REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT 504 OF 2000

EMMANUEL HATANGIMBABAZI……PLAINTIFF

-VERSUS-

THE COMMISSIONER OF CUSTOMS & EXCISE……DEFENDANT

RULING

The plaintiff's suit was lodged by the plaint of ***16th October, 2000***, filed on ***23rd October, 2000***. The plaintiff made claims as follows:

"(a) a declaration that the seizure of the plaintiff's truck Reg. No. KN 5282S by the defendant was misconceived, wrongful and totally unjustified;

"(b) a mandatory injunction compelling the defendant to lift the seizure of the truck and to have the truck released to the plaintiff;

"(c) damages for loss of use of the truck at the rate of US$14,400 from the date of seizure until the date of release of the truck to the plaintiff;

"(d) compensation for the damage and/or waste committed to the truck during the period of seizure;

"(e) any other relief that this Honourable Court may deem fit and just to grant;

"(f) costs and interest."

The claim has already been dealt with conclusively by way of Judgment, delivered by ***Mr. Justice***

Mwera on ***21st May, 2004***.The learned Judge made the following determinations:

(i) "Giving reasons to the owner of the object [forfeited] is based on principles whose importance cannot be underestimated. Property ownership is accorded a high place in this country's laws. In order for one to lose possession of it [reasons must be given]. That was not done [in this case]".

(ii) "[By s.202(2) of the Customs and Excise Act (Cap. 472, Laws of Kenya)], where the Commissioner fails to comply…., then unless the item was prohibited or restricted, it shall be released to the claimant."

(iii) "Accordingly the defendant was obliged to release the subject motor vehicle to the plaintiff, at the latest, in two months [as] from 24th September, 1998. He did not."

(iv) "The Court, in this case, cannot, therefore, assume that the seizure was lawful. It [fell to] the defendant to show this, and he did not do so."

(v) "This Court is however satisfied that the act of seizure was unjustified…As for general damages, in the circumstances, the plaintiff is awarded a sum of Kshs.200,000/=. This assessment need not await an assessor's report…."

(vi) "The plaintiff is entitled to have the seizure lifted and the motor vehicle released to him. He will also have Shs.200,000/= general damages paid to him plus costs and interest."

This matter came up before this Court only for the limited purpose of settling the question of *the payment obligation*– a question complicated by the fact, as submitted by learned counsel, ***Mr. Mulwa***, for the plaintiff, "*of the disappearance of the subject truck while in the hands of the defendant and/or its agent*"; it became necessary, and there was a consent to this effect, that the proceedings "*be re-opened to determine the value of the subject truck for purposes of assessment of damages [proceedings of* ***6th September, 2010****]."*

Counsel urged that the plaintiff's witness, ***John Wahome***, a valuer, who conducted a valuation of the subject truck, had placed the value at ***Kshs.10,472,000/=;*** and that the plaintiff himself had tendered information from the dealer showing that the price of the model of the subject motor vehicle, in ***1992***, was ***Kshs.9,500,000/=.***

Counsel urged that the defendant should raise no contest, as he had not challenged the valuation conducted by ***Mr. Wahome***.

Counsel submitted that the value of the subject motor vehicle be set at Kshs.10,472,000/=; and that the defendant be required to make that payment to the plaintiff with interest at Court rate as from the date of the Judgment by ***Mwera, J.*** Counsel asked that the amount already deposited in Court by the defendant, in the sum of Kshs.2,850,000/= be released to the plaintiff as part of the obligation to pay up.

Learned counsel illuminated the context in which the defendant had made the said payment of Kshs.2,850,000/= into Court: after the Judgment was delivered, requiring *release* of the subject truck to the plaintiff, the same could not be found, leading the plaintiff to file contempt proceedings against the Commissioner of Customs & Excise; and to avoid being committed to jail, the defendant deposited the said sum in Court – this amount, according to *the defendant*, representing the true value of the truck. The plaintiff on the other hand, *"insisted that his truck [was] worth much more than what he was*

offered." It is precisely this difference of opinion that led to a consent for post-judgment hearings – with a view to ascertaining the value of the subject truck. That, counsel urged, is the real issue here, rather than *damages* which had already been set in the Judgment at ***Kshs.200,000/=.*** Counsel submitted that the post-Judgment proceedings were not pegged on the prayers in the pleadings: the sole question now is the approximate value of the plaintiff's truck which the defendant seized and then failed to return as ordered by the Court.

What is the defendant's response" According to learned counsel, ***Mr. Matuku,*** *"subsequent to the Order of the Court against the defendant to release the plaintiff's motor vehicle, the same could not be traced and therefore the decree and Order of the Honourable Court issued on* ***9th July, 2004*** *or* ***22nd December, 2004*** *was not capable of being complied with to the [extent] of releasing the subject-lorry."*

Counsel's argument goes beyond the purpose before this Court: of ascertaining the true value of the subject lorry. ***Mr. Matuku*** urged: *"…the issue of liability was determined by the* ***Honourable Mr. Justice Mwera****, [who] was more than candid [in finding] that the remaining of the lorry in the garage had more than one hand in it for whatever it may have suffered."*

In my opinion counsel is introducing a speculative issue – which ought not to guide this Court in arriving at its Orders. It is no longer relevant how responsibility would be apportioned for the subject-lorry having overstayed at the garage: this question belongs to the proof stage in the main cause which was concluded by the Judgment delivered on ***21st May, 2004.*** The matter is *res judicata*; and as a matter of law applicable *de rigueur*, it is not to be reopened, save on appeal.

Mr. Matuku, in effect, urged this Court to return to the trial terrain; he said: *"It is our submission ….that the plaintiff having prayed [in the plaint] [for] compensation for damages and/or waste committed on the truck during the period of seizure and the same having not been granted, he failed in that prayer and this Court being a Court of concurrent jurisdiction cannot revisit that prayer for compensation for [damage] and/or waste committed on the truck."*

Counsel did not limit himself to the question of *valuation,* but returned to matters featuring at the trial; he said: *"…it was a finding of [****Mr.] Justice Mwera****… [that] the truck had been lying at the garage for two years or so because the plaintiff had not paid the garage its dues"*; and from this submission on original-trial material, counsel now urged this Court: *"It is our submission that the plaintiff contributed to the truck being seized 'in situ'…"* Not only must I decline that line of persuasion for encroaching on ground trodden during trial, I must do so on a consideration of merits at this stage: to say that the plaintiff contributed to the defendant's wrongful seizure of the lorry *in situ* is, firstly, to blame the victim in place of the libertine; and besides, any impropriety attributed to the plaintiff is being conveyed by a chain marked by *remoteness.*

I see in the plaintiff's submissions additional to the proceedings in the main cause, an abuse of process: through attempts to enhance proof that was already concluded before ***Mr. Justice Mwera.*** This, too, is excluded by the rule *of res judicata.*

I find only one aspect of ***Mr. Matuku's*** submissions to be relevant to the matter before this Court: as regards the *valuation evidence*.

Counsel contests the plaintiff's valuation evidence brought by ***Mr. Wahome,*** on the basis that such evidence "*is shaky and inconclusive*." He urged that ***Mr. Wahome*** "*never saw the Mercedes Benz lorry he was valuing*", and "*he placed the value of a new lorry [of] the same model as the one claimed by the plaintiff at Kshs.14,000,000/= – a value he states he obtained from…….DT Dobie*." Counsel submitted

that ***Mr. Wahome*** *"never produced a price catalogue or any document or a witness from DT Dobie to show that, indeed, the value of Kshs.14,000,000/= was given by DT Dobie…"*

Learned counsel invoked as many as eight past judicial decisions to support the defendant's case: but I do not find them relevant, as the real issue before this Court is to determine the value of a lorry *wrongfully seized* by a defendant who proved *unable to return* the same, *as decreed* by the Court.

The plaintiff's first witness, ***John Wahome*** (AW1), testified that he is a duly registered motor vehicle assessor, with more than 10 years' working experience. AW1, on the instructions of the plaintiff, carried out a valuation on ***17th February, 2005,*** in respect of a lost truck, Mercedes Benz, KN 5282S, Chassis No. 624113115256738. After receiving the registration book, AW1 visited DT Dobie, the dealers, and asked for the valuation of a similar truck, and this was found to be Kshs.14 million. AW2 then made a depreciation by 4.2%, as the subject truck was already six-years-old at the time of loss; the resulting figure was Kshs.10,472,000/= for the 1992-model vehicle. AW2 then prepared a valuation report (Exhibit No.2) giving the valuation at Kshs.10,472,000/=.

Upon cross-examination by learned counsel, ***Mr. Matuku***, AW2 testified that he had not seen the actual suit motor vehicle, as it could not be traced. AW2 said he had been shown the importation document for the subject motor vehicle, and that his valuation figure of Kshs.10,472,000/= was a fair estimate. The witness said he had no knowledge of how the lorry disappeared from the garage, nor its physical and mechanical condition while it was at the garage. On re-examination, AW1 said he had, as standard practice among motor vehicle valuers, relied on the price guide from the dealer, DT Dobie.

Emmanuel Hatangimbabazi, the plaintiff, gave evidence as AW2 and said he was a transporter of goods plying the lengthy route between Mombasa on the Indian Ocean coast and Goma, in the Democratic Republic of Congo; and for this purpose he had been in the truck business for some 30 years. AW2 testified that following the Judgment decreeing release of the subject-truck to him, the truck could not be found. As it became necessary to assess the value of the lost truck, AW2 relied on ***Mr. Wahome*** (AW1) as assessor, and on the dealer, DT Dobie. AW2 produced (Exhibit No.3) the dealer's booklet showing the value of the kind of truck now missing; and he produced a proforma invoice for a similar motor vehicle, of the 1992 model (Exhibit No.4). By AW2's evidence, the price of the subject-truck as at 2004 when it went missing, would have been Kshs.9,500,000/=.

AW2 testified that the loss of the subject-lorry in 2004 had damnified him commercially; he said: "*If in 2004 I had got that lorry, I would have been doing the business of clearing and forwarding*." But learned counsel ***Mr. Matuku***, quite properly, in my opinion, raised the objection that "*the liability question was finalized by* ***Mr. Justice Mwera***."

For the defendant, ***Julius Chege Macharia,*** an Assistant Commissioner of the Kenya Revenue Authority, gave evidence as RW1. The witness said he had in the past worked with the Kenya Police, and had been trained in investigations; he left Police service as Chief Inspector at the Criminal Investigation Department in 2006. RW1 said he had been seconded to the Revenue Protection Services of the Kenya Revenue Authority between ***2003*** and ***December, 2005***.

RW1 testified that after an Order was made by the High Court for the release of the subject-truck to the plaintiff, the truck could not be found; and he acted on the instructions of the Commissioner-General of the Kenya Revenue Authority to carry out investigations into the disappearance of the truck. RW1 started with the seizure notice of ***November, 2004*** which showed that seizure was effected *in situ*, at the Outermarine Garage based at Miritini in Mombasa. When RW1 visited the *locus in quo* he found that the garage outfit, Outermarine, had already vacated the yard in ***May, 2001***; and so he visited that tenant's

new premises, along the Nyali-Malindi Road; the information he got was that, seizure by the defendant had been done *in situ,* and the truck thus remained at Miritini.

RW1 had thereafter made a report to the Commissioner-General of the Kenya Revenue Authority, stating that, by his finding, "*the owner had vandalized his own truck"* while it was *in situ*. The witness testified that "*by giving seizure notice, the Kenya Revenue Authority was taking possession in situ";* and that the Kenya Revenue Authority had felt the truck "*was safe where it was."*

RW1 was aware that the Court (***Mwera, J***) had made orders for the restoration of the subject-truck to the owner (plaintiff), but he said he was "*not aware the Kenya Revenue Authority was required to pay the value of the truck."* According to this witness, "*if [the Court] made orders for [payment to the plaintiff] without knowing the whereabouts of the lorry, that would be wrong."*

RW1 stated his belief that: "*It is the owner [of the subject truck] who vandalized [it]; he should not be compensated at all; that came out clearly during investigations.*" Why did RW1 bring no criminal charge against the owner" RW1's account was that "*there was a [civil] case in Court [already]"; "taking the owner to Court might mean we are interfering in the civil matter."*

The defendant's second witness, ***Chrispin Sassoon*** (RW2) testified that he is a motor vehicle mechanic, and the proprietor of Automarine Services Ltd, within whose garage the subject truck had been kept at Miritini. The truck had been brought to RW2's garage *not for any mechanical repairs*, but for a re-spray, and it came into the yard in a *mechanically-sound condition*. From the evidence of RW2, it is clear that the defendant had seized the subject-truck *in situ,* but without making any responsible administrative arrangements for *care* and *security*; for the witness testified that over time, vandalisation of the truck took place, but there was no first-hand evidence as to ***who*** exactly was doing this damage. RW2's garage relocated in ***2001,*** leaving the vandalized truck still *in situ;* the premises had not belonged to RW1, who was only a tenant of M/s. Miritini Brick & Tiles Co.

RW2 believed the subject-truck to have been some 8 – 10 years old when it had been *driven* into his garage in 1998; and so he *thought* such a motor vehicle at current valuations would cost only Kshs.4-5 million. But when cross-examined by learned counsel, ***Mr. Odongo***, RW2 said he had prepared no valuation report, and that he had only prepared a statement from his current offices when the *Kenya Revenue Authority* asked him for such. RW2 testified that there had been no dispute between himself and the plaintiff as regards storage of the subject-truck.

Upon questioning by the Court, RW2 said that the subject truck was in the garage compound *up to 2001*, and "*it remained at the garage compound, behind closed doors"*, *when in 2001 we relocated to Bamburi."* The witness testified that even though the defendant have used his rented premises as the *in situ* facility for seizure, "*no duty was imposed on me [in respect of] care*." And while the truck remained *in situ*, the witness "*never saw any representative of [the defendant come to view or secure the same];"* when RW2's garage relocated to the North Coast, RW "*told the landlord that the [truck] should remain in that compound as it was under the protection of the Kenya Revenue Authority*"; and "*the landlord had no option but to just keep it."* Just like RW1, RW2 believed that "*some people definitely came to remove parts from the [subject truck]".*

The defendant's last witness (RW3), ***Firoz Yusuf Ali*** was an employee of the landlord aforesaid, at Miritini; and he testified that his tenant, ***Chrispin Sassoon***, had relocated with his garage service sometime in ***2001*** or ***2002***. RW3 testified that following the relocation of Automarine Garage, which took place without prior information, the landlord found on its premises "*a scrap which, once-upon-a-time, was a lorry", "a shell, with major parts missing";* it was a Mercedes Benz. The landlord, the witness said, sold

off the scrap after RW2 decline to come and collect it, for only Kshs.150,000/=.

It is from this evidence that this Court must discharge its single task of determining the *value* of the lost motor vehicle, the plaintiff's Mercedez Benz truck which had been seized by the defendant and held *in situ* at a garage at Miritini, Mombasa.

It has already been held in a Judgment that the defendant *wrongfully seized* the said truck, and Orders were made for *release* of the same to the plaintiff. Did the release take place" **No.** Therefore, the defendant must make payment in place of the truck which the defendant wrongfully seized and then failed to render to the owner in accordance with ***Court Orders.***

Although the defendant seeks excuses, based on claims that the subject-truck was already vandalized and was grossly depreciated in value thanks to the plaintiff, and so the plaintiff does not deserve appropriate compensation, this argument does not stand up, as a *matter of law*. It is true the defendant *wrongfully seized* the truck; and therefore, the truck remained in the *constructive* possession and care of the defendant. The defendant cannot rely on the *in-situ* nature of the seizure to ward off the charge in respect of *custody, care* and *security* for the truck; so long as the defendant kept an embargo, presumptively by law, on the *plaintiff accessing* and utilizing the subject truck, the possessor and custodian, in law, ***was*** the defendant. And once the Court ordered release of the truck to the plaintiff, the law *required* this to be done. But it was ***not*** done; and so the defendant *must pay.*

But pay what amount" There is only one answer: the "*valuation amount*."

I have found no incurable defect in the modes of valuation for the subject truck used, even though different figures have been proposed: (i) ***Kshs.10,472,000/=;*** and (ii) ***Kshs.9,500,000/=.*** Where two value assessments are given, as in this case, and there is nothing patently falsifying the one or the other, the Court's discretion should be exercised *economically,* as it is – I would take judicial notice – a negative attribute of human expectations that the larger figure is nearly always sought. On this basis, I decline to accept the larger figure; but I validate the lower valuation of ***Kshs.9,500,000/=.***

I will, accordingly, now make Orders as follows:

(1)The defendant shall pay to the plaintiff the assessed value of the Mercedes Benz truck Reg. No. KN 5282S as follows:

(a)Kshs.6,650,000/=;

(b)The deposit in Court of Kshs.2,850,000/= – this giving a total of Kshs.9,500,000/= – this amount to bear interest at Court rate as from the date hereof.

(2)*The defendant shall pay to the plaintiff general damages in the sum of Kshs.200,000/= – the same to bear interest at Court rate as from *21st May, 2004.

(3) The defendant shall pay the plaintiff's costs of the suit, with interest at Court rate, as from the date of filing suit.

Orders accordingly.

SIGNED at **NAIROBI** ……

J.B. OJWANG

JUDGE

DATED and **DELIVERED** at **MOMBASA** this 24th day of April, 2012.

MAUREEN ODERO

JUDGE