THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

AT NAKAWA

MISCELLANEOUS CAUSE NO. 15 OF 2013

KIRENGA FRED.....…… APPLICANT

VERSUS

THE COMMISSIONER CUSTOMS

UGANDA REVENUE AUTHORITY.....….. RESPONDENT

Before: HON. MR. JUSTICE WILSON MASALU MUSENE

RULING

The Applicant Kirenga Fred was on the 5th day of August 2009 charged with several counts of interfering with goods to wit; neutral portable Ethanol that had been seized by Uganda Revenue Authority's Commissioner in charge customs and fraudulent evasion of tax contrary to Section 203 (e) and (f) of the East African Community Customs Management Act in the chief magistrates court of Nakawa vide **criminal case No. 884 of 2009.** On the 13th day of June 2011 the chief magistrate dismissed the criminal charges against the Applicant having found no case to answer against him. In his ruling the chief magistrate also ordered the release of the 160 drums of Ethanol that the respondent had seized from the Applicant.

From the record, it is clear that the Applicant filed in the Chief Magistrates miscellaneous Application No. 423 of 2011 subsequent to his acquittal as a result of the respondent's refusal to release the Applicants goods as ordered by the chief magistrate. By an order dated 8th July 2011 - **annexture C** to the Applicant's affidavit in support of this application the chief magistrate declared

the commissioner customs URA a contemnor and further ordered the commissioner customs to pay daily sum of **UGX 1,000,000=** till his order were complied with.

The Applicant also successfully filed a further miscellaneous **Application No. 2206** of **2011** by which the chief magistrate awarded him **594,000,000/=** which the Respondent commissioner successfully appealed vide **Civil Appeal No. 39 of 2011.** It is pertinent that 1 set out the grounds of appeal in **Civil App. No. 39 of 2011** as summarized by **Her Lordship Faith Mwondha** in her judgment in the above stated civil Appeal dated 21st February 2013:

"(1) ***That the learned trial magistrate erred in law and fact by substituting his ruling dated 13th June, 2011 well aware that he had become functus afficio after making the 1st ruling.***

(2) That the Chief Magistrate erred in law when he exercised pecuniary jurisdiction not vested in his court by awarding the respondent the sum of Ugshs 494,000,000="

I go to length to set out the background as I have done because most issues raised in this matter greatly emanate from the facts as above outlined.

Suffice to add that **Civil Appeal NO. 39 of 2011** was allowed, with **Justice Faith Mwondha** (as she then was) holding interalia that the chief magistrate was **"functus officio'** when she entertained **M.A No. 2206 of 2011** having performed her office earlier and that in entertaining the said application whose pecuniary value/subject matter was **UGX 520,000,000=** being the market value of the seized goods as claimed by the Applicant he, the chief magistrate Nakawa then, acted without jurisdiction and seemingly in vain.

On the 24th April 2013, about two months after the decision of **Her Lordship Faith Mwondha** in **Civil Appeal No. 39 of 2011,** the Applicant institutes this

application. This application is brought under **Articles 26 and 50 of the constitution** of the Republic of Uganda and **Rules 3 and 6 of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules S.l No. 26 of 1992.** The Application seeks the following orders;

(1J A declaration that the Respondent's refusal to release the Applicants 160 drums of Ethanol as ordered by the Chief Magistrates court contravenes the Applicants right to property.

(2) An order compelling the Respondent to release the Applicants 160 drums of Ethanol.

(3) An order for general damages.

(4) An order for exemplary damages.

(5) Such other remedies that court shall find appropriate.

(6) Costs of the application.

The grounds upon which this application is brought as outlined in the notice of motion are as paraphrased below;

(1) That on 15th June 2011 the Chief Magistrates Court Nakawa acquitted the Applicant in criminal case No. 884 of2009 and ordered the release of his 160 drums of ethanol which the respondent had impounded.

(2) That on the 16th day of June 2011 the Applicant requested the respondent to release the said goods to M/s Muweina & Mugerwa Advocates counsel for the owner thereof.

(3) That the respondent has since refused to release the goods despite incessant demands from M/s Muwema & Mugerwa Advocates.

(4) That the Respondent was even cited for contempt of court by the Chief magistrates' court but still refused to release the Ethanol.

(5) That Justice demands that this application be granted.

The Application is supported by the Applicant's affidavit in support dated 19th April 2013. The Respondent opposes this application by an affidavit of a one **Kigwawo Kitaka Farouk** in reply dated **15th August 2013.** In rebuttal to Kitaka's affidavit, the applicant deposed a **further affidavit on the 7th of October 2013.** Both parties agreed to file written submissions in this matter.

I now revert to the submissions of the parties in this application.
The Applicant's counsel M/s Muwema & Mugerwa Advocates have proposed basically two issues in this matter in my view to wit;

1. Whether the respondent's refusal to release the Applicants 160 drums of Ethanol contravenes the Applicant's right to property.

2. What reliefs are available to the parties

In his submissions, counsel for the Applicant contended that by Paragraph **7** of **Kigwawo Kitaka Farouk's** affidavit in reply the respondent acknowledged that the chief magistrate court ordered the return of the **160 drums of Ethanol** seized by the respondent to the Applicant. Relying on **Article 26 (1) of the constitution of the Republic of Uganda,** counsel submitted that the Judgment of the Chief Magistrate ordering release of the Applicant's goods was property protected under the said law. He cited the case of **Shah Vs Attorney General [1970] E A 523** as authority for the above proposition. Counsel further submitted that the respondent has not adduced any evidence on record to prove that the sale of the Applicant's property ever took place. That there was no sale agreement, delivery note to the buyer nor is the name of the purported buyer put

forward. Counsel also alluded to **Section 55 and 56 (1) & (2) of the PPDA Act (Public Procurement and disposal of Public Assets Act)** which provisions he submitted outline a detailed Public Procurement Procedures which ought to have been followed if at all the sale of the Ethanol belonging to the Applicant took place. It is also submitted that nothing warranted the selling off or depriving the Applicant of his property. Counsel prayed that all the issues he framed be answered in the affirmative. He proposed 100,000,000= as general damages, 400,000,000 as exemplary damages and also prayed for costs of this application.

In reply, counsel for the respondent submitted and rightly so that the Applicant was acquitted in **NAK-Co - 884 of 209, Uganda Vs Fred Kirenga** and the chief magistrate ordered that 160 drums of Ethanol that were seized by the Respondent be returned to the Applicant. He submitted, however, that prior to the order, the Respondent had exercised its powers under the East African Community Customs management Act and sold off the drums of Ethanol at **UGX 110,000,000=** a value allegedly much higher than the Applicant had declared. That after the sale **UGX 26,054,706=** was transferred into the Applicant's Bank account after deducting the requisite taxes. That the Applicant without challenging the sale and refund filed **miscellaneous Application No. 2206 of 2011** against the respondent seeking 'double compensation' in respect of the alleged 160 drums of Ethanol. Counsel submitted that the chief magistrate awarded the Applicant a sum of **UGX 494,000,000=** as compensation which the respondent successfully challenged vide Civil Appeal NO. 39 of 2011. Counsel for the respondent also raised three objections against the Applicant's action as follows;

(i) Relying on **Rule 4 of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992** counsel submitted that the

Attorney General is the proper person/main party to be sued in applications of this nature within the meaning of that rule and service upon the Attorney was mandatory under Rule 4 of S I 26 of 1992. He submitted that on this ground alone, the present cause is incurably defective and should be dismissed.

(ii) That the application does not disclose a reasonable cause of action which constitutes a fundamental violation of any rights and freedoms by the defendant. Counsel relies on Article 50 (1) of the 1995 constitution of Uganda. He submitted that an order of court cannot constitute a breach of a human right or a fundamental right. Counsel cited the Kenyan case of **Kapa Oil refineries Ltd Vs Kenyan Revenue Authority and others; Constitutional petition No. 370 of 2012** where it was held by **D.S Majanja - Judge of the High court of Kenya** citing the privy council decision in **Maharaj Vs Attorney General Of Trinidad And Tobago (No. 2) [1979] AC. 385 @ 399** that:

> ***"Further, I do not think that affecting the decision of a court of itself constitutes a violation of any fundamental right or freedom"***

Counsel for the respondent then alluded to the decision of Her Lordship Faith Mwondah at pages 5 - 6 extensively. He referred me to the well celebrated case of **Motokov Vs Auto Garage & Others (No. 3) [1971] E. A 353** on what constitutes a cause of action and concluded on this point that the application is misconceived, lacks merit and is an abuse of court process.

(iii) That the Application is resjudicata and therefore contravenes **Section 7 of the Civil Procedure Act** in so far as Her Lordship Faith Mwondha (as she then was) carefully dealt with the same subject matter of the 160 drums of Ethanol vide **Civil Appeal No. 39 of 2011.**

On the merits counsel for the respondent submitted that any attempt to challenge the sale of the 160 drums by the respondent is misconceived as it seeks to challenge the lawfulness of the said sale and introduces issues of monetary value of the goods whereas there is no evidence pointing to such a value. He further submitted that the Applicant has not proved any right to the impounded goods. Counsel alluded to section 214 (2) of the East African community customs management Act which he said empowers the respondent to sell goods seized which are perishable in nature by way of public auction or private treaty. He also submitted that by Annexture A3 to the affidavit in reply the Applicant declared the value of goods at **UGX 26,384,524=**

On the reliefs sought by the Applicant counsel submitted that they do not arise since the respondent had not infringed the Applicant's rights as pleaded.

The Applicant's counsel filed submissions in rejoinder on 1st November 2013. He submitted that the Fundamental Rights and Freedoms (Enforcement Procedure) Rules were made in 1992 under the 1967 Constitution and Rule 4 thereof therefore had no legal effect on Article 50 of the constitution of Uganda. He referred to Article 250 (2) of the constitution which provides that all civil proceedings by or against government shall be instituted by or against the Attorney General. He submitted that these proceedings are not against the Attorney General and that there would therefore be no need to serve the Attorney General. It was submitted that the Application discloses a cause of action and is not resjudicata and that the application has merit.

I have carefully considered to the submissions of both parties. Counsel for the respondent raises three preliminary objections by his submissions and paras 4, 17 and 18 of the affidavit in reply. It is therefore incumbent upon this court to dispose of the said points of law/objections before excavating into the merits of this application.

The first objection raised by counsel for the respondent is that the none service to the Attorney General as required by **Rule 4 of the Fundamental Rights and Freedoms (Enforcement Procedure)** renders this application nay and incompetent. According to counsel for the respondent service upon the Attorney General was mandatory, since according to counsel, the Attorney General is the proper/main party to this application. In reply counsel for the Applicant submitted that service upon the Attorney General is only required where the suit is filed against the Attorney General as a party.

The requirement for service of a statutory notice as required by the law is mandatory according to the case of **Fancy Stores Ltd & Anor Vs UCB (1994) IV KALR Page 18; HCCS NO. 09 of 1992.** Any proceedings brought in contravention of the requirement to serve a statutory notice are a nullity and of no legal effect. Where the law requires service of a statutory notice prior to the filing of any action, the law requires the party filing such suit to plead that the statutory notice was issued and served upon the defendant or Respondent as the case may be.

But the above position is common place adjectival law in ordinary suits. Such requirement though has exceptions. In the case of **Uganda Registration Services Bureau Vs Stella properties Ltd; High court (Commercial Division) miscellaneous Application No. 62 or 2013;** the applicant in an application for leave to appear and defend a suit filed under order 36 CPR raised

in his application by way of a triable issue that it had not been served with a statutory notice my brother Judge **Justice Madrama Izama** held;

"The requirement for serving a statutory notice as required or prescribed is mandatory according to the ease of Fancy Stores Ltd and Another Vs UCB [1994] HCCS number 9 of1992 cited in volume 4 KALR Page 18. The only exception to serve a statutory notice is found under Article 50 of the Constitution of the Republic of Uganda for the enforcement of fundamental rights and freedoms".

The above is the position of the law. However, I do not think that the fundamental rights and freedoms (Enforcement procedure) Rules S.I. 26 of 1992 have any, force of law in the first place. Tome these rules applied in respect to the old constitution of 1967 under which they were made. In **JANE FRANCIS ANANIO Vs A.G, miscellaneous Application No. 317 of 2002,** Katutsi J (as he then was) held that the above rules were not made within the spirit of Article 50(4) of the 1995 constitution of the republic of Uganda and consequently held that they were not enforceable. Article 50 (4) of the constitution requires that such rules must be prescribed by parliament. Indeed, in 2008, the Judicature Fundamental rights and Freedoms (Enforcement Procedure Rules) S.I. No. 55 of 2008 was enacted. It also required service upon the Attorney in its Rule 4 in similar terms as S.I. No. 26 of 1992 had ordained. IN the case of **Bukenya Church Ambrose Vs Attorney General Constitutional Petition No. 26 of 2010** the constitutional court annulled the 2008 rules holding that they contravened Article 50 (4) of the constitution as they were not made by parliament. It is my holding therefore that just like the judicature (Fundamental Rights and Freedoms) (Enforcement Procedure Rules) SI No. 55 of 2008, the fundamental rights and Freedoms (Enforcement Procedure) Rules SI No. 26 of 1992 has no force of law in our jurisprudence

and any preliminary objection premised there upon cannot shake the wheels of this court.

In any event as already held above, there is no need to serve a statutory notice in matters brought under article 50 of the Constitution which concerns enforcement of fundamental human rights and freedoms. I am fortified in my finding by the decision in **Francis Tumwekwasize and others Vs Attorney General High Court (Civil Division) miscellaneous cause NO. HCT-00-CV-MC-0036 of 2009** which considered **Rule 4 of the Judicature (Fundamental rights and freedoms) (Enforcement Procedure) Rules 2008** which is in par materia with **Rule 4 of the Fundamental Rights and freedoms (Enforcement procedure) Rules 1992.** The rule in the 2008 Rules just as rule 4 of S.I. 26 of 1992 provided as follows:

> ***"A motion shall not be made without notice to the Attorney General and other party affected by the application "***

Justice Yorokamu Bamwine (as the then was, now Principal Judge) held;

> ***"I am inclined to the view that the notice to the Attorney General referred to in Rule 4 of statutory instrument No. 55 2008 is different from the statutory notice required under section 2 of the civil procedure and Limitation (Miscellaneous provisions) Act Cap 72. I say so because Article 50 of the constitution provides a relaxed procedure for enforcement of human rights and freedoms. The procedure pointed out by learned counsel for the respondent obtains in ordinary suits on plaint under the civil procedure Rules"***

In **Dr. J. W Rwanyarare & 2 others Vs Attorney HC MA No.** 85 **of 1993** the high court held that in matters concerning the enforcement of human rights under the Constitution no statutory notice was required because to do so would

result in an absurdity as the effect of it would be to condone the violation of the right and deny the applicant a remedy.

See also: **Green Watch Vs Uganda Wildlife Authority and Another HCMA No. 15 of 2004 for the same proposition.**

The above is the clear position of the law which counsel for the respondent ought to have known. Thus the stronger the attachment to constitutional provisions involving the enforcement of fundamental rights and freedoms the more relaxed the rules are.

I therefore find no merit in the first objection and accordingly dismiss it forth with.

On the second objection that the application discloses no cause of action, it was submitted for the respondent that none of the applicant's fundamental rights have been violated in terms of Article 50 (1) of the 1995 constitution of Uganda. Counsel submitted, relying on the Kenyan High court decision of **Kapa oil Refineries Ltd Vs Kenyan Revenue Authority (supra)** that affecting the decision of itself does not constitute a violation of any fundamental right and freedom. Counsel for the applicant does not agree. He submitted that the Applicant's right to property under **Article 26 (1) of the constitution** had been violated. That the applicant's claim is **NOT** premised on **Criminal Appeal NO. 39 of 2011** but on criminal case **No. 884 of 2009** which Judgment was never appealed. He maintained that miscellaneous Application **No. 15 of 2013** - the instant application discloses a cause of action. I have attentively followed the submissions of both sides on this point. **Law J. A of the East African Court of Appeal observed in Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] E A 696 at page 700:**

> ***"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded... and which if argued as a preliminary point may dispose of the suit."***

Then at Page 701 Sir Charles Newbold P. added:

> ***"A preliminary objection is in the nature of what used to be a demurrer. It 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. "***

From the submissions of the respondent's counsel, affidavit evidence is alluded to on this particular objection. For example at page 3 para 3 of his submissions counsel refers this honourable court to paragraph 4 of the respondent's affidavit in reply and annextures there to. Counsel also invites this honourable court to look at the record of court in criminal case **No. 884 of 2009** which is annexture B to the affidavit in support of this application all of which are matters of evidence for this court to consider. Counsel ends his submissions on this point by imploring this court to find inter-alia that this application lacks merit and should be dismissed.

In view of the above submission, I am inclined to follow the decision of the East African Court of Justice in **James Katabazi & 21 others Vs The secretary General of the East African Community & Another, Reference No. 1 of 2007** that the matter raised was not one that could appropriately be dealt with as a preliminary objection because it was not a pure point of law but one involving facts. Assuming I was wrong, I would also find that the objection so raised is unserious and lacks merit. For in line with the decision of **Auto Garage Vs Motokov (NO. 3) (Supra),** the applicant has pleaded that his right has been violated by the respondent's continued seizure of his goods and that the

respondent is liable. Whether that claim has merit or not was not for court to determine at a preliminary stage but on full trial of issues in this matter. I must also state straight away that the decision of the Kenyan High Court in **Kapa Oil Refineries Vs Kenyan Revenue Authority (Supra)** which was quoted in extentio by counsel for the respondent has no semblance or bearing on the instant application. In that case petitioner did not claim that its right to property had been infringed nor had the respondent impounded its property. The petitioner simply impugned the respondent's move to collect taxes on ground that the judge had found in favour of the petitioner Kapa that there was no relationship between Kinsum and Kapa where upon the respondent still issued agency notices to collect the taxes. Justice Majanja held:

> ***"... I do not think that effecting the decision of a court, of itself constitutes a violation of any fundamental right or freedom. After the motion was dismissed, KRA was entitled to proceed with enforcement."***

Majanja J. also cited the case of **Methodist church of Kenya & Anor Vs Rev. Jeremiah Maku & Another CA Civil Application NO. 233 of 2008 (Unreported)** where it was held that;

> ***"it is only in rare cases that an error in the judgment or order of a court can constitute a breach of human right or fundamental freedoms".***

In the instant application the applicant's complaint is not that an error in any judgment has constituted any breach of his right and freedom. The applicant claims that the respondent impounded his goods to wit 160 drums of Ethanol which he continues to fasten unto even with the chief magistrates' court ordering release of them. The respondent does not dispute impounding the said goods nor is it ready to release the same but avers that it did sale the same at UGX 110,000,000= which it says is far and above what was declared by the Applicant in annexture A3 to the respondent's affidavit in reply. It is clear

therefore that the Applicant is not claiming that the respondent's continued disobedience to the chief magistrate's order in **Cr. Case No. 884 of 2009** has constituted any breach of his rights per-se but claims that the 160 drums of Ethanol are his property which is undisputed.

The argument that no fundamental right of the applicant has been breached is also not proper. This is because **chapter 4 of the constitution** under which **article 26** falls is titled: ***"protection and promotion of fundamental and other human rights and freedoms".***

I therefore, do not find any merit in the argument that no fundamental right of the applicant has been breached because Article 26 falls under Chapter 4 of the Constitution already described above. In any case Article 50 (1) of the Constitution of the Republic of Uganda talks of infringement of fundamental or other right; Even If the right to property were not fundamental right which argument has been rejected still the applicant was entitled to challenge the respondent's conduct.

For the reasons above, I find no merit in the second objection and I disallow the same.

Lastly, the respondent contended that this application is resjudicata in view of the decision in High court Civil Appeal NO. 39 of 2011. The question I have to ask myself is am I barred from adjudicating on this application because of the doctrine of resjudicata. I may or I may not because of the law and the facts of the case. Counsel for the respondent has submitted that criminal appeal No. 39 of 2011 although was headed as a criminal appeal was in substance a civil appeal arising out of criminal case No. 884 of 2009 and miscellaneous application No. 2206 of 2011. On the other hand, counsel for the applicant submitted that the doctrine of resjudicata is inapplicable to the present

circumstances because the decision in criminal case No. 884 of 2009 was never appealed.

I am surprised by counsel for the respondent's submission that the decision of the high court annexture A, to the respondent's affidavit in reply and titled **"Civil Appeal No. 39 of 2011** is a criminal appeal. In civil Appeal No. 39 of 2011 there are only two issues emanating from the grounds of appeal which 1 set out at the beginning of my ruling to wit;

(1) Whether the learned Chief Magistrate erred in law and fact by substituting his ruling dated 13th June 2011 with another one dated 16th August 2011 in MA. No. 2206 of 2011 well aware that he had performed his office already and was 'functus officio'

(2) Whether the chief magistrate erred in law in exercising a pecuniary jurisdiction not vested in him.

The respondent hereof who was the appellant in civil Appeal No. 39 of 2011 prayed for the following orders in that appeal to wit;

(i) That the appeal be allowed with costs

(ii) A declaration that the chief magistrates court had become functus officio after making the 1st ruling of 13th June 2011; and

(Hi) A declaration that the chief magistrate had no pecuniary jurisdiction to award UGX494,000,000= to the respondent (now applicant).

The learned Justice Faith Mwondha at pages 5 - 6 of her judgment in the above appeal granted all the above prayers and allowed the said appeal. There is no order in Her Lordship's judgment of 21st February 2013 relating to criminal case NO. 884 of 2009. In the East African Court of Justice case of **James Katabazi & 21 others Vs the Secretary General of the East-African Community &**

Another (Supra), the East African Court of justice held at pages 13 - 14 as follows:

> ***"Three situations appear to us to be essential for the doctrine (of resjudicata) to apply; one the matter must be 'directly and substantially' in issue in the two suits. Two the parties must be the same or parties under whom any of them claim litigating under the same title. Lastly, the matter was finally decided in the previous suit. All the three situations must be available for the doctrine of resjudicata to operate."***

It is my finding that the issues in civil Appeal NO. 39 of 2011 are not the same issues in the instant application. The matter before me is to determine whether by refusing to return the Applicant's 160 drums of Ethanol and denying him the right to enjoy the fruits of his judgment in Criminal Case No. 884 of 2009 the respondent has violated the applicant's right to property as enshrined in Article 26 of the constitution and what reliefs if any are available to the parties.

In my view therefore the questions to be tried here are a world apart from what was in issue in civil Appeal No. 39 of 2011. Suffice to note that civil appeal No. 39 of 2011 was brought under ordinary civil procedure legal regimes while this application is brought for determination of a human rights question. Secondly, in paragraph 16 of the respondent's affidavit in reply, the respondent depones that it duly complied with the orders of court in cr. Case No. 884 of 2009. If the order in cr. Case No. 884 of 2009 had been successfully appealed as the respondent's counsel wants this court to believe, why would the respondent comply with the same order? In the premises, this objection also collapses. It lacks merit and is disallowed.

I now proceed to determine the crux of the first issue i.e. whether the respondent's refusal to release the applicant's 160 drums of Ethanol contravenes

the applicant's right to property. According to paragraph 2 of the applicant's affidavit in support of application, the applicant deposed that on the" 1st day of August 2009, the respondent seized his 160 drums of Ethanol from 6th street industrial area on the allegation that the same were not customed. Whereas the respondent in para 2 of its affidavit in reply denies paragraph 2 of the affidavit in support of application which is to the above effect, in the respondent's submissions, it is admitted that the applicant's 160 drums of Ethanol were impounded. However, counsel for the respondent submitted that the said Ethanol was sold off at UGX 110,000,000=. That UGX 26,000,000 which the applicant had declared was banked into his account. In rejoinder, counsel submitted to the effect that the purported sale of the Applicant's goods was a sham and suspicious. The first question to ask myself is whether by the time the chief magistrates court ordered the release of the applicant's goods the same had already been sold'.

In paragraph 8 of the respondent's affidavit in reply, Kiggwawo Kitaka deponed that prior to the order, the respondent had exercised its powers under section 216 of the East African Community customs management Act and sold off the said goods.

It is obviously clear that the order in cr. Case no. 884 of 2009 for the release of goods was never appealed as I have already held above.

I have carefully read section 216 of Act No. 1 of 2005 – East African Community customs management Act 2014. I do not find any provision therein which gives the respondent express powers to sell the property seized by it without notice and the procedures detailed therein with due respect to counsel for the respondent. The alleged sale of the applicant's goods begs more questions than answers. For instance, on which date were the said goods sold? To whom were these goods sold and where is the proof of that sale. A court of

law acts on evidence and I find no reliable evidence of the purported sale. But even if the said goods had been sold what was the formula for purportedly giving the respondent 26,000,000= only. How much was chargeable as taxes on these goods, nobody knows.

There was in my view no excuse for disobeying the chief magistrates order for the release of the applicant's Ethanol. The chief magistrate's order in cr. Case No. 884 of 2009 acquitted the respondent with an order that his goods be released to him. A court order is a court order and whosoever disobeys it with impunity does so at his/her own peril. See: **Goyal Vs Goyal (2011) 1EALR.** I also dismiss the applicant's argument that the applicant declared **UGX 26,054,706=** as the value of his 160 drums of Ethanol. An examination of annexture A3 to the respondent's affidavit in reply reveals the contrary. It clearly shows 26,384,524Ug. Shs as a tax base for import duty 32,980,655Ug. Shs as tax base for exercise duty, 56,067,113Ug. Shs as tax base for import VAT and 26,384,524Ug.shs as the tax base for withholding tax.

The consignee according to annexture A3 of the respondent's affidavit in reply is **Ryan Enterprises of Plot 19 Nakivubo Road** and the Declarant is **Malisu Appollo investments Ltd of P.O. Box 86 Kiboko** the agent of an unnamed principal. The description of the goods in the same annexture A3 to the respondent's affidavit is as follows;

> ***"undenatured ethylalcohol, of alcoholic strength 7 = 8% and other spirits of any str drums x 250/itres of natural portable ethanol" (underlining emphasized)***

In paragraph 6 of the applicant's affidavit in rebuttal dated 7th October 2013, Annexture A3 to the respondent's affidavit in reply is denied. I agree and hold that Annexture A3 above mentioned relates to 250 drums of natural portable ethanol and other unsaturated spirits of any strength, and not 160 drums of

Ethanol. Besides<the document Annexture A3 above does not bear the Uganda Revenue Authority or the respondent's stamp.

The importance of clear and secure property rights is fundamental to the well being of citizens of any country. In the Indian supreme court case of **State of Jharkhand & ors Vs Jitendra Kumar Srivastava & Anor, Civil Appeal No. 6770 of 2013 (Sci),** His Lordship A.K Sikiri held: made a very important statement in respect of the right to property. He held;

> ***"This right to property cannot be taken away without due process of law as per the provisions of article 300A of the constitution of India (Equivalent to article 26 (2) of our Constitution)".***

It is pertinent therefore that all public authorities and citizens alike must respect people's hard earned properties and any law which gives any public authority powers to dispose of or deal with a person's property in any way that is inconsistent with the owners' right must be exercised in line with articles 26 and 2 (2) of the constitution of the republic of Uganda. It is therefore my finding that the seizure of the applicant property without sound justification contravened article 26 (1) of the constitution of the republic of Uganda. In the application, the applicant has not indicated anywhere the monetary value of the 160 drums ethanol. I think counsel for the applicants exhibited a poor art of pleading here. However, in paragraph 10 of the respondent's affidavit in reply, it was averred that the respondent sold 158 drums of ethanol for a sum of UGX 110,000,000. This means that each drum was sold at 696,202.53shs. 696,202.53 x 160 drums would bring me to a figure of UGX 111,392,405= as the value of the 160 drums of ethanol. I accordingly order that the respondent pays to the applicant UGX 111,392,405= in lieu of the 160 drums of ethanol which the respondent unlawfully sold contrary to the detailed procedure under section 216 of the East African community Act 2004 as supplemented by the East African

Community Act supplement No. 1 of 2005. Since the applicant is businessman who would have profitably invested his money, the said sums shall be subjected to a compound investment multiplier of **1.2** per annum from 1st August 2009 when the goods were impounded fill the date of this ruling.

See: **Administrator General Vs Bwanika & ors CACA No. 36 of 2002**

A calculation of the above sum at the **1.2** compound investment multiplier the respondent shall pay to the applicant UGX 230,983,291 inclusive of the investment multiplier to date.

The first issue is accordingly answered in the affirmative.

Among the reliefs the applicant seeks are general damages, exemplary damages and costs. In Paragraph 11, of the affidavit in support of application the applicant defined as follows;

> ***"That the respondent's aforesaid conduct is in breach of the constitution, wanton, arbitrary, unjustified and in contempt of court"***

According to Paragraph 16 of the respondent's affidavit in reply, it is averred in reply to paragraph 11 above interalia that the respondent duly complied with the order in NAK-CO- 884 of **2009** by paying the applicant **UGX 26,054,706=** in an unnamed account in Eco Bank.

In his submissions, counsel for the applicant relied on Paragraph 2 of the applicant's affidavit in support of the application and submitted that the applicant is entitled to general damages for loss of opportunity to profit in the trade of his goods. In a brief reply, counsel for the respondent submitted that an award of damages is based on the principle of restitution in integrum.

I have considered the submissions of both sides on the issue of general damages. I do not see any relevance of paragraph 2 of the applicant's affidavit as alluded to by counsel for the applicant for evidence on general damages in paragraph 11 of the affidavit in support of application suffices. In **Uganda Revenue Authority Vs Wanume David Kitamirike, court of Appeal civil appeal No. 43 of 2010, His Lordship Remmy Kasule J. A.** who wrote the lead Judgment held;

> ***"General damages are awardable by court at large and after due assessment. They are compensatory in nature and should offer some satisfaction to the injured plaintiff"***

As rightly submitted by counsel for the respondent, the purpose of general damages generally is *"restituio in integrum'.* It is not in dispute that the applicant has gone through hustle and bustle in attempting to get back his goods. He was charged with criminal offences, filed a number of applications to get back his goods unsuccessfully. It is also undisputed that his goods have been under seizure and subsequently allegedly sold and the proceeds thereof pocketed by the respondent. I therefore find that this is a proper case for the award of genera! damages. Counsel for the applicant has proposed UGX 100,000,000= as general damages. **In Fredrick Zabwe Vs Orient Bank SCU** the supreme court of Uganda awarded the appellant UGX 200,000,000= as general damages for the respondent's conversion of his goods. In that case the respondent also claimed that it appropriated the said goods by way of right as mortgagee and claimed that it had acted lawfully as in the instant case. I have already held that the respondent acted unconstitutionally and contrary to the procedures laid down under S.216 of the East African community customs management Act. Be that as it may, 1 find the 100,000,000= proposed by counsel for the applicant out of range given the circumstances pertaining to this case. Doing the best I can, I find **80,000,000** sufficient to restitute the applicant's

endurance for more than four years with his goods disposed off by the respondent. I accordingly award the applicant **UGX 80,000,000** as general damages.

I now move on to consider to whether it is appropriate to condemn the respondent to pay exemplary damages as prayed. In **Uganda Revenue Authority Vs Wanume David Kitamirike (Supra),** the court of appeal further held as follows;

> ***"Punitive or exemplary damages are an exception to the rule that damages generally are to compensate the injured person. These are awardable to punish, deter, express outrage of court at the defendants egregious, highhanded, malicious, vindictive, oppressive and or malicious conduct. They are also awarded for the improper interference by public officials with the rights of ordinary subjects."***

In **Dr. Nganwa William and Another Vs Attorney General, HCCS No. 640 of 2005** (Civil Division) Mwangutsya J (as he then was) held;

> ***"Exemplary damages may be awarded where there is oppressive, arbitrary or unconstitutional action by the servant of government."***

The respondent in this matter took the applicant's goods without issuing any tax assessment, it sold the Applicant's goods at an alleged 110,000,000= UGX and chose to allegedly deposit only twenty six million in the applicant's account. It disobeyed the court order in NAK-Co-884 of 2009 with impunity. It acted unconstitutionally and as deterrence, it must be condemned in exemplary damages. Exercising my discretion upon the findings above, I condemn the respondent to pay to the Applicant **UGX 150,000,000=** by way of exemplary damages. The respondent should know that it is not above the law.

I consequently allow this application and order as follows:

1. I find that the respondent violated the Applicant's right to property when it seized and sold off the 160 drums of Ethanol belonging to him illegally.

2. In order that the respondent pays to the applicant **UGX 230,983,291** in lieu of the 160 drums of Ethanol out which the respondent sold 158 drums at **UGX 110,000,000.**

3. The applicant is awarded UGX 80,000,000= as general damages.

4. The respondent is condemned to pay UGX 150,000,000 as exemplary damages for its unconstitutional and (arbitrary) or high handed conduct.

5. Since I subjected the sums in £2) above I ward no interest on the said item. However, items 3 and 4 shall attract interest at court rate from the date of judgment till payment is full

6. Costs of this Application are awarded to the Applicant.

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WILSON MASALU MUSENE

JUDGE

6/2/2014