

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

REVENUE DIVISION

REVENUE CAUSE NO. 13 OF 2018

THE STATE

(MAYAMIKO KADANGO) CLAIMANT

AND

THE MALAWI REVENUE AUTHORITY DEFENDANT

CORAM: HON. JUSTICE R. MBVUNDULA

Dikiya, Counsel for the Claimant

Kambumwa, Counsel for the Defendant

Chimang'anga, Official Interpreter

JUDGMENT

This judicial review arises as a result of a decision of the defendant to sell by public auction a Nissan Tiida motor vehicle whose chassis number is given as C11-305480, imported by the claimant. The complaint is that the sale was effected without affording the claimant the right to be heard and assigning a wrong owner's name in the notice of the intended sale thereof published in the Gazette. The claimant consequently seeks several declarations effectively adjudging the decision wrongful and orders granting relief.

The claimant deposes that he is in the business of importing motor vehicles for sale in Malawi and that on July 29 2018 he imported, through Songwe border, four vehicles including the Tiida. He states that he intended to clear the motor vehicles one at a time due to financial constraints and was able to clear the other three leaving out the Tiida. The claimant acknowledges that goods which overstay at the border, uncleared, may be sold by auction by the defendant, and contends that this should

be upon communication to that effect in writing by the defendant. In the case of the Tiida the claimant contends that the defendant did not in any way communicate with him that his motor vehicle had overstayed in the defendant's warehouse or that should he fail to clear it the same would be sold. He states that it was whilst he was in the process of raising money to clear the vehicle that he was informed, on December 10, 2018 that the defendant had, on December 7, 2018, sold the vehicle by public auction after a notice published in the Gazette. Claimant states that upon examining the Gazette he noted that the notice carried a name not his and that only a part of the chassis number appeared in the notice rendering it impossible to ascertain the owner of the vehicle. According to the copy of the Gazette produced by the claimant, however, the number assigned to the vehicle is "IT5480". It is common knowledge that such numbers are temporary registration numbers assigned to vehicles in transit from the port into Malawi.

For the defendant are two sworn statements by one Jeniffer Kawalewale, a manager in the enforcement section of the defendant's Customs and Excise department, which counsel for the defendant adopted, together with his skeleton arguments without oral submissions. The deponent confirms the importation of the vehicle which she states was deposited at the defendant's warehouse on 27th July 2018 without any declaration or payment of duty as required by law, and it remained there until 7th or 8th December 2018. The deponent states that the vehicle became liable for sale after one month on 27th August 2018 and that by 19th October 2018 it had overstayed by almost six months, which fact the claimant was aware of yet he did not take any steps to ensure the duty payable was paid, or do anything at all in connection therewith. The deponent also states that the allowable period for keeping one's imported goods in the defendant's warehouse is ten days after which the goods attract warehousing charges.

It is further deposed by Kawalewale that the notice of sale was published in the Gazette as well as in the *Nation* newspaper of 30th October 2018 and that prior to the goods being advertised for sale the defendant carried out a verification and valuation exercise whereby the goods liable for sale were listed together with the owners' addresses, where the details were handy, and the reasons for the disposal. It is further deposed that the details of the claimant's vehicle were obtained from the keys and/or the gate-pass of the vehicle where the name "Mayamba" appeared. It is that name under which the vehicle was advertised, according to the exhibits to the sworn statements of both parties.

The claimant contends that since the Customs and Excise Act requires publication of such notices in the Gazette, it is an implied requirement that such notices must be effective hence a notice that bears a wrong name of an importer is not effective as required. On that ground therefore, so argues the claimant, the notice herein was not effective as against the claimant. Counsel expressed the view that the defendant did not exercise sufficient diligence in advertising the motor vehicle with insufficient details.

The claimant also argued that in carrying out the auction the defendant violated principles of procedural propriety under section 43 of the Constitution. He submitted that notwithstanding the statutory framework under the Customs and Excise Act the defendant was under an obligation to afford each and every owner of the goods the defendant advertised for sale an opportunity to be heard before the sale was conducted, thereby minimizing the injury to their proprietary rights. Counsel argued that the requirement for an opportunity to be heard meant that the defendant must meet each and every owner of the goods advertised for a pre-action hearing, citing as authority for that position, the Order dated 14th January 2014 in *The State and the Malawi Revenue Authority ex parte Blantyre Printing and Publishing Company*, Judicial Review Case No 11 of 2013 where the court stated that in certain circumstances the revenue must call for such a hearing. Counsel for the claimant also cited the Supreme Court of Philippines judgment in *Roxas et al v. Court of Tax Appeals and another* [1968] PHSC 248 for the argument that the conduct of the defendant amounted to killing the hen that lays the golden egg. Counsel confessed, however, that he has never read the judgment in *Roxas*, but only a small extract quoted in the *Blantyre Printing and Publishing case* just referred to, an unhealthy practice for anyone in legal practise. That said I am not persuaded that either of the dicta cited from the two cases is relevant on the facts of the present case.

For the defendant it was submitted, firstly, that under section 39 as read with section 38 of the Customs and Excise Act the defendant is authorized to proceed as the defendant did. It was also submitted that the defendant was reasonable in maintaining custody of the claimant's motor vehicle for a period of about six months before disposing of it and that by the notice published in the Gazette the defendant informed all the owners of the advertised goods whose duty was overdue that the goods would be sold in line with section 39 of the Customs and Excise Act.

Regarding the name under which the vehicle was sold it was submitted that the defendant could not have done more than it did as the vehicle was not even declared

and therefore no sufficient details were available to appear in the advertisement. Counsel therefore argued that it was the claimant's own violation of the customs laws which occasioned the omission. It was also the defendant's position that the law does not compel the defendant to publish the full details of the owner of the goods if the same are not available but that the main interest of the defendant is to publish the list or details of the goods which will be offered for sale.

It is pertinent to refer to sections 38 (2) and (4) as well as section 39 (1) and (2) of the Customs and Excise Act as they are material to the issues here.

Section 38 (2) provides:

(2) Subject to the provisions of this Part any goods deposited in a customs warehouse under the provisions of Part IV or Part VI may be entered by the owner within one month after deposit, or such further period as the proper officer may permit:

Provided that if any such goods are unsuitable for storage or are of a perishable or dangerous nature, or if the Controller considers that unless the goods are sold the proceeds will not be sufficient to cover the full duty and expenses of removal and sale he may direct that they be sold, without notice, in such manner as he may deem fit, as soon as possible after deposit in a customs warehouse.

(4) If the proper officer authorizes or requires the removal of any goods from a customs warehouse, the owner shall remove such goods within such period as the proper officer may allow.

And section 39 (1) and (2) provides:

39. Sale of goods

(1) The Controller may cause any goods which are not entered within the period provided or sold under section 38 (2) or are not lawfully removed from a customs warehouse within the period allowed under section 38 (4) to be sold or resold by public auction or by tender after not less than one month's notice thereof being given in the Gazette.

(2) Where any goods are sold or resold under this section or section 38 (2), the proceeds of such sale shall be applied in discharge of—

- (a) the full duty;
- (b) the expenses of removal and sale;
- (c) carriage charges due to any carrier;
- (d) the rent and other charges due to the Department; and
- (e) rent and storage charges due to any carrier,


I observe in the first instance that the claimant violated the provisions of section 38 (2) of the Act by failing to enter his goods within one month as required. I also observe, in agreement with the defendant, that section 39 (2) does not require that the name of the owner of the goods to be sold should be specified in the notice of the sale. The provision is plain that upon non-compliance the defendant may cause the goods to be sold upon giving not less than one month's notice of the sale. The notice, in my understanding, is with reference to the goods and not the importer, owner or other person with an interest therein. The word "thereof" in that section clearly referring to the notice of the sale it must follow that the subject matter of the notice must be the same as the subject matter of the sale, in that case the goods and not the defaulter or any other person interested. Therefore, what the notice must legally contain is as much detail of the goods as are availed to the defendant by the complainant, or his agent, or otherwise reasonably gathered by the defendant as will sufficiently describe the goods. However, though not a legal requirement, in my view, fairness to the person interested would dictate that where the details of such person are known, they too be published in the notice. In the case at hand, therefore, it was sufficient that the defendant advertised the claimant's vehicle with reference to the facts availed or reasonably available to the defendant, namely, the "IT" number of the vehicle and the name "Mayamba" (which was attached to the car keys), supposedly the importer, owner or other person interested or representing the complainant.

The other pertinent issue raised in the application relates to the opportunity to be heard. Opportunity to be heard is not, as argued by counsel for the claimant, the same as being heard. It is the opportunity that matters, which the claimant may utilise or not. The claimant submitted that the defendant violated the claimant's right to be heard as the defendant did not in any way communicate with him that his motor vehicle had overstayed at Songwe, let alone about the impending sale should he fail to clear his motor vehicle, which submission is erroneous. Firstly, the claimant knew how long his vehicle had stayed at Songwe. He needed not be told this. He was under a legal obligation to comply with the law, which he did not, so the law had to take its course, that is to say, the defendant was entitled to advertise the vehicle for sale which it did. It is the legal position that a notice published in the Gazette or a newspaper is a notice to the world: *In the matter of Cromington Clothing & Textile Co Ltd* [2000-2001] MLR 157; *Mtambo v Nation Newspapers Limited* [1999] MLR 256. Accordingly the notice in the Gazette and the *Nation* newspaper which the defendant published in regard to the sale was sufficient notice to the claimant as to

the world, under the law. In the premises there was no procedural impropriety in the conduct of the defendant as alleged or at all. It then remained incumbent upon the claimant to make any representations he deemed necessary in regard to the issue. Consequently the claim regarding the absence of an opportunity to be heard does not avail the claimant.

The judicial review application fails therefore and is dismissed with costs.

Pronounced in open court at Blantyre this 13th day of March 2019.


R Mbvundula
JUDGE