



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY**

JUDICIAL REVIEW CAUSE NO. 79 OF 2016

THE STATE

AND

THE COMMISSIONER GENERAL

OF THE MALAWI REVENUE AUTHORITY RESPONDENT

EX-PARTE:

PAMODZI SETTLEMENT TRUST..... APPLICANT

CORAM: HON. JUSTICE R. MBVUNDULA

Hara, Counsel for the Applicant

Respondent unrepresented

Chimang'anga, Official Interpreter

ORDER

Factual background

The subject matter of the present case is a Toyota Fortuner motor vehicle registered as CA 988 and whose VIN/Chassis Number is presented as AHTEZ39G907024207, Engine Number 2KD5516407.

On or about 2nd November 2016 this court granted leave to the applicant to commence judicial review proceedings challenging several decisions of the Malawi Revenue Authority (the MRA) leading to and including the seizure of the vehicle by the MRA. Following the granting of the leave the applicant, as would be expected, set in motion the process of judicial review. The matter was in due course set down for hearing on 16th November 2017 when counsel for the applicant, Mr Wanangwa

Hara, of Ritz Attorneys, sought to discontinue the matter on the ground that the matter had been “superseded by events in that since the commencement of the judicial review proceedings another matter concerning the same subject matter had been instituted before the Blantyre Magistrate Court”... “for the recovery of the vehicle in dispute”. In explaining the circumstances leading to the institution of the proceedings in the magistrate court counsel explained that after an embargo (the issue in the judicial review proceedings) was issued by the MRA in respect of the motor vehicle, the MRA, some months later, issued a notice of seizure of the same vehicle, and since jurisdiction in respect of the recovery of the motor vehicle subject to customs control, is before the Resident Magistrate Court, so said counsel, the applicant commenced fresh proceedings before that court.

Counsel further pointed out that there had been discussions with the investigating team as well as the legal department of the MRA on how best the matter could be resolved regarding the assessment as well as who would be liable for duty.

Counsel was asked to address the court as regards the apparent multiplicity of actions pertaining to the subject matter, and counsel explained that the motor vehicle had been released under the judicial review proceedings, and that the motor vehicle had subsequently been seized on grounds of non-payment of duty. Counsel went on to state that that the only issue that was before the magistrate was as regards who would pay duty.

Pursuant to the provisions of section 26 of the Courts Act this court ordered that the record of the proceedings before the lower court be brought before this court to be examined and dealt with as provided thereunder, as it seemed to this court, on the information laid by counsel, that the matter may have proceeded inappropriately. Section 26 provides as follows:

“26. – (1) In addition to the powers conferred upon the High Court by this or any other Act, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts and may, in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof and may remove the same into the High Court or may give to such subordinate court such directions as to the further conduct of the same as justice may require.

(2) Upon the High Court calling for any record under subsection (1), the matter or proceeding in question shall be stayed in the subordinate court pending the further order of the High Court.”

The court file from the magistrate reveals the following material information.

1. The subject matter of that action is the same as that in the present judicial review proceedings.
2. The particulars of the case in the magistrate court are Miscellaneous Application No. 309 of 2017 Between *Ritz Partners Ltd* (Plaintiff) and *The Commissioner General/Controller of Customs for the Malawi Revenue Authority* (Defendant).
3. The heading in the application in issue is “EX PARTE NOTICE OF APPLICATION FOR AN ORDER FOR DELIVERY, PRESERVATION AND CUSTODY OF MOTOR VEHICLE PENDING FULL DETERMINATION OF THE MATTER”, purportedly brought under Order XXV of the Subordinate Court Rules as read with section 147 of the Customs and Excise Act.
4. The issues in dispute included whether duty was paid and, if not paid, who was liable therefore.

Law and jurisdiction

Order XXV (1) of the Subordinate Court Rules reads as follows:

“1. – (1) Where in any action *on a contract* or *for the recovery of any moveable property* the plaintiff’s claim *is prima facie established* and *the defendant relies by way of defence on matters as to which the burden of proof is on him, or claims a lien*, the Court may make such order for the delivery, preservation or custody of any moveable property the subject matter of the dispute, or for the payment into Court of any sum in dispute, or both, as may be just.” (emphasis supplied)

In paragraph 3.1 of their skeletal arguments in the court below, the applicant purported to paraphrase the above provision in the following terms:

“Order XXV (1) of the Subordinate Court Rules empowers the Subordinate Court to make an order for the delivery, preservation or custody of any moveable property the subject matter of the dispute for the recovery of a Motor Vehicle.” (sic).

This, clearly, was an utterly misleading submission as far as the interpretation of the Order is concerned, a misstatement of the law.

A proper reading and interpretation of Order XXV (1) will show that it applies to circumstances where either:

- (a) there is action on a contract, or
- (b) an action for the recovery of any moveable property, and, in either case

- (c) the plaintiff's claim is prima facie established and the defendant relies by way of defence on matters as to which the burden of proof is on him, or claims a lien.

Since, at the time of the application in the magistrate court there subsisted, and still subsist to this moment, an unresolved dispute as to the quantum and legal liability for duty, it cannot be the case that "the plaintiff's claim [was] prima facie established". The matter did not therefore meet the legal requirements for it to proceed under the provisions of Order XXV of the Subordinate Court Rules as the requirement for prima facie proof had not been met.

The Customs and Excise Act is the primary and principal legislation in matters of customs and excise, including disputes arising thereunder, whereas Order XXV (1) of the Subordinate Court Rules is subsidiary legislation applicable in the limited scope, as explained above, and not applicable on the facts of this or any similar case.

All Acts of Parliament take precedence over all and any subsidiary legislation. In matters of customs and excise, therefore, a litigant must first have recourse to the provisions of the Customs and Excise Act, it being the principal legislation thereon, before having recourse to subsidiary legislation thereunder, or anywhere else, as might be relevant. A litigant may not, without justification, bypass the principal law on the subject in preference for other law, and the courts should be vigilant.

The appropriate procedure in the present circumstances is spelt out under section 147 (2), (3) and (4) of the Customs and Excise Act as follows:

"(2) Where any goods or conveyance are seized in accordance with the customs laws and no proceedings have been instituted in respect of an offence by reason of which such goods or conveyance were seized, the owner thereof may claim such goods or conveyance within 30 days of the date of the seizure or of the giving of any required notice of seizure, whichever is the later, by notice of claim in writing to the Controller.

(3) The Controller may within three months of the date of the seizure or of the giving of any notice of seizure, whichever is the later, permit any goods or conveyance which have been seized in accordance with customs laws and for which notice of claim in accordance with subsection (2) has been received by him –

(a) to be restored conditionally or unconditionally to the claimant; or

(b) to be delivered to the claimant upon the payment of any duty payable; or

(c) to be delivered to the claimant upon giving by him of such security as the Controller may think appropriate for the payment of the full duty-paid value of such goods or

conveyance in the event of their forfeiture, and upon compliance with and subject to such conditions as the Controller may impose.

(4) If, within 30 days after the making of a claim for any goods or conveyance in accordance with subsection (2), the Controller does not restore or deliver them to the claimant or delivers them upon the giving of security under subsection (3) (c), the claimant may, within three months of the date of seizure, or the giving of any required notice of seizure, whichever is the later, institute proceedings for the recovery of such goods or conveyance or of any security given therefor, giving notice in writing to the Controller of the institution of such proceedings.”

By way of summary, under section 147 (2), (3) and (4) the following must obtain for an order in the nature or akin to the order granted in the court below to be sustained:

1. no proceedings should have been instituted in respect of an offence by reason of which the goods or conveyance were seized;
2. the owner should, within 30 days of the later between the seizure or the giving of notice of seizure, have claimed the goods or conveyance in writing to the Controller;
3. the Controller should have been allowed a maximum of three months, from his receipt of the claim, to exercise the options under subsection (3); failing which
4. the claimant would be entitled, within three months, to institute proceedings for the recovery of the goods or conveyance etc. with notice to the Controller of the institution of such proceedings.

The court of Resident Magistrate has, under section 152 of the Customs and Excise Act, jurisdiction over “civil proceedings ... relating to any claim to any goods which have been seized under customs laws, and any claim to any duty, rent, charge, expense or other sum, payable under the customs laws, ... without limit of amount”. In the exercise of its jurisdiction in respect of goods seized under customs laws the court must proceed under the procedure laid out under section 147 (2), (3) and (4) of the Customs and Excise Act. In the case at hand the court failed to do so.

It is a matter for concern that at the time the proceedings in the magistrate court were instituted there was already a pending action in the nature of the judicial review proceedings in this court over the same subject matter and, as will be seen shortly, between the same or substantially the same parties. As earlier noted, the objective advanced by counsel behind the plaintiff’s commencement of the proceedings in the magistrate court was “for the recovery of the vehicle in dispute”, an objective attained, not only by a misrepresentation and misapplication of the law in the

magistrate's court, but also by an abuse of process in the nature of maintaining a multiplicity of actions over the same subject matter and/or the same parties or their privies. In short, the objective was attained illegally.

By way of elaboration on the point regarding the parties, according to the affidavit sworn in support of the application in the magistrate court, the motor vehicle is registered in the name of Pamodzi Settlement Trust, the applicant in the judicial review. It is deposed on behalf of the plaintiff in the case before the magistrate court, Ritz Partners Limited, that the vehicle was passed by Pamodzi Settlement Trust to Ritz Partners Limited for the latter's use, and at the time of its detention by the MRA in connection with the alleged non-payment of duty, it was being driven by Mr Bright Theu, presumably of Ritz Partners Limited. Ritz Partners Limited thus held the vehicle as privies of Pamodzi Settlement Trust. Taking that relationship into account it was evidently an abuse of the process of court for Ritz Partners Limited to commence fresh proceedings in the magistrate court over the same subject matter and the same or substantially the same issues that were subject of the judicial review when the judicial review was still subsisting.

This court must also point out that the order which the magistrate granted, being of the nature and effect of a mandatory injunction was contrary to section 39 (2) (b) of the Courts Act, and therefore made without jurisdiction. Section 39 (2) (b) expressly states that no subordinate court shall have jurisdiction to deal with, try or determine any civil matter for an injunction. The order made by the magistrate is therefore null and void for want of jurisdiction on the part of the court, more so in view of the fact that the court proceeded upon irrelevant statutory provisions and considerations, which do not alter the effect of section 39 (2) (b).

Orders and directions

In consequence of the foregoing considerations this court orders and directs that:

1. The proceedings before the Senior Resident Magistrate's court at Blantyre in Miscellaneous Application No. 309 of 2017 between Ritz Partners Limited and The Commissioner General/Controller of Customs, having been premised upon the wrong and irrelevant law and considerations, are hereby discontinued and nullified *in toto*.
2. In consequence of the order 1 above the orders made by the said Blantyre Magistrate Court in Miscellaneous Application No. 309 of 2017 between Ritz

Partners Limited and The Commissioner General/Controller of Customs are hereby declared null and void *ab initio*.

3. The order sought by the applicant to discontinue the present judicial review proceedings, being premised upon the perceived subsistence of the matter in the court below, is withheld, with liberty on the part of the applicant to re-apply for such discontinuance, within 10 days hereof, if the applicant be so minded.

Made in chambers at Blantyre this 21st day of March, 2018.


R Mbvundula
JUDGE