



IN THE HIGH COURT OF MALAWI
REVENUE DIVISION
CIVIL CAUSE NUMBER 20 OF 2016

BETWEEN:

JONATHAN BANDA

CLAIMANT

AND

MALAWI REVENUE AUTHORITY

RESPONDENT

CORAM: THE HONOURABLE JUSTICE JOSEPH CHIGONA

PEARSON WAME, COUNSEL FOR THE CLAIMANT

LINDA KAMBUWA, OF COUNSEL FOR THE RESPONDENT

MR KAMCHIPUTU, OFFICIAL COURT INTERPRETER

CHIGONA, J.

ORDER

The claimant, Jonathan Banda, through counsel commenced the present proceedings by originating summons against the respondent, Malawi Revenue Authority, seeking various declarations and orders, as follows:

- A declaration that on the true construction of Section 155 of the Customs and Excise Act, the defendant has no legal authority to prosecute and seizure of the plaintiff's property to wit a motor vehicle Mazda Etude Registration Number DZX042W after the expiry of two (2) years from the time of seizure and notice of seizure.
- A declaration that on the true construction of Section 147 of the Customs and Excise Act, the plaintiff is entitled to take possession of the property referred in Clause (i) above by reason of statute barred unconditionally.
- A declaration that on the true construction of Section 147 of the Customs and Excise Act, the defendant through the Controller of Customs, or Commissioner General cannot permit the plaintiff's seized property herein to be restored conditionally after expiry of three months from the date of seizure and notice
- Pursuant to determination in paragraphs (i), (ii) and (iii), an order awarding damages to the plaintiff for unlawful deprivation of property and loss of use to be assessed by the Honourable Court.
- An order that the defendant pays costs of this action
- Any other order which to the court appear just and proper in all the circumstances hereof

The claimant has given the following grounds for his application:

- The defendant without due regard to Customs Laws prevailing in our jurisdiction has failed to prosecute the plaintiff before expiry of two years from the date of seizure and notice to wit 10th June 2013
- The defendant has failed to restore the plaintiff's property despite seizure and intended prosecution being time barred under the Customs Laws.
- The plaintiff has suffered great loss and damage by reason of the defendant's actions heretofore and the defendant is liable to compensate him for all damages arising thereof.

It has to be put on record that the claimant brought an application for a mandatory injunction seeking release of the said motor vehicle. When the application came ex-parte, I ordered that the same be heard interpartes. During the interpartes hearing, it was agreed with the parties that instead of proceeding with the application for mandatory injunction, we could proceed to hear the substantive

matter. Hence, the parties addressed me on the substantive issues as outlined above. However, let me make one observation. When I was perusing through the file, I noted that the application for a mandatory injunction was also brought before Honourable Justice Kenyatta Nyirenda on 14th day of January 2016. The Judge refused to grant the injunction as he was of the humble view that damages would be an adequate remedy. It was therefore surprising to note that instead of lodging an appeal against the order of the Judge, counsel had to file another application before this court. I am of the humble view that this behavior by counsel needs to be discouraged by the court at all cost. This is abuse of the court process.

In a nutshell, the claimant's case, is as has been stated above. During oral submissions, counsel for the claimant stressed that the defendant has no any legal authority to prosecute the claimant after the expiry of two years as the action is now statute barred as per the provision of Section 155 (1) of the Customs and Excise Act. Further he submitted that under Section 147 (1) of the Customs and Excise Act, the claimant is entitled to take possession of the motor vehicle unconditionally.

In response, counsel for the respondent submitted that it was not in dispute that the claimant committed an offence under the customs laws of Malawi. She stated that after the vehicle was seized, the claimant wrote the commissioner general appealing against the duty and penalty imposed. Counsel submitted that as a result of the appeal, the duty and penalty were reduced. She submitted that to their surprise, the claimant just disappeared, only to resurface with the present proceedings. Further, counsel for the respondent is of the view that the proceedings herein are not statute barred. She referred the court to provisions of Section 155 (2) of the Customs and Excise Act, which states that proceedings will be deemed to have been commenced upon seizure of an item by the commissioner general. To her, immediately the motor vehicle was seized, proceedings are to be deemed to have commenced. In response, counsel for the claimant submitted that the proceedings herein are statute barred in as far as prosecution did not commence within the prescribed two years as contained in Section 155 (1) of the Customs and Excise Act. He submitted that proceedings refer to judicial proceedings and cannot be interpreted to include administrative actions. He stressed the point that the respondent has taken time to prosecute the claimant and ignored all remedies available to them under the customs laws. He prayed to this court to dismiss the

respondent's arguments and declare that the respondent cannot prosecute the claimant since the limitation period has expired.

ISSUE(S) FOR DETERMINATION

Having heard both counsel herein, the issue for determination is whether the proceedings are statute barred.

THE LAW AND ANALYSIS OF THE EVIDENCE

In deciding the above issue, the first point of reference is Section 155 (1) of the Customs and Excise Act, as referred to by counsel for the claimant. That Section provides as follows:

“ 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...”

Counsel for the claimant has relied on this provision to submit that the proceedings are statute barred as two years passed from the date of the offence without any prosecution. It is not in dispute that two years have elapsed since the date of commission of the offence. The respondent even agrees to that fact that two years have elapsed. The respondent has placed much emphasis on Section 155(2) of the Customs and Excise Act.

Let me also comment on Section 155(1) as quoted above. The Section uses the word “may” that connotes discretion. Further, in interpretation of statutes, the word “shall” connotes mandatory action. In the case of **Massey v Council of the Municipality of Yass**¹, it was held that the use of “may” prima facie conveys that the authority which has power to do such an act has the option to do it or not to do it. However, it is not always the case that the use of the word “may” will be construed as giving an option to the authority. In certain instances, “may” will be construed to mean “shall”. It is said that where a statute directs the doing of a thing

¹ (1922) 22 SR (NSW) 494 at 499

for the sake of justice or the public good, the word “may” is the same as the word “shall”².

Reverting to the present case, I am of the humble view that Section 155 (1) of the Customs and Excise Act is aimed at according fair justice to the taxpayer. I do not think that the respondent should be given discretion whether to prosecute or not after expiry of two years. I am of the considered view and I so hold that the word “may” in that Section should read “shall” so that the respondent is under an obligation to prosecute within two years from the date of the offence.

As alluded to above, there is no dispute between the parties pertaining to the limitation period of two years. Having said that, counsel for the respondent has argued that Section 155 (2) of the Customs and Excise Act needs to be taken into consideration. Let me also put on record that counsel for the claimant did not make any reference to Section 155 (2) of the Customs and Excise Act, which his colleague referred to. Section 155 (2) provides as follows:

“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.”

While I agree with counsel for the claimant that proceedings are to be interpreted to mean judicial proceedings, the framers of the law through Section 155 (2) intended that seizure of an item be part of the commencement of proceedings. I do not think that Section 155 (2) requires any interpretation apart from literal interpretation. The words as used in Section 155 (2) are so clear that date of seizure shall be deemed to be the date of commencement of any proceedings for an offence in respect of such goods. I am of the humble view that there is no any ambiguity being brought by literal interpretation of the words used in Section 155 (2) of the Customs and Excise Act. It was stated in the case of **Mangin V Inland Revenue Commissioner**³ with reference to interpretation of tax statutes, as follows:

“... secondly, ‘... one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about

² **Galaxy Broadcasting Company Limited v George Stephen Misinde and three others**, Miscellaneous Number 31 of 2016. See also **Re Erye & Leicester Corpn** [1892] 1 QB 136 at 142; **R V Barlow** (1693) 2 Salk 609.

³ [1971] 1 ALL ER 179

tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.' (Per Rowlatt J in *Cape Brandy Syndicate V Inland Revenue Comrs* ([1921] 1 KB 64 at 71), approved by Viscount Simons LC in *Canadian Eagle Oil Co Ltd V Regem.*)”

Reverting to the present case, Section 155 (2) of the Customs and Excise Act is so clear that date of seizure is deemed to be date of commencement of proceedings. In the case of **Kinyara Sugar Ltd V The Commissioner General , Uganda Revenue Authority**⁴, it was stated as follows on interpretation of tax statutes:

“ I would further mention the principles of interpretation of tax statute that they are to be strictly construed. If the intention of Parliament can be discerned from the wording of the statute, then there would be no need to look beyond the wording of the section.”

As alluded to above, Section 155 (2) of the Customs and Excise Act is so clear that intention of parliament was to have date of seizure of any goods as commencement date of any proceedings. The challenge on the claimant submission is that counsel read Section 155 (1) in isolation to Section 155 (2) of the Customs and Excise Act. What this means is that where seizure of goods is effected within the prescribed period under the law, date of seizure is to be construed as the date of commencement of proceedings. I have to stress that this is only applicable to cases where seizure of goods is involved. What this means is that in all cases where there is no seizure of goods, the limitation period is two years from the date of the offence. Having said that, it is my finding that the proceedings in the present case are not statute barred as date of commencement is deemed to be the date when the motor vehicle was seized by the respondent.

However, let me mention that the respondent in the present case has been neglect in the way they have handled the issue thereby affecting rights of the claimant. I will hasten to add that where seizure has taken place, the respondent is supposed to be on his guard always as to move with speed in resolving the issues. The respondent is not to hide behind the veil of the law. I therefore order that the respondent should take effective steps within the next 21 days to either prosecute the claimant or enter into any lawful settlement with the claimant, failing which,

⁴ H.C.C.S NO 73 OF 2011 (Commercial Division)

the claimant be discharged from prosecution and the said motor vehicle be released to the claimant unconditionally.

On costs, I exercise my discretion to order that each party should bear its own costs.

Pronounced in Chamber this 16th day of January 2018 at Blantyre in the Republic of Malawi.



Joseph Chigona

JUDGE