidavit in reply to the application; or if they filed, the affidavit in reply was filed out of time and in contravention of the provisions of *Order 12 Rule 3(2) of the CPR*.

Counsel for the Respondent did not make any response to this matter. The reason is clear. Counsel for the Applicant raised this point in their submissions in rejoinder, without any prior indication they would. It was therefore not anticipated by the opposite party. This move by the Applicant's Counsel appears to me as an afterthought seeing as the Applicant had the opportunity to raise the matter concerning the absence of an affidavit in reply in their main submissions but did not.

Be that as it may, I will deal with the matter as raised by the Applicant's Counsel since it is a question of law. *Order 12 Rule 3 (2) of the CPR* provides –

*“Service of an interlocutory application to the opposite party shall be made within fifteen days from the filing of the application, and a reply to the application by the opposite party shall be filed within fifteen days from the date of service of the application and be served on the applicant within fifteen days from the date of filing of the reply.”*

I notice that there was total non-compliance with the above provision of the law from all sides. The application was filed on the 28<sup>th</sup> January 2020. As per affidavit of service dated and filed on 16<sup>th</sup> March 2020, the application was served onto the Respondent on the 13<sup>th</sup> March 2020.

This was way past the 15 days directed under the law. The Respondent filed an affidavit in reply on 5<sup>th</sup> June 2020, still way past the prescribed period of 15 days from the date of service. There is no indication as to when or whether the affidavit in reply was served onto to the Applicant.

Because this matter was raised too late into the proceedings, there is no explanation as to the said delays. Counsel for the Applicant attempted to explain in their submissions in rejoinder to the effect that they retrieved the signed application from the Court on 13<sup>th</sup> March 2020. But this is evidence from the bar that cannot be accepted and relied upon by the Court. The record indicates that the Chamber Summons were issued by the Court on 5<sup>th</sup> March 2020. There is no explanation as to why it took that long, from the time of filing, for the Registrar to sign them off; and for the Applicant's Counsel to retrieve them from the Court.

In all therefore, the Court Registry and both parties are guilty of non-compliance with the timelines. If the Court was to choose to construe the timelines strictly, this application will have to be struck out for not being served within the prescribed 15 days from the date of filing. In such a case, it would be immaterial whether the affidavit in reply was filed and served within time.

However, since the Court Registry had a hand in the delay, and no prejudice will be occasioned to either party if the non-compliance with the timelines is ignored, I will ignore the said timelines and proceed to consider the application on the merits.

Another preliminary point of objection was also raised by Counsel for the Respondent. It is to the effect that the Applicant was out of time and has no locus to bring this application before the Court. Counsel submitted that pursuant to the provisions of *Section 57 of the East African Customs Management Act, 2004 (hereinafter called 'EACCMA')*, mandatory timelines are set out for warehousing of goods subsequent to which, the right to such goods is forfeited and the goods are to be sold off at the discretion of the Commissioner. Counsel submitted that according to the evidence before the Court, two years had elapsed since the vehicle in issue was first warehoused and there was no written communication of the Commissioner extending the warehousing period nor an application for extension of the same.

Counsel for the Respondent further submitted that there had been an application for change of ownership of the vehicle in issue that had been approved by the Respondent and was reflected in the current documentation of the vehicle. As such, the Applicant had no locus standi to bring the suit or this application.

In response, Counsel for the Applicant submitted that the nature of the objection raised by the Respondent's Counsel could not be argued at this stage, as doing so would lead to delving into the merits of the main suit; which is not permitted at the level of considering whether or not to grant an application for a temporary injunction.

I am in agreement with the submission of Counsel for the Applicant. The content of this point of objection is indeed the substance of the Respondent/Defendant's defence in the main suit. The entitlement of the

Applicant/Plaintiff to the motor vehicle in issue is the substance of the dispute. The statutory power of the Commissioner over warehoused goods under the **EACCMA** has to be balanced with the statutory duty of the Commissioner to ensure that such goods remain in sound condition. Such a balance cannot be the subject of this application but of the main suit.

Counsel for the Respondent further argues that by operation of the provisions of the **EACCMA**, the subject matter of the suit was already forfeited and the Applicant was stripped of his legal rights over the vehicle. As such the main suit and this application were untenable. With due respect to learned Counsel for the Respondent, I believe this submission is misguided, as it is tantamount to opining that because of the cited provisions of the **EACCMA**, the Court is divested of jurisdiction to investigate into allegations of injustice committed against a party in the course of clearance of customs duties for warehoused goods. I find this argument unmeritorious and unacceptable to me. This equally applies to the argument as to whether the Applicant is still the owner of the vehicle. This can only be established through evidence which can only be secured from hearing of the main suit.

In all therefore, the objection raised by the Respondent's Counsel is premature, pre-emptive and unsustainable. It is therefore rejected.

Turning to the merits of the application, the issue for determination is **whether the Applicant has satisfied the conditions for grant of an order of a temporary injunction**. I will proceed under the sub-headings listed before each finding.

## **The Position of the Law**

Grant of a temporary injunction is an exercise of judicial discretion for purposes of maintaining the status quo until the question(s) to be investigated in the main suit is/are tried on the merits and disposed of finally. The principles for grant of a temporary injunction were laid down in the case of ***E.L.T Kiyimba Kaggwa Vs Hajji Abdu Nasser Katende (1986) HCB 43*** citing with approval the decision in ***Giella vs. Cassman Brown & Co Ltd [1973] 1 EA 358***, as follows:

***“The conditions for the grant of an interlocutory injunction are .... first, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”***

In the present case therefore, for an order of temporary injunction to be issued, the Applicant must prove that:

- a) The applicant has shown a prima facie case with a probability of success.
- b) The Applicant might suffer irreparable loss or injury, which cannot be adequately compensated for in damages.
- c) If the court is in doubt, the case will be determined on the balance of convenience.

### **Need to preserve the status quo**

As stated above, the main purpose of a temporary injunction is to preserve the status quo pending the disposal of the main suit. It was submitted by Counsel for the Applicant that the status quo in this case is that the Applicant's vehicle is currently parked at the Respondent's park yard; under a risk of being disposed of by the Respondent by way of auction. This status is verified by averments in the affidavit in support of the application. The Respondent does not contradict this evidence on the status quo. In the affidavit in reply, the Respondent confirms the vehicle is in their possession and the Commissioner of Customs intended to auction the same following its forfeiture in accordance with the Commissioner's statutory obligations under the **EACCMA**.

The Applicant has satisfied the Court that the motor vehicle, the subject matter of the main suit, is in possession and control of the Respondent; and that it is at risk of being disposed of through action by the Respondent. I am satisfied that there is need to preserve the status quo pending disposal of the main suit.

### **Prima facie case**

According to **Lord Diplock** in *American Cyanamid Co. Ltd v Ethicon [1975] 1 ALL ER 504 at page 510*, to establish a prima facie case, all that the plaintiff needs to show by his action is that there are serious questions to be tried and that the action is not frivolous or vexatious.

The text in **Halsbury's Laws of England 4<sup>th</sup> Edition Vol. 24 Paragraph 858** puts it thus –

**“On an application for an interlocutory injunction, the court must be satisfied that there are serious questions to be tried. The material available at the hearing of the application must disclose that the plaintiff has real prospects for succeeding in his claim for a permanent injunction at the trial”.**

On the evidence before the Court, it was shown by the Applicant that he is the owner of the vehicle in issue; the vehicle was deposited with the Respondent Customs Bond for purpose of tax clearance of import duties; and that the taxes could not be cleared because the vehicle was blacklisted and impounded by the Respondent following a newspaper publication that the vehicle was one of the cars that had been smuggled into Uganda from the United States of America. The Applicant further showed that by the time the vehicle was cleared of the said allegations, it had been grossly damaged, for which he holds the Respondent liable in damages. The Applicant has therefore brought a suit against the Respondent in negligence and for compensation for the damages occasioned to the vehicle.

It was submitted by Counsel for the Applicant that a serious question arises as to whether the Respondent’s actions of wrongfully publishing the Applicant’s vehicle as a smuggled vehicle and impounding it were lawful; and whether the applicant is entitled to damages arising from the Respondent’s actions. Counsel submitted that the Applicant has a reasonable chance of success on his claims. Counsel prayed that the Court finds that the Applicant has established a prima facie case with a high chance of success in the main suit.

In response, Counsel for the Respondent stated that no prima facie case with a probability of success could be disclosed by the Applicant since the main suit was untenable on account of the mandatory provisions of *Section 57 of the EACCMA*. Counsel submitted that the suit by the Applicant was frivolous and vexatious and there was no substantial question to be investigated. Counsel further submitted that the Applicant was seeking to create legal rights and remedies where the statute clearly prescribed what ought to be done, when and how. Counsel submitted that the Applicant was simply hiding under the cloak of justice and seeking benefit from his own wrong doing and failure to comply with a statutory obligation. Counsel prayed that the application be dismissed.

As I have stated herein above, the provisions of the **EACCMA** cannot be construed as divesting the Court of jurisdiction to investigate a wrong allegedly committed by the Respondent in the course of performing its duties. Where a party, such as the Applicant herein, lays allegations before the Court pertaining to infringement of his rights, such allegations cannot be wished away simply because the law gives the Respondent statutory powers to deal with the property of the Applicant. Where there is prima facie evidence that the Respondent may have acted negligently and occasioned injury to the Applicant's rights, such an allegation has to be investigated and determined by the Court.

On the case before me, the evidence by the Applicant raise serious questions as to whether in the performance of its statutory duties, the Respondent acted unlawfully and negligently, as alleged by the Respondent. As such, before the status quo concerning the motor vehicle in issue can be interfered with, the Court needs to investigate the above

question raised by the Applicant. As held by **Ssekaana J** in the case of ***Alcohol Association of Uganda & Others Vs Uganda Revenue Authority & Another, HC MA No. 744 of 2019***, an injunction may be issued to restrain a public body from acting in a way that is unlawful or in abuse of its statutory powers or to compel the performance of a duty created by statute. Where any of the above listed elements appear in the conduct of a public body, a case for grant of an injunction will be duly established.

In the instant case, the Applicant has established a prima facie case over the allegation of wrongful and negligent conduct on the part of the Respondent. The first condition for grant of an order of a temporary injunction has therefore been satisfied.

#### **Irreparable Injury incapable of being atoned in damages**

For a temporary injunction to issue, the Applicant must show that upon his/her claim in the main suit, if the injunction is not granted, an award of damages would not suffice to adequately compensate him/her for the loss or injury suffered. It has been held that irreparable injury does not necessarily mean that there must be physical impossibility of repairing the injury but simply means that the injury is a substantial or material one, that cannot be adequately compensated by an award of damages. See ***Kiyimba Kaggwa Vs Hajji Abdu Nasser Katende (supra)***.

It was submitted by Counsel for the Applicant that in order for the Court to investigate and determine the claim of negligence against the Respondent, the vehicle needs to be preserved for purpose of assessing the extent of the damage and the cost of repairs. Counsel submitted that

if the Respondent is allowed to auction the vehicle, there will be no material upon which to assess the quantum of damages. Counsel further submitted that the said vehicle was also the basis of assessment and ascertainment of the taxes supposed to be paid by the Applicant. Disposing of the vehicle would therefore render the main suit nugatory.

In reply, it was submitted by the Respondent's Counsel that the Respondent was in a good financial position to pay the Applicant damages if the Applicant was to succeed at the trial. Counsel therefore submitted that there was no irreparable injury that would be suffered by the Applicant if the injunction is not granted. Counsel further submitted that the Applicant had not led any evidence that the property in issue was in danger of being wasted, damaged, alienated or disposed of by the Respondent.

I find that it is not in dispute that there is a threat by the Respondent to auction the motor vehicle in issue. In the very affidavit in reply to the application deposed on behalf of the Respondent, the Respondent shows that the vehicle is already forfeited to the Commissioner Customs and was due for auctioning and the Applicant could not reverse this situation owing to statutory timelines. I find this evidence of an absolute threat of disposal of the subject matter of the main suit. The Applicant needed not prove any further the existence of imminent risk or danger of disposal of the subject vehicle.

The Applicant has also established that the suit vehicle is the basis of the claim in the main suit. If it is disposed of, there will be no basis of either assessing any damages or ascertainment of the taxes the Applicant

is obliged to pay. I find this sufficient evidence of a possibility of the Applicant suffering irreparable damage if the Respondent is not restrained from disposing of the vehicle. I agree that the suit will be rendered nugatory and, as such, there would be no compensation in damages to talk about. The second condition has also been satisfied by the Applicant.

### **Balance of convenience**

The law is that where the Court is in doubt as regards the two earlier conditions, but finds that there is need to preserve the status quo, then it can decide the matter on the balance of convenience. See ***Kiyimba Kaggwa Vs Hajji Abdu Nasser Katende(supra)*** and ***Giella vs. Cassman Brown & Co Ltd (supra)***.

In the instant case, I have no doubt that the Applicant has established the two earlier conditions. But even if I had, it is clear to me that it would be imperative on the part of the Court to restrain the disposal of the subject matter of the main suit. The balance of convenience would therefore lie in favour of the Applicant.

The Applicant has therefore satisfied all the conditions for grant of an order of a temporary injunction. I have therefore allowed the application with the following orders:

1. A temporary injunction order is issued against the Respondent, its agents or servants restraining them from auctioning the Applicant's motor vehicle Toyota Sequoia Chassis No. 5TDT3A72S067486 (the suit property), or in any other way wasting, damaging, alienating,

selling, removing or disposing of the said suit property until the determination of the main suit.

2. The costs of the application shall be in the cause.

It is so ordered.

A handwritten signature in blue ink, appearing to read 'Boniface Wamala', with a long horizontal flourish extending to the right.

**Boniface Wamala**

**JUDGE**

**01/10/2020**