THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 355 OF 2000

AFRO MOTORS LTD……PLAINTIFF

VERSUS

UGANDA REVENUE AUTHORITY……DEFENDANT

BEFORE: JUSTICE GEOFFREY KIRYABWIRE

J U D G M E N T

The brief facts of this case are as follows. The plaintiff company were the authorised dealer of Peugeot cars and spare parts in Uganda. The case for the plaintiff is that sometime in the early 1990s it imported spare parts for Peugeot cars and warehoused them in a customs bonded warehouse at the company premises at Bombo Road Kampala as taxes were due to be paid on the said spare parts. However in 1995 the plaintiff company was evicted from their premises at Bombo Road in Kampala. As a result of the Plaintiffs eviction, the goods in the customs bonded warehouse and were taken over by the defendants and moved to two different warehouses at two different times. It is the contention of the plaintiff that at the time the spare parts were moved from the customs bonded warehouse at Bombo Road by the defendant there were eleven

boxes of spare parts. However a subsequent inspection of the spares jointly carried out by representatives the plaintiff and the defendant showed that only three out of the eleven boxes of spare parts would be accounted for and that eight boxes were missing. It is also the case for the plaintiff that they demanded that the defendant account for the eight missing boxes but that the defendants have failed to do so. The spares parts are therefore presumed to have been lost by the defendants. The plaintiffs therefore claim the CIF value of the said spare parts less taxes amounting to Ug.Shs.94,503,061/=. The plaintiffs also claim general and exemplary damages for the loss of the spare parts.

For the defendant in their written statement of defence, it is denied that they took over control of the bonded warehouse but rather that they seized the plaintiff's goods for non payment of taxes. Accordingly the plaintiff ceased to have any claim of right. The defendants also filed with their defence a counterclaim for unpaid taxes in the sum of Ug.Shs.52,948,439/= in respect of the same motor vehicle spare parts. However the defendants later on during the trial abandoned this counterclaim for taxes on the motor vehicle spare parts.

This case has a long history before the courts. It first came up for hearing before the learned Lady Justice Constance Byamugisha (as she then was, now a Justice of Appeal) in October 2001. The Learned Judge gave judgment on admission in favour the defendants in the sum of Ug.Shs.50, 548,439/= less the sum of Ug.Shs.2,400,000/= which the defendants claimed to have realised from

the sale of the spare parts in a bid to recover the said unpaid taxes. The plaintiffs then appealed the decision to the Court of Appeal largely on the grounds that they did not make any admission as to the counter claim. The Court of Appeal up held the appeal and directed a retrial of the matter before another High Court Judge hence this hearing.

Three issues were framed for hearing namely;

1. Whether the goods were seized by the Defendants?
2. Whether the defendants are entitled to an accountability of the proceeds of the sale?
3. Whether the parties are entitled to the claims prayed for?

Mr Jacob Oulanyah and Moses Namanya appeared for the Plaintiff

Mr Hudson Musoke and T. Kavuma appeared for the Defendant.

Issue No 1: <u>Whether the goods were seized by the Defendants?</u>

The case for the plaintiffs simply put is that some time in April 1995 they were evicted from their business premises at Bombo Road Kampala which included a customs Bonded warehouse. As a result of the eviction it was necessary to relocate the uncustomed goods in the bonded warehouse to another warehouse where the said goods could be kept until taxes on them were paid. Counsel for

the plaintiff submitted that the defendants were notified about the eviction whereupon the defendants transferred the uncustomed goods to another warehouse. Counsel for the plaintiff submitted that this was a normal exercise and did not amount to any seizure of the uncustomed spares as no notice of seizure was served on the plaintiff. The Managing Director of the Plaintiff Mr. Okumu Ringa PW 1 testified that the Plaintiff Company were the sole dealers of Peugeot cars and spares in Uganda. The Plaintiff Company was also authorised to run a customs bonded warehouse on their business premises for the good in which they traded. He further testified that on the 5th April 1995 the Plaintiff Company were served with an eviction notice by M/s Muziira Court Bailiff. Mr Okumu testified that he notified the court bailiff that as there was a customs bonded warehouse on the premises. The Uganda Revenue Authority (URA) had to be notified to relocate the uncustomed goods therein as they had final authority over the bonded warehouse. Mr Okumu testified that the bailiffs then officially notified the URA which came to the business premises and took the uncustomed goods for re warehousing. It is Mr. Okumu's contention that there were eleven boxes of spare parts that were moved by URA first to a private bonded warehouse in Kawempe (belonging to The Uganda Cooperative Transport Union) from where the goods were subsequently transferred again to the customs bonded warehouse in Ntinda (a bid to reduce on demurrage being incurred at Kawempe). Mr. Innocent Mugisha PW 2 of Muziira court bailiff also testified that in 1995 they got instructions from the High Court to evict the

Plaintiff Company and they did so. Mr. Mugisha however further testified that since there was a bonded warehouse on the premises they also served the eviction notice on the URA with a view that they open the bonded warehouse and remove the uncustomed goods to another location. Mr Mugisha testified that The URA provided three to four officers who opened the warehouse and removed to his memory nine to ten boxes of spare parts. These spare parts were then loaded on to a lorry hired by URA and taken away to a place he did not know.

The defendants URA did not call any witnesses for their side of the case. However counsel for the defendants submitted that what actually happened when the plaintiff Company was evicted was not just a transfer of the uncustomed goods to another warehouse but rather their actual legal seizure by the URA. The reason for the seizure was the non payment of taxes. Counsel for the defendant specifically submitted that the seizure was because the spare parts were imported and warehoused around 1994 and at that time that the plaintiff was evicted from its premises the statutory period for warehousing had expired. It therefore followed that in the circumstances the uncustomed goods had to be seized. Counsel for the defendant further submitted that the plaintiff was under legal obligation to claim the goods one month after the seizure and pay the taxes. Thereafter the goods were liable to be disposed of by the defendant. Counsel for the defendant further submitted that since the plaintiff's

representatives were present at the time of the seizure there was no legal obligation on the defendants to serve the plaintiffs with a seizure notice.

I have had an opportunity to review the pleadings, the evidence and the submissions of both Counsels on this issue. At the time of the alleged seizure the applicable law on the matter was the East African Customs and transfer tax management Act, Cap 27-1970 (hereinafter referred to as "The CMA"). Section 158 (one) provides as follows

> *"Any officer…. May seize any… goods...liable to forfeiture under this act or which he has reasonable grounds to believe is liable to forfeiture and any such… goods... May be seized whether or not in a prosecution for an offence under this Act which rendered such… goods... to forfeiture has been, or will, be taken."*
>
> *Section 155 outlines which goods are liable to forfeiture as follows*
>
> *"(c) any uncustomed goods.."*
>
> *Section 159 (1) then goes on to outline the procedure to be followed on any such seizure as follows;*
>
> *"where anything has been seized under this act, then, unless such thing was seized in the presence of the owner thereof, the officer effecting the*

seizure shall, within one month of such seizure, give notice in writing of such seizure and of the reasons thereof to the owner thereof …

Provided that….

(b) where any suchthing has been seized in the presence of any person coming within the definition of owner for purposes of this act, then it shall not be necessary for the officer effecting the seizure to give notice thereof to any other person coming within such definition…"

Owner is defined in section 2 as

" *"Owner" in respect of*

(b) goods, includes any person (other than a person acting in his official capacity)being or holding himself out to be the owner, importer, exporter, consignee, agent, or the person in possession of, or beneficially interested in, or having control of, or power of disposition over, the goods…"

The issue therefore, for the determination of the court is to see whether the act of seizure has been proved. As always the standard of proof in civil matters is discharged on the balance of probabilities. As submitted by counsel for the Plaintiff the burden of proof looking at the Evidence Act (cap 6 Rev Laws of Uganda 2000) Sections 101 to 104 and case of

lies with the person who makes the assertion or allegation. The burden of proof of seizure in this case lays with the URA the defendant, not only because it is them who calm the act of seizure but because it is only them who can effect a seizure. Broadly speaking seizure can occur in two ways according to law I have just reviewed. First is in the absence of the owner in which case notice of seizure must be given to the owner within one month see

Bhagwani V Commissioner for Customs & Excise [1969] EA 184.

The second is when the seizure is effected in the presence of the owner in which case there will be no reason to give a notice of seizure.

I would like to agree with the findings of **Sir Charles Newbold** (President of the Court of Appeal of East Africa as it then was) in the **Bhagwani case** at P. 188 when he said

> *"…I can see no distinction in essence between a seizure in the presence of the owner and one in his absence. The notice required when seizure is in his absence is obviously intended to inform him of the fact of seizure …"*

In the Bhagwani case the seizure took place in the absence of the owner whereas in this case the seizure was allegedly effected in the presence of the

owner. To my mind therefore to effect seizure as a bottom line there must be notification of the fact of seizure. In the absence of the owner the notification is done in writing it follows therefore that in the presence of the owner this must be communicated directly to the owner even if this is done orally. In this case the evidence of PW1 Mr. Okumu and PW2 Mr. Mugisha is that the goods were simply relocated to another warehouse because the Plaintiff was evicted from his commercial premises which included a bonded warehouse. There is no evidence on record to the contrary. At the very least no evidence was called from the defendants of their officer who carried out the alleged seizure and who therefore gave the plaintiff notice (oral or otherwise) of the act of Seizure. Indeed of the little evidence available to court that can be attributed to what the defendants did is the letter from the then Board Secretary of the defendant Mr. James Byamukama to the PW1 Mr. Okumu dated 12th July 1999 when he wrote

> *"I have been instructed to point out the following to you regarding the matter…*
>
> *(2) Due to eviction of your company from its business premises at Bombo Road at the material time, the spares had to be moved to bonded warehouses elsewhere as customs duty on them had not been paid;*
>
> *(3) Eventually the spares were shifted to the customs warehouse at Ntinda to avoid further demurrage charges in private warehouses. They are still being stored in the said customs warehouse;*

(4) By 1996, the spares had exceeded the statutory warehousing period for imported goods. ***They were therefore advertised for auction for want of entry*** *in order to realise the import duties due on them as provided for under the customs management Act;…(emphasis mine)"*

I must with respect disagree with counsel for the defendant that the act of seizure took place when the said goods were relocated from the plaintiff's business premises as there is no evidence adduced by the defence to prove the act of seizure. Indeed there is no evidence that the said spares were ever seized even at a subsequent time within the meaning of the Act. The spares were simply put up for auction for want of entry as their warehousing period had expired. There was no need for seizure as the spares were re warehoused in the normal way with the knowledge of the plaintiff and so at the time had not been forfeited. I therefore find on the first issue that the goods were not seized by the defendant.

Issue No 2: If the goods had been seized whether the plaintiff is entitled to accountability on the proceeds of sale?

I have already found that the said goods/spares were not seized by the defendants. However it is an agreed fact that three boxes found during a joint inspection of the parties at the Ntinda Warehouse. The plaintiff believes that eight boxes of spares went missing under the watch of the defendants and

therefore they should account for them. I have also found that the spares were sold for want of warehouse entry because the goods/spares had exceeded the warehousing period. To my mind the substance of the issue as to whether the defendant should account for the sales it makes of uncustomed goods remains when the sale is as a result of seizure or want of entry. In this case it is where a sale has been made due to want of entry.

Counsel for the plaintiff made a general submission that the defendant should held accountable because the URA stood in the position of a baliee of the goods/spares of the plaintiff. Indeed Counsel for the Plaintiff went on to argue that the defendant should pay damages to the plaintiff as would a bailee in such circumstances. He referred court to the case of

Brooks Wharf & Bull Wharf Ltd V Goodman Brothers [1936] 3 All ER 696

for the proposition that the defendant URA stood in a position of bailee. Counsel for the Plaintiff further argued that S.39 (1) and (2) of the CMA provides that the Proper Officer in charge of the warehouse is required to take into account and enter into a book particulars of what is warehoused including the number of packages and their value. In this respect therefore it is for the Proper officer to explain what happened to the eight missing boxes.

Counsel for the defendant denies that the URA as defendant could be regarded as a bailee of the Plaintiff. Counsel for the defendant argued that the spare parts were held as security for the outstanding taxes to be paid. Counsel for the plaintiff further argued and I quote

> *"…The plaintiff has in no instance led evidence to the effect that an entry was made because this would determine the number of boxes delivered into the warehouse as declared by the plaintiff…the defendant submits that the account of such goods i.e. spare parts as was verified were three boxes in its custody at the time. The defend(ant) still maintains that the boxes found by the plaintiff witness PW1 at a joint verification were the same number the defendant took possession of in April 1995.."*

Counsel for the defendant further argued that since the plaintiff failed to pay the tax dues and the warehousing period had expired without a new warehousing entry being made then the good had to be sold to recover the taxes. Counsel further argued that the plaintiff at all material times knew of the intended sale of these spare parts The attempt to auction these spare parts was not successful as no buyer came forward and it was only after three years after the first auction advert that the spare parts (four boxes in number) were eventually sold by private treaty at Ug shs 2,400,000/=. In the view of counsel for the defendant there is only accountability if there is any balance from the sale which in this case it appears there was none.

I have considered the evidence adduced on this issue and submissions made by both counsel. I start with the issue of bailment. According to **Osborn's Concise law Dictionary** 6th edition bailment is defined as

> *"...A delivery of goods on a condition, expressed or implied, that they shall be restored by the bailee to the bailor, or according to his direction as soon as the purpose for which they were bailed shall be answered..."*

In the case of **Brooks Warf (supra)** the plaintiffs in that case as bonded warehousemen, were sued by way of a counterclaim by the defendant for the value of uncustomed goods which they had held for the defendants pending taxation but which were stolen from their warehouse. Though this was not a contested point in the case it was not disputed by both parties that the plaintiffs as bonded warehousemen were in a position of a bailee. The issue in that case was whether the defendant's goods were lost by reason of the negligence of the plaintiff, who did not deny the theft of the goods and what standard of care should have been exercised by the plaintiffs. In that case it was found that as bonded warehousemen they had to show that they had taken all reasonable precautions to protect the goods against the risk of theft. Interestingly in the **Brooks Warf case (supra)** the plaintiffs as bonded warehousemen paid the customs duties of the defendants because the defendants had refused to provide the necessary funds to do so. The plaintiffs in that case claimed obligation to the tax authority to do so (i.e. pay the said taxes) and had actually sued the

defendants to recover the tax they had paid on behalf of the defendants (the defendants then counterclaimed in negligence for the value of the goods stolen from the warehouse of the plaintiffs). The Court of Appeals in the **Brooks Warf case (supra)** found that the plaintiffs as bonded warehousemen were not negligent as result of the theft of the plaintiff's goods and could actually recover the tax they had paid on behalf of the defendants. This case provides some interesting insight as to question of accountability of bonded warehousemen.

In this case the evidence adduced shows that the spare parts were moved from private warehouses to a customs warehouse in order to avoid demurrage. To my mind whether the goods are held in a customs warehouse (under S. 36 of the CMA) or a private bonded warehouse (under S 38 of the CMA) does not really change much. The person in charge of the warehouse holds the said uncustomed good on the express condition that the duty/tax on them shall be paid by the owner of the goods and as soon as the duty/tax issue is answered is to restore the goods (now duty/tax paid) to the owner. It therefore follows that the person in charge of the warehouse acts in the legal position of bailee and the owner as bailor. As the defendant was in charge of the customs warehouse then it was in position of bailee and in this regard I must agree with the submission of counsel for the Plaintiff. It follows therefore that the defendant must account as bailee. The evidence actually shows that the defendants did account for the boxes of spares parts that they had being three in number but that the plaintiffs argue that there should have been eleven.

The evidence also shows and this is not disputed by the parties that a joint inspection was carried out at the Ntinda customs warehouse on the 10th August 1999 to establish the spare parts that were available. Exhibit P 5 shows an inventory signed by representatives of both the plaintiff and defendants of the spare parts found in the customs warehouse. The said exhibit also contains a protest by the then lawyers of the plaintiff M/S Odere & Nalyanya Advocates that only three of eleven boxes of spare parts were found. Counsel for the defendant submitted that it was for the plaintiffs to led evidence as to the number of boxes delivered into the warehouse. With the greatest of respect to counsel I must disagree, it is for the warehouse keeper to show from their records what goods they received for storage. Indeed when one looks at exhibit P7 which is a Uganda Customs and Excise warehousing entry for Bond 373 dated 6th May 1992 and endorsed by one Byaruhanga as in charge of bond 373 it clearly shows that eleven boxes of spare parts were received at that time. The fact that in April 1999 a joint verification had to be undertaken by both parties suggests that the number of the boxes was now in question otherwise defendant would simply have produced their original warehousing records to settle this issue of how many boxes were involved. It is important also to note that this verification exercise was done in August 1999 yet the said spares were first taken by defendant in April 1995 when plaintiff was evicted from their premises. So if the defendants then decided to sell the spares to recover the duties/taxes then the plaintiff is indeed entitled an accountability of the proceeds and to receive

any surplus proceeds of money. In the absence of any official warehouse records it would appear to be the plaintiff's word against the defendant's which is an unfortunate state of affairs given the clear provisions relating to record keeping in the CMA.

Considering that under exhibit P2 dated 12th July 1999 the defendants were demanding from the plaintiff the sum of Ug.Shs.52,948,4539/= (which according to the same letter was the same amount they demanded in another earlier letter of 27/11/98) it is reasonable to find on the balance of probabilities that there were more than three boxes in question. Indeed Exhibit P9 a letter from the defendant to the Registrar of this court shows that when the sale actually took place on 9th January 2001 four and not three boxes of spares were sold for the sum of Ug.Shs.2,400,000/=. One wonders where the fourth box showed up from. PW2 Innocent Mugisha the court bailiff also testified that there were nine or ten boxes removed from the former premises of the plaintiff. I therefore find the count of the plaintiff more believable that there were eleven boxes.

How does one now account for the missing eight boxes or as Exhibit P9 would suggest seven boxes? Section 48 (1) and (2) of the CMA provides that warehoused goods not removed from the warehouse within a period of 2 years and not re-warehoused shall be sold by public auction after a notice of one month. Section 48 (3) then outlines how the proceeds of the sales are to be applied which in reality is the form of accountability to be followed. The order of application of the funds there under is

"48

(3)…….

(a) the duties

(b) the expenses of the sale

(c) any rent and charges due to the customs or to the warehouse keeper

(d) the port charges and

(e) the freight and any other charges

(4) Where, after the proceeds of any such sale have been applied in accordance with subsection (3), there is any balance, then such Balance shall, if the owner of the goods makes application therefore within one year from the date of the sale, be paid to such owner, or in any other case, be paid into the customs revenue.

(5) Where any goods are offered for sale…and cannot be sold for a sum to pay all the duties, expenses, freight, and other charges, they may be destroyed or disposed of in such manner as the Commissioner General may direct."

It would appear to me that when a decision is made to sale warehoused goods that have not been removed or re warehoused the law gives the owner of the goods little priority in what follows to the goods. Still the owner may claim a refund (though this is not mandatory since he has to apply for it within one year of the sale). In this particular case as far back as august 1999 vide a letter from

their lawyers Exbit P 5 to the defendants after the joint verification exercise had this to say

> *"7 It is clear therefore that the bulk of the consignment of spare parts have been disposed of by the URA but this was not brought to the attention of our client neither have the proceeds been declared!*
>
> *This is now to demand as we hereby do, payment of the total CIF value of the spares together with interest at bank rate and damages of US$ 50,000 for loss of business profits, less what is due to URA in Taxes"*

This demand of course presupposes that the defendants sold all the boxes of spares but by exhibit P9 the defendants all admit to selling four boxes for Ug.Shs.2,400,000/= as the boxes they claim to have had. If that is all the accountability that the defendants can do then it is difficult to see how to apply S. 48 (4) of the CMA for any balance to be paid to the plaintiff. The letters exhibited to court show that it took many years to sell even the few boxes that were sold in which case the defendant may have decided to destroy the said spares or dispose of them as the Commissioner General directs. The problem with this case is that it is impossible from the evidence to see what the Commissioner General directed if at all. It would have easier if the plaintiff had paid the taxes due then claim the value of the boxes of spares if they disappeared. To seek that the CIF value of the goods be offset against the taxes

due as demanded by the plaintiff is clearly not a procedure envisaged under the CMA and would tantamount to the URA buying the said spares for themselves. Still if the Commissioner General made a direction as to what to do with the missing spares it would have been good corporate governance on the part of defendant to explain that to the tax payer/owner.

In answer to the issue as framed I find that the plaintiff is not only entitled to an accountability of the proceeds of the sale but also to what happened to spare parts if no sale was made. However I also find that in this case that no complete accountability was made of the seven of the eleven boxes.

Issue No. 3: **Whether the parties are entitled to the Claims?**

The plaintiff has sought the following remedies

(a) Special damages being the CIF value of the Spare parts Ug.Shs.147,457,500/= less the demanded taxes of Ug.Shs.52,948,439/= giving a total of Ug Shs 94,503,061/=. In light of my findings under issue No 2, I decline to give it as inappropriate and not proved.

(b) General Damages for loss of business profit, inconvenience and financial suffering. Again in light of my findings in issue no. 2, where the plaintiff did not pay taxes I also decline to give them as inappropriate and not proved.

(c) Exemplary damages for an oppressive and high handed manner in collecting spares owned by the plaintiff and not allowing for immediate verification and not rendering accountability of the spares collected. Counsel for the plaintiff referred court to the case of

Rookes V Bernard & ors [1964] AC 1129

For the authority that exemplary damages are awarded where there is oppressive, arbitrary or unconstitutional action by the servants of the Government, and where the defendants conduct was calculated to procure him some benefit not necessarily financial at the expense of the plaintiff. Counsel for the plaintiff submits that the plaintiff was kept in the dark as to fate of his spares until this court ordered the discovery of what happened to the spares and for their valuation and that is sufficient to make out a case for exemplary damages. Counsel for the defendant submitted on the authority of

Obwolo V Barclays Bank (u) Ltd (1992-1993) HCB 179 at 180

That a claim for exemplary damages had to specifically pleaded in the body of the plaint with full particulars and not just in the prayers. Counsel for the defendant submits that the plaintiff only made a prayer for exemplary damages which was not proved. Counsel for the defendant also submits that the

defendant did not act in an arbitrary manner but invoked the strict provisions of the CMA.

On the claim for exemplary damages Para 6 of the Plaint clearly pleads and states the particulars of exemplary damages, so I am not sure what Counsel for the defendant meant when he submitted that exemplary damages were only prayed for which is clearly not the case. The **Owolo case** (supra) is therefore irrelevant for purposes of this case. From my holding in issue no. 2, it is also clear that the clear provisions of the CMA especially with regards to records and the disclosure of what happen to the missing boxes were not followed. I find that the plaintiff has made out a case for the award of exemplary damages as clearly the defendant failed to account for the missing boxes and did even bother to call evidence in their favour which would have shed light on this for reasons best known to them. This conduct is not acceptable of a governmental organisation such as the defendant. Unfortunately counsel for the plaintiff did not guide court as to the quantum of exemplary damages to be awarded against the defendant. I therefore award the sum of Ug.Shs.10,000,000/= as exemplary damages.

(d) Interest at 40% on the award of exemplary damages from date of judgment until payment in full. I find that 40% interest as excessive and award interest on exemplary damages at 24% from date of judgment until payment in full.

(e) As to costs I find that in light of my award of exemplary damages only to the plaintiff that the defendant pays half of the costs of the plaintiff in this case.

Judgment is entered accordingly

Justice Geoffrey Kiryabwire

Date_____