



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
JUDICIAL REVIEW CASE NO. 34 OF 2015**

BETWEEN:

THE STATE

-AND-

**(THE COMMISSIONER GENERAL OF THE)
MALAWI REVENUE AUTHORITY RESPONDENT**

EX PARTE: SALIM SULEMAN 1ST APPLICANT

BILAL SALIM SULEMAN 2ND APPLICANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Chipeta, of Counsel, for the Applicants

Mr. Gondwe, of Counsel, for the Respondent

Ms. Emily Chimang'anga, Court Clerk

ORDER

Kenyatta Nyirenda, J.

INTRODUCTION

The Summons before the Court has been taken out by the Respondent, who seek an order vacating and /or setting aside leave to move for Judicial Review granted to the Applicants on 19th March 2015 [hereinafter referred to as the “Summons to Vacate Leave”]. The Summons to Vacate Leave, which is accompanied by an affidavit in support, sworn by Moses Nyirenda, a Customs Officer at Blantyre Port [hereinafter referred to as the “Respondent’ Affidavit”], is based on two grounds: first, that the Applicants lack sufficient interest to commence the action herein and, secondly, that the actions being complained of by the Applicants were done by the Respondent within its legal mandate.

The Applicants oppose the Summons to Vacate Leave and they have, to this end, filed an affidavit in opposition, sworn by the 2nd Applicant [hereinafter referred to as the “Applicants’ Affidavit”].

NOTICE OF APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Challenged Decisions

The decisions which the Applicants seek to be judicially reviewed [hereinafter referred to as the “challenged decisions”] are set out in the Notice of Application for Leave to Apply for Judicial Review, commonly known as “Form 86A”. The challenged decisions read, and I quote them in full as they set forth very clearly the case for the Applicants:

- “1. *The decision of the Respondents made on Thursday, March 19, 2015 (hereinafter referred to simply as ‘the Decision’) to seize or intending to seize the Applicants [motor vehicles] when the Respondent knows that the importer of the said motor vehicles, Mr. Tony Ngalande (hereinafter referred to as ‘the importer’) was and is still under customs obligation to pay duty in full or indeed any outstanding balance on the same.*
2. *The Respondent’s decision vexing the Applicants with search warrants in a manner that clearly portrays bad faith in blatant violation of the jurisprudential basis of section 153 of the Customs and Excise Act”*

Reliefs Sought

The reliefs sought by the Applicants are also contained in Form 86A and the same are reproduced in full:

- “1. *A declaration that the decision to seize the Applicants motor vehicles when the Respondent knows that the importer was and is still under obligation to pay duty in full or any outstanding balance on the same is unreasonable in the **Wednesbury sense**.*
2. *A declaration that the Respondent’s decision in unreasonable interference with the Applicant’s right not to be arbitrarily deprived of property as enshrined in section 28 of the Constitution and consequently is unlawful, illegal, unconstitutional and unreasonable in the **Wesnesbury sense**.*
3. *A declaration that the decision of the Respondent abdicating (from) the pursuing the importer is adversely and drastically inconsistent with the Applicant’s right to ownership and enjoyment of property and the Applicant’s right to economic activity.*

4. *A declaration that the decision of the Respondent is not necessary in an open and democratic society, is unreasonable, negates the essential content of the Applicant's right to enjoyment and ownership of property and therefore illegal, unlawful, unconstitutional and unreasonable in the **Wesnesbury sense**.*
5. *A like Order to certiorari quashing the Respondent's decision to seize or detain the Applicant's motor vehicle in the circumstances.*
6. *If leave to apply is granted, an Order staying the Decision of the Respondent.*
7. *If leave to apply is granted, a direction that the hearing of the application for Judicial Review be expedited.*
8. *Further or other relief.*
9. *An Order for costs.*
10. *And that all necessary and consequential directions be given."*

Locus standi

Paragraph 2 of Form 86A deals with *locus standi*. For reasons which appear presently, it is necessary to reproduce the paragraph *in extensio*:

- “2.1 *The Applicant has sufficient interest.*
- 2.2 *The Applicant is the lawful owner of the motor vehicles aforesaid.*
- 2.3 *The Applicant is directly affected by the decision of the Respondent to seize the motor vehicle.*
- 2.4 *It is the Applicant that is deprived of the right to own property in the vehicle and also of the right to economic activity.”*

FACTS

In as much as is necessary for purposes of the Summons to Vacate Leave, the relevant facts can be briefly stated as follows.

The Applicants, Malawian businessmen based in Blantyre, purchased four motor vehicles from one Mr. Tony Ngalande (the importer) whose contact addresses are 3rd Floor, Gowa House, Capital City, Lilongwe and P.O. Box 2908, Lilongwe. The Applicants state that the importer represented to them that he had paid duty in full to the Respondent as required by law and that the Respondent issued Customs Clearance Certificates (**CCCs**) in relation to the motor vehicles. Basing on the said CCCs, the motor vehicles were duly registered by the Road Traffic Directorate.

On 16th March 2015, the Respondent obtained a search warrant to search the premises of Amina Sattar Salim. The search warrant was executed on 17th March 2015 and the four motor vehicles were detained. On the same day, Amina Sattar Salim applied to the magistrate court to have the search warrant cancelled as it was irregular since it was issued under s. 113 of the Criminal Procedure and Evidence Code. The magistrate court cancelled the search warrant and ordered the Respondent to release the motor vehicles. The Respondent released the motor vehicles on 19th March 2015.

On the same day, that is, 19th March 2015, the Respondent obtained a regular Search Warrant and executed the same on Amina Sattar Salim. The motor vehicles were detained once more. Later on the same day around 17:30 hours, the Applicants obtained an Order of the High Court granting Leave for Judicial Review [hereinafter referred to as the “Leave”] and incidental orders of Stay compelling the Respondent to release the motor vehicles to the Applicants. The Respondent complied with the Order and released the motor vehicle to the Applicant.

THE CASE OF THE RESPONDENT

In terms of the Summons to Vacate Leave, the grounds for vacating the Leave are stated in the Respondent’s Affidavit. Paragraphs 12 to 19 of the Respondent’s Affidavit are relevant and these read thus:

“UNCERTAINTY AS TO THE SUFFICIENCY OF INTEREST OF THE APPLICANTS IN THIS MATTER

12. ***THAT*** it is noteworthy that the Motor Vehicles were detained at the premises of ***AMINA SATTAR SALIM***, however, the Applicants herein are ***SALIM SULEMAN*** and ***BILAL SALIM SULEMAN***. The Respondent is uncertain as to whether ***AMINA SATTAR SALIM*** and ***SALIM SULEMAN*** is one and the same person.
13. ***THAT*** I verily believe that the uncertainty highlighted above is prejudicial to the order of leave and the substantial judicial review as the Court and the Respondent cannot ascertain who the proper Applicant should be and whether the current Applicants have sufficient interest or any interest at all in this matter.”

THE RESPONDENT ACTED REASONABLY

14. ***THAT*** the Respondent is mandated by law to collect customs duty on all imports.
15. ***THAT*** the Applicants have admitted that customs duty has not been paid at all.
16. ***THAT*** I verily believe that the Respondent has the legal mandate to collect the customs duty due.

17. **THAT** I further verily believe that there is no fetter on the Respondent's discretion regarding the person from whom it can collect the said duty between the actual importer and the Applicants herein.
18. **THAT** I also verily believe that the Respondent cannot be dictated to as to person from whom to collect duty in the circumstances in issue herein. The Respondent can collect duty from the importer or any person whose possession dutiable goods are found.
19. **THAT** in light of the averments above, I verily believe the injunction and leave for judicial review orders obtained are just trying to suffocate the process of the Respondents in the discharge of his duties."

Counsel Chipeta submitted that the Applicants failed to raise triable issues to warrant the granting of the Leave. He contended that the Applicants accept that they have not paid duty on the motor vehicles and, as such, they are only bent on frustrating the Respondent in its quest to fulfil its mandate of collecting duty.

The second point taken by Counsel Chipeta relates to s. 91(1) of the Customs and Excise Act. The provision deals with short levy and it reads:

"(1) Where any amount of duty has been underpaid or not paid, the person who should have paid such duty or the person in whose possession the goods in respect of which the underpayment was made shall pay such outstanding amount"

Counsel Chipeta submitted that s. 91(1) of the Customs and Excise Act empowers the Respondent to collect duty from the actual importer or person in possession. Given that choice, Counsel Chipeta argued that the Respondent cannot be faulted for opting to seek the payment of duty from the Applicants. It may not be out of place to set forth in full paragraphs 3.20.7 and 3.20.8 of the Respondents' written submissions:

"From the above exposition of the law the Respondent is mandated to claim from any importer of goods, or any person in whose possession such goods are found, payment for duty due to it. The Respondent has discretion from whom to demand payment. Reasonably, the one in whose possession the goods are found would be the first choice. If such person fails to produce evidence that duty has been paid, that constitutes an offence against customs laws and entitles the Respondent to seize such goods to enforce payment.

In the present matter, the Respondent acted within its lawful mandate and hence the leave for Judicial Review granted by the Court is severely vitiated. The motor vehicles in issue were detained (for) non-payment of duty. The Applicants admit that duty was not paid. Non-payment of duty is an offence under section 134 of the Customs and excise Act. Thus the motor vehicles were detained legally and the Respondent cannot be faulted in the exercise of this legal mandate."

THE CASE FOR THE APPLICANTS

It is the case of the Applicants that the Leave be sustained in that (a) the Applicants, being the owners of the motor vehicles, have sufficient interest therein and (b) there are triable issues herein.

Counsel Gondwe submitted that the Applicants are title holders of the motor vehicles and they are duly registered as such under the Road Traffic Act. He placed reliance on s. 2 of the Roads Traffic Act which defines “owner”, in relation to a motor vehicle as follows:

- (a) the person who has the right to the use and enjoyment of a vehicle in terms of a contractual agreement with the title holder of such vehicle;*
- (b) any person referred to in paragraph(a), for any period during which such person has failed to return that vehicle to the title holder in accordance with the contractual agreement referred to in paragraph (a);*
- (c) the person who is a title holder and has the enjoyment of the vehicle;*
- (d) a motor trader who is in possession of a vehicle for the purpose of sale, and who is registered as such under section 11; and “owned” or any like word has a corresponding meaning.”*

Counsel Gondwe further submitted that the Applicants have an arguable case based on s. 91(1) of the Customs and Excise Act. Counsel Gondwe conceded that, in relation to the present matter, the Respondent has two options under section 91(1) of the Customs and Excise Act: to pursue the importer or the Applicants but he argued that there is a rule of ancient application that where a public body has two or more options, it is bound to choose the less or least drastic of the options and he cited **Re The Estate and the Commissioner General of the Malawi Revenue Authority ex parte the Estate of wa Mutharika, HC/PR Judicial Review Cause No. 3 of 2013, (unreported)** as his authority. In his view, the lesser drastic option is to pursue the importer whose identity is well known to the Respondent.

Counsel Gondwe also submitted that in terms of the general principles that govern vacation of leave to move for judicial review, the Court’s jurisdiction to vacate leave is one which must be exercised sparingly. To buttress the point, Counsel Gondwe cited, among other cases, **R. v. DPP ex parte Camelot plc [1997] 10 Admin L. Rep. 93, R v. Lloyds of London, ex-parte Briggs [1994] 6 Admin LR 778 and R. v. Customs & Exercise Commissioners, ex parte Eurotunnel [1995]CLC 392.**

ANALYSIS

In considering the Summons to Vacate, I deem it imperative for the Court to warn itself at the outset of the danger of being dragged into delving into matters meant for determination at the substantive judicial review proceedings. However, the Court has to examine whether in light of the matters raised by the Respondent herein, the case of the Applicants deserve to go to the next stage of substantive judicial review proceedings. In this regard, the Court per force would have to consider the nature of judicial review vis-à-vis the facts obtaining herein.

I believe the first point to make is that this Court retains discretion to vacate leave to move for judicial review in appropriate cases. That this Court has such power was put beyond question in the **The State v. Secretary to Treasury and Others, Ex-parte Mponda and Others**, supra, where Mkandawire J, put the point thus:

“Both the Attorney General and Counsel Kaphale have formidably submitted that leave for judicial review granted herein should be set aside.. This Court has the inherent jurisdiction to set aside orders including orders granting permission to apply for judicial review, which have been made without notice being given to the defendant as was the case herein. The case authority in point is R v DPP ex parte Camelot PLC [1997] 10 Admin. L. Rep 93 – Order53.

Practice note 53/1-14/34 is also very clear on this point that such an application has to be made promptly after the person had discovered the grant of leave. Thus the power of this court to set aside leave, already given for judicial review is covered in several case authorities from various jurisdictions.” – [Emphasis by underlining supplied]

However, the power to vacate leave to move for judicial review has to be sparingly used. This is how it ought to be: see **R v. Customs and Excise Commissioners ex parte Eurotunnel PLC [1995] CLC 392** where the court said:

“It is obvious that the whole purpose of the leave stage would be violated if the grant of leave were to be regularly followed by an application to set aside”

Leave will be vacated where the application discloses absolutely no arguable case: see **In Re: Ministry of Finance, Ex-parte SGS Malawi Limited, Miscellaneous Civil Application Number 40 of 2003** (unreported) wherein Mwaungulu J, as he was then, said:

“..where given, the other party may apply to have the leave set aside because the application discloses absolutely no arguable case (R v. Secretary of State for the Home Department ex parte Khalid Al-Nafeesi [1990] C.O.D. 306) or because the applicant has not frankly disclosed material facts or material aspects of the law. (R v. Jockey Club

Licensing Committee ex parte Wright [1991] C.O.D. 306 – [Emphasis by underlining supplied]

Turning to the present case, I am not persuaded that it can be realistically argued that the application by the Applicants for Leave raises no arguable case. Firstly, it is significant to note that the main plank on which the Respondent rests its Summons to Vacate Leave is that “*The Applicants admit that duty was not paid*”. There is no merit in this argument and it has to be dismissed summarily. I have read and re-read the documents filed by the Applicants, including the affidavits and skeleton arguments, and in doing so, I found no reason for the Respondent’s contention. The Applicants have consistently maintained that duty in respect of the motor vehicles must be presumed to have been made by virtue of the motor vehicles being registered under the Road Traffic Act.

Secondly, the argument by the Respondent that there is uncertainty as to the sufficiency of interest of the Applicant cannot be sustained. The blue books in respect of the motor vehicles tell their own story: the Applicants are registered as the owner of the motor vehicles. In the circumstances, it seems to be inescapable that the Applicant have sufficient interest to pursue judicial review of the Respondent’s decision.

Thirdly, the Respondent have not at all sought to challenge the Applicants’ contention that the importer represented to them that he had paid duty in full to Respondent as required by law and that the Respondent duly issued CCCs in respect of the motor vehicles.

All in all, I see no merit in the grounds advanced by the Defendant in support of the Summons to Vacate Leave. To the contrary, the grounds merely serve to confirm, in my view, that serious legal issues are raised on the sparse and agreed facts of this matter to warrant the case to proceed to a substantive hearing of the judicial review of the Respondent’s decision. Consequently, the Respondent’s Application is dismissed with costs.

Pronounced in Chambers this 7th day of July 2015 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE