IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

CIVIL CAUSE NO. 328 OF 2013

JOHN NANDILIMBE ..... PLAINTIFF
AND-

MALAWI REVENUE AUTHORITY ..... 1ST DEFENDANT
WELLS GAMA T/A TRADEX FREIGHT
INTERNATIONAL ..... 2ND DEFENDANT
WONDER SAMIKWA ..... THIRD PARTY

CORAM: HON. JUSTICE R. MBVUNDULA
Mauluka, Counsel for the Plaintiff
Chipeta/Mwangwela, Counsel for the 1st Defendant
Masanje, Counsel for the 2nd Defendant
Chimang'anga, Official Interpreter

JUDGMENT

The plaintiff's claim is for:

1. the sum of K2 214 255.21 being the cost of repairing his motor vehicle;
2. damages for diminution in the value of the said vehicle;
3. damages for loss of use of the vehicle; and
4. costs of this action.

The plaintiff imported a Toyota Surf motor vehicle, through the Songwe border post. It is his case that when the vehicle entered the country he was advised by MRA's employee of the amount of duty payable and to engage Tradex Freight International (Tradex), the 2nd defendant, a customs agent, for purposes of clearing the motor vehicle. A year after the motor vehicle had purportedly been cleared it was

impounded by the Malawi Revenue Authority (MRA) on the ground of non-payment of duty. The claimant then instituted proceedings in the Principal Resident's Magistrate's court at Blantyre for an order of its release which the magistrate granted. The court also found that the plaintiff had paid to Tradex money intended to settle the duty payable for the vehicle and consequently also ordered that Tradex do remit to MRA the said money.

It is the plaintiff's evidence that the vehicle was released by MRA in a vandalized state and some of its parts not being functional. It is also the plaintiff's case that the seizure by MRA was wrongful and unlawful, the detention of the vehicle being a trespass. MRA denies liability stating that the judgment of the Principal Resident Magistrate unequivocally cleared MRA of any wrongdoing in effecting the seizure of the motor vehicle, and also that such liability is untenable by virtue of section 154(2) of the Customs and Excise Act asserting

i) that the risk of liability for imported goods is always on the importer;
ii) that the goods kept at a warehouse are always kept at the owner's risk;

hence that the plaintiff has to bear the costs of repair to the vehicle in issue and not MRA.

On his part the 2nd defendant denies having cleared the plaintiff's vehicle or given any advice concerning duty for the vehicle or having received payment in relation to the clearing of the vehicle. He asserts that the vehicle was cleared by a totally different customs agent called Link Cargo. The court is also informed, in the evidence of the 2nd defendant that he lodged an appeal to the High Court against the judgment of the magistrate court, which is yet to be determined. He also informs this court that sheriffs executed the judgment whereby they seized asserts belonging to his firm but he has not received any report as to how the items were dealt with. He has produced evidence of the execution by the sheriffs.

Before I consider the claim arising from the alleged vandalism of the vehicle I must point out some procedural fundamentals which are out of order in the matter at hand and amounting to abuse of the court process.

The first is in in regard to the evidence that the magistrate court made certain findings of fact and law which are now on appeal to the High Court. The magistrate court expressly held (whether correctly or not), firstly, that since MRA's records showed that duty had not been paid for the vehicle MRA was justified to seize the motor vehicle since the law attaches duty to goods and not the importer and, secondly, that

the plaintiff paid the amount of duty for his vehicle to the 2nd defendant. The second point is that not only has the plaintiff sought to re-litigate the very same issues which the magistrate determined, but he has done so when the issues are on appeal. Further still, the plaintiff has included in his action against the 2nd defendant a claim for the amount of duty when the evidence shows, and is not disputed, that he executed the judgment and the defendant's goods were actually seized to satisfy the judgment. The plaintiff cannot, in the circumstances, reopen that matter in this or any other court. On his part too, the 2nd defendant's argument that the firm did not deal with the plaintiff or receive the amount meant for the duty was decided by the magistrate court against him. The only remedy available, in so far as MRA's act of impounding the motor vehicle is concerned, is the appeal and not a fresh trial of the issue. There are no indications that the judgment was either reversed or stayed, until either of which it remains binding on the parties to the case. I will therefore, on these grounds, refrain from considering the aforesaid issues and confine myself only to matters occurring after the impounding of the vehicle.

That the vehicle was vandalised is not in question. What is disputed by both defendants is liability for the damage. As earlier on stated the position of MRA, the 1st defendant, is that MRA is not liable on the ground that such liability is untenable by virtue of section 154(2) of the Customs and Excise Act as

i) that the risk of liability for imported goods is always on the importer;
ii) that the goods kept at a warehouse are always kept at the owner's risk.

On his part the plaintiff submits, as against MRA, that MRA is liable because its employees wrongfully interfered with the plaintiff's possession of the vehicle by taking it away from him without his consent even though he told them that he had paid duty for it and without carrying out further inquiries with its agent, the 2nd defendant, thus committing an act of trespass and conversion, which matters, I have already stated, were addressed by the magistrate court and are the subject of an appeal.

Section 154 (2) of the Customs and Excise Act which has been cited by counsel for MRA provides as follows:

> "154. Actions by or against the Controller
>
> (1) ...
>
> (2) Where any proceedings are brought against the Controller under the customs laws and judgment is given against the Controller then, if the court before which such

proceedings are heard is satisfied that there were reasonable grounds for the action giving rise to the institution of the proceedings, the plaintiff shall be entitled to recover anything seized, or the value thereof, but shall not otherwise be entitled to any damages, and no costs shall be awarded to either party:

Provided that this subsection shall not apply to any action brought in accordance with sections 20 and 174."

Section 20 provides:

"20. Damage to premises etc. resulting from exercising of powers

(1) If the exercise of powers under this Part reveals no breach of the customs laws, any physical damage done by an officer, police officer or other person properly assisting him, in respect of persons, goods or premises, resulting from the exercise of such powers shall be made good at the expense of the Department, unless such damage was caused by or attributed to the obstruction of or the failure on the part of the person concerned to comply with the directions given by the proper officer, police officer or other person.

(2) An action shall lie against the Controller for any damages allowable under subsection (1)."

The provisions of this section apply only where there is no breach of customs laws, an issue which shall be considered soon hereinafter.

And section 174 states:

"174. Handling etc. of goods, at risk and expense of owner

Except as otherwise specifically provided in the customs laws, all handling, storage and transportation of goods for the purposes of the customs laws shall be performed at the risk and expense of the owner of such goods:

Provided that an action shall lie against the Controller for any loss or damage to goods or additional expense caused by the gross negligence or wilful misconduct of an officer acting or purporting to act in his official capacity."

Section 28 (a) of the Malawi Revenue Authority Act substituted the term "Commissioner-General" for "Controller".

In summary the following is the legal position flowing from the foregoing provisions of the Customs and Excise Act. Firstly, under a validly brought action against the Commissioner-General under the customs laws the claimant's only remedy is an

order for the recovery of anything seized or the value thereof and, subject to the provisions of section 20, no damages or costs are payable: s. 154 (2). Secondly, an action for damages will lie against the Commissioner-General for physical damage to goods if done by an officer or anyone properly assisting him in the exercise of his powers which exercise reveals no breach of customs laws, unless the damage is attributable to the conduct of the complainant: s. 20. Thirdly, subject to any provision of the Act to the contrary, except where damage is caused by the gross negligence or wilful misconduct of an officer acting or purporting to act in his official capacity, all handling, storage etc. of goods for the purposes of the customs laws shall be performed at the risk and expense of the owner of such goods: s. 174.

In so far as the claim for the recovery of damages, therefore, for the plaintiff to succeed, he must prove:

1. that the damage to the vehicle was caused by an officer or anyone assisting him in the exercise of his powers; or
2. that the damage was caused by the gross negligence or wilful misconduct of an officer acting or purporting to act in his official capacity; and
3. that the damage is not attributable to the conduct of the plaintiff; and
4. that the exercise of the powers revealed no breach of customs laws.

It is a rule of evidence that for a party to succeed on a claim or defence that party must not only adduce evidence on the point but must also raise the matter in his pleadings. The plaintiff herein neither pleaded nor adduced evidence showing that the damage to the vehicle was caused by an officer of the 1st defendant or any other person assisting him. In fact there is no evidence as to who occasioned the damage but only that the damage occurred whilst the vehicle was in the custody of the 1st defendant. The plaintiff did not also plead or adduce any evidence as to whether, if the damage had been caused by such person as mentioned, the same was as a result of their gross negligence or wilful misconduct, and acting or purporting to act in their official capacity. In addition, that customs duty for the motor vehicle was not remitted to MRA is not a disputed fact. This is clear from the plaintiff's own evidence that it was established that the documents handed to him by the customs agent were fake and also the finding of fact by the magistrate court that the money the plaintiff paid to the agent was not remitted to MRA. That no duty was remitted to MRA coupled with the fact that false documents were used to register the documents are breaches of customs laws. Section 128 (1) of the Customs and Excise Act provides that a customs agent acts on behalf of the person who appoints them,

and section 130 is to the effect that the appointment of an agent does not relieve their principal from liability for the performance of any act or obligation under the customs laws. Thus regardless of whether it was the 2nd defendant or another customs agent who dealt with the matter on behalf of the plaintiff, the plaintiff remains liable for the duty. In this regard therefore, the plaintiff's evidence fails to satisfy conditions 1, 2 and 4. Accordingly, notwithstanding that the damage is not attributable to the plaintiff, as envisaged under the Customs and Excise Act, the plaintiff's claim against the 1st defendant fails.

As against the 2nd defendant the plaintiff's submissions are that the 2nd defendant contributed to the plaintiff's loss and damage by fraudulently registering the plaintiff's motor vehicle. I observe however that he raises this argument within the context of his claim for wrongful seizure of the motor vehicle, on the ground of trespass and conversion, which, as already pointed out, are before another court on appeal. For the reasons I have earlier on stated the claim is not sustainable in this court.

In the final analysis the plaintiff's action fails *in toto* and is dismissed with costs.

Pronounced in open court at Blantyre this 5th day of April 2019.

R Mbvundula
JUDGE