



IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
JUDICIAL REVIEW CAUSE NO. 49 OF 2012

BETWEEN:

THE STATE

AND

THE COMMISSIONER GENERAL OF MALAWI REVENUE

AUTHORITY.....RESPONDENT

(MRA)

EX-PARTE: EKOM HOME CENTRE.....APPLICANT

CORAM: HON. JUSTICE M L KAMWAMBE

Mr Chungu of counsel for the Respondent

Mr Phwitika, Official Interpreter

RULING

Kamwambe J

This is an application by the Respondent for an order to vacate the injunction and the Order for leave to apply for Judicial Review which were obtained earlier on.

This matter was heard on 15th April, 2013. The Notice of Adjournment was duly served on the applicant on the 8th April, 2013 as the record shows. No counsel from Messrs Ralph & Arnold appeared on behalf of the Applicant on the day of hearing, and

no explanation has ever been advanced for failure to attend court. The court proceeded to hear Mr Chungu, counsel for Malawi Revenue Authority, who said that he filed an affidavit and skeleton arguments. The court record shows that they were filed on the 26th November, 2012 and 16th January, 2013 respectively. The affidavit of Nelson Kayenda on behalf of the Respondent (MRA) and skeleton arguments clearly indicate that they were served on the Applicant's lawyers on the 18th January, 2013. From that time till the hearing of the matter on 15th April, 2013 counsel for the Applicant had not filed any affidavit in opposition in response to the application or skeleton arguments. May be it is not surprising that they did not show up to attend court. It seems also that the Applicant is contented the way things are and does not intend any longer to proceed with the judicial review proceedings as he does not appear to have interest in moving the court into action.

This court has to determine whether the Order of injunction and that of Leave for Judicial Review granted by the court on the 8TH November, 2012 may be vacated. Lord Diplock explained in **American Cyanamid Company v Ethcon Limited** (1975) All ER 540 some principles to follow when considering applications for interlocutory injunctions. Some of these principles are as follows:

1. The Plaintiff must establish that he has a good arguable claim to the right he seeks to protect.
2. The courts must not try to decide the claim on the affidavits; it is enough if the Plaintiff shows that there is a serious question to be tried.
3. If the Plaintiff satisfies these tests, the grant or refusal for an injunction is a matter for the exercise of the court's discretion on the balance of convenience.

Where material facts had been suppressed the court is entitled to vacate the injunction and/or the Order for Leave to move for Judicial Review in exercise of its discretionary powers. Authorities

are abound in this regard. Indeed, the mere fact that the court is requested to grant a relief ex-parte (without the defendant against whom the relief is sought) calls for full and frank disclosure of all material facts (**R v Kinsington Income Tax Commissioners** ex-parte de Polignac (1917) 1 KB 486 at 514 per Scrutton L. J.). Failure to give a full and frank disclosure means you are coming to court with unclean hands. It would be absurd and unjust for the plaintiff who has been unfaithful to benefit from his fraudulent acts.

One may wish to ask what the Applicant is alleged to have done in this case that which would cause the court to lean in favour of vacating the Orders. The lengthy affidavit of the Respondent says it all and I may not wish to cover all. Firstly, the driver of the truck carrying the consignment produced a wrong and dubious document being a Special Delivery Order (SDO) which had a duplicated serial number. This meant that the import declaration was false. As a result, the Applicant had committed the offence of smuggling by presentation of a false Import Declaration contrary to sections 134 and 135 of the Customs and Excise Act, hence the goods were detained by the Respondents. Second, later the goods were seized at Nathenje through a proper Seizure Notice exhibited as "NK 1" and duty payable was assessed at K11,585,139.02. Also a fine of K500,000.00 was imposed. But without disclosing the seizure Notice he paid Lilongwe Malawi Revenue Authority MK2,696,994.53. In this court's view, it was deliberate so that he avoids paying the larger amount. This was not disclosed in court then. The conduct demonstrates that Applicant was unrepentant, uncompromising and fraudulent. If he was genuinely intending to amicably settle the matter, he would procedurally have challenged the larger amount. Instead he chose to secretly pay the smaller amount which he knew was disowned by the Respondent.

In the light of the above, it cannot be said that the Respondent refused to release the goods for no justifiable cause, since the reason for the seizure was that the goods were smuggled and that

Applicant had committed the offence of Smuggling through presentation of a false import declaration under the Customs and Excise Act. This court does not see any malice in refusing to release the goods. The Respondent was faithfully carrying out its duties as best as it could because they detected that something was amiss. This is why Respondent decided to pursue Applicant after passing through Dedza Boarder and later informed their colleagues, Flexible Anti-Smuggling Team (FAST) to implement the decision of detaining the truck in Lilongwe. Respondent did not arbitrarily deprive Applicant of his property.

Indeed the Applicant did not give full disclosure of all relevant facts to court when applying for leave to move for judicial review; for instance, he concealed the fact that there was an offence of Smuggling through presentation of a false declaration in respect of the goods in issue. This was a material fact to be disclosed. Applicant did not even disclose to court that duty assessed as due and payable was MK11,585,139.02, and not the controversial MK2,696,994.53 which he chose to pay very quickly while knowing what was actually due. It is this court's finding that Applicant is guilty of suppression of material facts.

The reliefs sought by Respondent are as follows:

1. An Order of injunction obtained ex-parte by the Applicant be vacated and set aside for suppression of material facts and that the Leave for Judicial Review that was granted be discharged and set aside since what the Respondent did was/is within its legal mandate,
2. The Respondent be permitted to collect the remaining MK9,392,144.47 from the Applicant (being the MK11,585,139.02 duty, less the part paid MK2,696,994.53),
3. The Applicant pays the MK500,000.00 penalty for the offence committed.
4. The Respondent be awarded damages as this injunction was wrongfully obtained.

5. The Respondent be awarded costs of this action.

I grant Respondent first relief sought above. Needless to say it, second and third reliefs should automatically come to fruition upon the first relief being granted for the hands of the Respondent are no longer tied to perform its usual duties and functions. Let me therefore say that the two reliefs are granted. Further I award Respondent damages for wrongfully obtaining the injunction. The Registrar shall assess the quantum of damages. If it were obtained in good faith, I would not grant the relief as Applicant would not be blamed for his actions. The Respondent is awarded costs of this action.

***Made in open court this 5th day of August, 2014 at Chichiri,
Blantyre***



M L Kamwambe

JUDGE