



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 1804 OF 2005

**BETWEEN:**

V.W GHAMBI .....PLAINTIFF

-AND-

THE COMMISSIONER GENERAL  
MALAWI REVENUE AUTHORITY .....DEFENDANT

CORAM: HON. KAMWAMBE , J  
Mr Kauka of Counsel for the Plaintiff  
Mr Ngutwa of Counsel for the Defendant  
Mr Jere Official Interpreter

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**JUDGMENT**

**Kamwambe J**

The plaintiff made this application by originating summons dated 16<sup>th</sup> June 2005 in which he seeks the following declarations:-

1. If duty was not paid in respect of the car, the importer, and not the plaintiff as an innocent buyer without notice should pay the same;

2. By disclosing the name of the previous owner of the plaintiff's car to the defendant, the plaintiff had discharged his legal duty under the Customs and Excise Act of providing information as the defendant may require to discover the person who either imported the vehicle or paid duty in respect of the same;
3. The plaintiff's vehicle having been in this country for over a period of 5 years, the defendant is statute barred from invoking his powers of seizure in respect of the same.

The plaintiff consequently seeks the following orders:-

1. An order compelling the defendant to immediately release and restore to the plaintiff the motor vehicle and/or in the alternative;
2. An order permanently restraining the defendant whether by himself, his agents, servants or whomsoever, from detaining/seizing the plaintiffs car registration number KA 1844 Mercedes Benz;
3. Such other relief or order as the court may deem fit;
4. Costs of this action.

The simple facts of the case are that on 18<sup>th</sup> February 2000 the plaintiff bought a motor vehicle registration number BT 537. A Mercedes Benz from Sunrise Holding as per exhibit "VWG1" which was a letter dated 18<sup>th</sup> February 2000 from Sunrise Holding to the Motor Examiner for change of ownership. The registration number of the said motor vehicle was later changed from BT 537 to KA1844. The defendant queried the plaintiff that duty had not been paid for the vehicle. The plaintiff explained that he was a subsequent purchaser and he was not in a position to produce relevant customs clearance certificate of which he was not in custody. The defendant then

proceeded to detain the vehicle pending the production of the Custom Clearance Certificate and a Detention Notice dated 2<sup>nd</sup> June, 2005 was served on him, herein exhibited as "VWG5".

The plaintiff avers that at the time of seizure the vehicle had already been in the country for 5 year. He quoted section 155 (1) of the Customs and Excise Act which provides for limitation periods of 2 or 5 years. He claims that the Act of seizure is time barred. He says he never imported the vehicle but bought it after it was registered and that therefore defendant must collect such duty from the importer.

The defendant through the affidavit of Hinges Phiri avers that since the detention notice of 2<sup>nd</sup> June 2005 the plaintiff has failed to furnish to the defendant the customs clearance certificate and that he reasonably believes that the vehicle was not cleared. He prays that relief sought by the plaintiff be denied. Counsel for the defendant argued in court that the documents brought by the plaintiff are cooked and full of lies. That there is no evidence that the vehicle ever belonged to Sunrise Holding. He described "VWG1" as a piece of evidence that attempts to hoodwink the court that the vehicle belongs to Sunrise Holding, otherwise there is nothing else, not even a blue book. He further says that if Sunrise exists then the plaintiff is making hearsay statements of first registration of the motor vehicle. Hence, he emphasises that "VWG1" is cooked up.

Counsel for the defendant goes further to refer to "VWG2" which is an old type of blue book which shows that the vehicle was first registered on 5<sup>th</sup> September, 2001 in the name of the plaintiff and wonders how the plaintiff becomes the second or subsequent registered owner. He maintains that there was no registration before this, otherwise it is a lie that he bought the vehicle from Sunrise. He also wonders why plaintiff uses two addresses, one of Blantyre being Private Bag 82 Soche, Blantyre 4 which is also used by Sunrise Holding – see "VWG 1" and "VWG 2" which is blue book the ownership being in the plaintiff using a Lilongwe address. It shows that plaintiff was of the same

address when he registered the vehicle in his name or that it is a family affair. Counsel maintains that the cooking up of exhibit "VWG 2" shows registration was on 5<sup>th</sup> September 2001 and therefore the defendant is within the 5 year period. He doubts if the plaintiff is really a bona fide and innocent purchaser without notice.

Counsel for the plaintiff avers that there is no evidence of fraud and that fraud was not pleaded. He says that at the time of seizure of the motor vehicle it had been in the country for over 5 years. That the plaintiff bought the vehicle from Sunrise Holding and therefore was a second owner and not liable to pay duty. He avers further that under section 155 of the Customs and Excise Act proceedings for an offence under this Act must be commenced within 2 years from time of offence committed or where fraud is a material element within 5 years. He says this renders the act of seizure time barred.

The plaintiff was registered as proprietor of the motor vehicle as per blue book on the 15<sup>th</sup> September, 2001. The registration number of the vehicle was KA 1844. The plaintiff alleges that prior to this, as per letter of change of ownership being exhibit "VWG1" the registration number of the vehicle was BT 537 and this letter is dated 18<sup>th</sup> February 2000. I am called upon to consider the genuineness of this letter. The truth of the matter is that the registration number BT 537 must have its own blue book in the name of Sunrise Holding but there is no evidence of such. The inconsistency is further worsened by blue book "VWG2" which shows the applicant as first owner. This situation is irreconcilable in my view and unexplained to the satisfaction of this court. To say the plaintiff is second owner when there is no evidence of another registered owner is beyond my comprehension.

It is further argued that duty is payable by the importer and not the plaintiff. Who should I hold as the importer in the absence of evidence? Sunrise Holding, through its letter for change of

ownership being exhibit "VWG1" dated 18<sup>th</sup> February, 2000 does nothing else better other than show that they are owners of the motor vehicle which they are purporting to sell to the plaintiff. The letter on its own is no evidence that the car mentioned therein was owned by Sunrise Holding. The best evidence of ownership is the blue book. The said letter can be written by anybody under any circumstances. Hence, if I say that there is no evidence of ownership by Sunrise Holding of the vehicle, it can only mean that the applicant who is registered in the blue book, should be the importer and therefore liable to pay duty himself.

May be it is of help to look at section 134 (c) of the Customs and Excise Act which makes it an offence except in accordance with the customs laws, for any person to buy, receive, harbour, offer for sale, deal in or have in his possession any goods subject to customs control. (My underlining) The defendant is saying that duty was not paid. The plaintiff's vehicle has been seized pending production of customs clearance certificate which he has failed to so produce. According to section 134 (c) did the plaintiff have in his possession any goods subject to customs control. The answer is in the affirmative. If so, he should be liable in person to pay duty. It was observed by Chimasula J. in **Wilson Mulauzi vs Controller of Customs and Excise** when refusing the injunction as follows:-

*"However, section 160 (b) of the Act deals with proceedings for recovery of goods under section 147 (4) particularly where the claimant has satisfied the court, the remedy is not outright release of the goods subject to payment of the duty and such other conditions as may be imposed. Therefore, if in any event the plaintiff would be required to pay duty, then why should the court restore the goods to the owner where it is clear that no duty was paid by the earlier owners thereof."*

I also note that sections 160 and 147 of the Customs and Excise Act talk of a claimant so rightly in my view and nor "earlier or subsequent" owner or claimant. I have not seen any specific provision which says only the importer is liable to pay duty.

May be it is the interpretation of section 161 (2) which comes near to imputing that only the importer is so liable to pay duty. I quote it as follows:-

*" Notwithstanding the provisions of ss 159 (1) and 160 goods ... or a conveyance liable to forfeiture shall not be forfeited if the owner thereof satisfies the court that the offence in respect of which they were rendered liable to forfeiture was committed without his knowledge or consent and that he was unable to prevent it, or if such goods or conveyance were acquired by him after the commission of the said offence, that they were acquired for their true value and without knowledge that they were liable to forfeiture."*

Chimasula Phiri J. in the **Mulauzi** case rightly observed that this section does not exempt the plaintiff from paying appropriate duty, but that he is only exempted from forfeiture and that it comes to the same point of his liability to pay custom duty now that he knows that duty was not paid. Thus if he satisfies the court that he was an innocent subsequent owner forfeiture will not lie against his goods or conveyance under section 159, but he would still pay duty. In other words, duty is payable by the plaintiff in any case so long as it was never paid before.

The plaintiff also mixed the issue of seizure as being time barred under section 155 of the Act which reads as follows:-

*"1. Any proceedings for an offence against the customs laws may be commenced within two years of the date of the offence and the powers of seizure under section 146 may be exercised within two years of the date when the goods first became liable to seizure:*

*Provided that –*

- (i) in any case where fraud is a material element the said periods of two years shall be extended to five years; and*
  - (ii) prohibited goods may be seized at any time."*
- 2. For the purposes of this section, the date when any goods are seized shall be deemed to be the date of*

*commencement of any proceedings for an offence in respect of such goods."*

As soon as the goods or conveyance are in the country upon importation they become dutiable. This is in line with section 53 of the Act which reads as follows:-

- "1. Where any goods entered for exportation are not exported in accordance with such entry the owner thereof shall forthwith notify the proper officer, who may direct that the goods shall remain within, or shall be removed into, a custom area appointed by the proper officer and shall remain therein pending re-entry for exportation, such re-entry be completed within 10 days or within such further period not exceeding 30 days as the proper officer may allow.
2. Where any goods entered for exportation are exported contrary to any provision of their entry for exportation, the owner shall forthwith notify proper officer."

Section 4(1) of the Act also sheds more light to our benefit and reads as follows:-

*"The time of importation of any goods shall be the time at which such goods cross the borders into Malawi."*

One may summarize out of this that once the goods or conveyance are in Malawi they become dutiable and one must make arrangements to pay quickly or shall be kept at Malawi Revenue Authority or other authorised premises till duty is paid.

The vehicle was seized through detention notice dated 2<sup>nd</sup> June 2005 pending production of customs clearance documents within 14 days. From the date he was registered on 5<sup>th</sup> September 2001 the earliest period we know the vehicle was in the country a period of 2 years had already expired and therefore as regards that period it is time barred. I have not taken the date of the letter of change of ownership being 18<sup>th</sup> February 2000 because as I said earlier on it is not conclusive evidence that the vehicle was really there; and further, it is

written by K.Y Ghambi directed to the Motor Examiner, rendering the tendering of this document by the plaintiff hearsay evidence. This letter to me is very suspect and questionable especially when I want to discern its purpose or intention behind it. So that I tread properly I do not intend to accept and be influenced by it. It is neither tendered by its author or recipient of the same. This therefore goes further to say that the name of the importer remains unknown.

Having said what I have just said above the 2 years limitation period having expired it is indeed time barred. The next question to determine is whether the 5 year limitation in the circumstances should apply – if fraud is a material element to this case. Let me admit that fraud was not pleaded by the defendant but the defendant through counsel when arguing the case kept on saying that certainly documents were cooked up as there is no evidence that the motor vehicle belonged to Sunrise Holding. Indeed I have seen no such evidence even on affidavit. Apart from exhibit "VWG1" being a letter of change of ownership which I have disallowed as forming part of evidence there is no other evidence to substantiate the fact that the vehicle belonged to Sunrise. Secondly first registration of the vehicle is in the name of the plaintiff himself. It remains a mystery how he came to be registered in that manner and yet claiming to be a subsequent owner.

Further, the author of "VWG1" or Sunrise Holding uses Private Bag 82, Soche, Blantyre 4 as its address. The plaintiff is at liberty to use the same address as shown on the blue book. Not that I am against one acquiring several postal addresses, but this shows that indeed this may have been family business. In any case the author of that letter and the plaintiff bear the same surname. The defendant has told this court that the plaintiff does not come to court with clean hands. He has managed in fulfilment of section 90 of the Act to merely state that sunrise Holding should be liable as importer but has not shown whether it is a going concern today or not, whether it exists or not, instead chooses to put the burden on the defendant. I wish to

agree that this claim smacks of fraud as shown by the defendant and I affirmatively hold that fraud was involved.

In the case of **Yanu Yanu Co. Ltd v Mbewe** MLR Vol 10 at 417 Jere J. (as he was then) stated at page 420 that:

*"the purpose of pleadings is to identify issues in dispute and it is only those issues that can go for hearing."*

In **Likaku v Mponda** MLR Vol 11 page 411 particularly at pages 414 and 415. it was held by Makuta CJ that the function of particulars is to carry into operation the overriding principle that the litigation between the parties and particularly the trial should be conducted fairly, openly and without surprises and reduce costs..."

As stated above, no pleading of fraud was made by the defendant in his affidavit and therefore this court will not grant judgment on a question which was not pleaded by the parties. This entails that this court shall not apply the 5 year limitation period where fraud is an essential material to the case. If fraud were specifically pleaded the respondent would have succeeded in this case.

In the premises I make the following declarations:-

1. The plaintiff was duty bound to pay duty whether as an innocent purchaser or not since an innocent purchaser is exempt only from forfeiture.
2. Even if the plaintiff disclosed the previous owner as Sunrise Holding there is no conclusive evidence of such ownership.
3. Fraud having not been pleaded this court shall not be moved to determine whether the defendant is statute barred or not as it is non-issue for having been introduced too late.

It is thus ordered that the defendant do immediately release and restore to the plaintiff the motor vehicle,

The case was well argued by both parties in a balanced manner and I order that each party shall pay his own costs.

It is so decided.

Pronounced in open court this 13<sup>th</sup> day of December 2005 at Blantyre.



M.L. Kamwambe  
**JUDGE**