MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

JUDICIAL CAUSE NO. 62 OF 2016

BETWEEN:

THE STATE

AND

THE COMMISSIONER GENERAL OF THE MALAWI REVENUE AUTHORITY.....RESPONDENT

AND

***EX-PARTE:* HUSSEIN JUSSAB.....1ST APPLICANT**

NAZIR JUSSAB.....2ND APPLICANT

CORAM: THE HON. JUSTICE H.S.B. POTANI

Mr. W. Hara, Counsel for the Applicants

Mrs. B. Mangwela, Counsel for the Respondent

Mr. Kanchiputu, Court Clerk

RULING

Pursuant to Order 53 of the Rules of the Supreme Court (RSC) and through an *ex parte* application made on August 4, 2016, the applicant sought the leave of the court to commence judicial review proceedings for purposes of challenging the decision of the respondent made on June 27, 2016, to seize vehicles belonging to the applicants for non-payment of customs duty when the respondent knows that the importer of the vehicles was and is still under customs obligations to pay duty. Bearing in mind that the purpose of the requirement of leave is to eliminate frivolous,

vexatious or hopeless applications for judicial review without the need for a substantive judicial review hearing and having noted that under section 91 of the Customs and Excise Act the respondent can collect customs duty from either the importer or the person in possession of the goods in respect of which duty is payable, it proved somehow difficult for the court to assess whether or not the applicants have an arguable case hence guided by Practice Note 53/14/62, the court ordered an *inter partes* hearing on the application for leave so that the putative respondent should make representations as to whether or not leave should be granted.

In support of the application for leave, there are the affidavits of the 1st and 2nd applicant. The application is vigorously resisted by the respondent and in that regard reliance is placed on the affidavits of Catherine Maulana and Samuel Ridi Revenue Officers for the respondent in the Customs and Excise Division. The court also has been presented with spirited written and oral arguments from counsel for the parties.

It is imperative to state, at the set, that as counsel for the applicants rightly cautioned in his oral submissions, the court should at this stage not attempt to determine the substantive judicial review but only consider whether there is an arguable case for determination at a substantive judicial review stage. The approach the court has to take is well spelt out under Practice Note 52/14/62 as follows:

That inter partes leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing. The test to be applied by the Judge at that inter partes leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator's award (see ***Antaios Compania Naviera SA v. Salen Rederierna AB*** *[1985] A.C. 191 at 207) namely: if, taking account of a brief argument on either side, the Judge is satisfied that there is a case fit for further consideration, then he should grant leave.* [Emphasis supplied]

As mentioned earlier, the *inter parties* hearing was ordered in the light of section 91 of the Customs and Excise Act which allows the respondent to demand payment of customs duty from the importer or the person in possession of the goods and such being the case, the court formed the view that the applicants' case was weak and suspect. Thus, in order to avoid delving into issues fit for consideration at the substantive judicial review, the court at this stage will mainly focus on and consider whether on the facts of the case and in the light of section 91 aforesaid, the applicants have made out an arguable case fit for investigation at a substantive judicial review.

From the facts in totality, it is not in dispute that the applicants bought the vehicles from one Tonny Ngalande who imported them into the country and that the importer represented to the applicants that all customs duty was duly paid. As it turned out, duty was not duly paid prompting the respondents to demand payment from the applicants and issuing detention and seizure notices in respect of the vehicles. It also not appears to be not in dispute that the address or whereabouts of the importer are well known to the respondents.

It is contended by counsel for the applicants that by going for the applicants and not the importer without giving reasons in the bid to enforce payment of duty, the respondent acted unreasonably in the Wednesbury sense. In the submission of counsel, the respondent resorted to a more drastic course of action which calls for further probe by way of judicial review. On this point, reference has been to the case of **The State and The Malawi Revenue Authority *Ex Parte* Blantyre Printing and Publishing High** Court Principal Registry Judicial Review No. 11 of 2013 [Unreported] in which Mwaungulu J stated as follows:

The Taxation Act provides the Revenue [Authority] with many options. In my judgement, where there are many options, the citizen can properly query the decision why the Revenue Authority opted for a particular or onerous method. This, to my mind, is what the claimant seeks judicial review for. The matter ought to be tried.

While the pronouncement by the Honourable judge quoted above cannot be faulted or impeached on the facts of the case that was before the court, with due respect to counsel, it does not help the case for the applicants herein. In the understanding of this court, the options the Honourable judge envisaged were with regard to how to deal with a party that is liable to payment of levy and not necessarily as regards which party to go for in the enforcement of payment of duty. This can easily be discerned from what the court said earlier as follows:

One dominant development is that in certain circumstances, to which the claimant's situation is a perfect example, the revenue authority must call for a pre-action hearing where the citizen must bring all detail about the operation so that the revenue authority can determine the best way to ensure collectability of taxes. This seems to have been done here only that the Revenue Authority opted for collecting taxes at once with the prospect of immediate distress.

Therefore the dictum in **Blantyre Printing and Publishing** case cannot be the basis for granting the applicants leave to move for the judicial review they seek to pursue in this case. The two cases are distinguishable.

The applicants have also provided to the court a transcript for the case of **The State and The Commissioner General of Malawi Revenue Authority Ex Parte Chipiliro Phiri Anganile** High Court Principal Registry Miscellaneous Civil Cause No. 89 of 2002 in which the court faulted and set aside the respondent's decision to seize a vehicle belonging to the applicant in a bid to enforce payment of duty. The court arrived at its decision on the basis that the obligation to pay duty under section 91 of the Customs and Excise Act fell on the importer. Observably section 91 as applied in that case has since been amended by Acts No. 11 of 2003 and 8 of 2005. In its old version as quoted by the court in that case it read as follows:

> *(1) When any amount of duty has been underpaid...the person who should have paid such duty ...shall pay such amount...on demand being made by a proper officer.*

Presently the section as amended 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.*

As can be seen, at the time of the decision in the **Chipiliro Phiri Anganile** case, the respondent only had the importer to go for in order to enforce payment of duty while as the section stands now, the respondent has the option to go for the importer or the person in possession of the goods. The case therefore would not apply to the present case.

The other case the applicants have drawn the court's attention to in a bid to be granted the leave they seek is that of **The State v. The Commissioner General of the Malawi Revenue Authority Ex Parte Salim Suleman and Bilal Salim Sulemen** High Court Principal Registry Judicial Review No. 34 of 2015. The facts of that case bear striking similarity to those in the present case and counsel for the applicants, in fact, says the two cases are on all fours. In that case the court refused to discharge the leave it granted to the applicants to move for judicial review to challenge the decision of the respondent to seize for, alleged non-payment of duty, vehicles they bought from the same person from whom the applicants herein also

bought the vehicles the subject of these proceedings, that is, one Tonny Ngalande. The court by refusing to discharge the leave was actually saying that there was a case fit for judicial review and therefore the applicants beseech this court to likewise grant leave for judicial review.

To an extent indeed the facts in this matter are similar to those in the **ex parte Suleman** case but there is a striking difference in the facts on an aspect on which the decision the court would make in this matter would turn. Reading through the ruling of the court in the **ex parte Suleman** case, the respondent did not demonstrate that there were no Customs Clearance Certificates [CCCs] issued for the vehicles hence the court found that the respondent did not challenge the applicants' contention that the importer represented to them that he had paid duty and this was one of the reasons the court gave for sustaining the leave granted to the applicants *ex parte* to move for judicial review. In the present case, the facts in the affidavits filed by the respondent indisputably show that the respondent demanded from the applicants CCCs for the vehicles but they failed to produce any. The applicants have sought to argue that the vehicles having been registered by the Road Traffic Directorate is proof that duty was paid. According to counsel for the applicants, under the Road Traffic Act, a Motor Vehicle Registration Certificate is *prima facie* proof that due processes including production of CCCs were followed at the Road Traffic Directorate. When the court requested counsel to pin point the specific provision on the proposition, he made an undertaking to do so which was never to be. The court in the **ex parte Suleman** case seems to have agreed with the proposition when one reads the first paragraph of page 8 of the transcript of the ruling where it said:

> *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.* [Emphasis supplied]

It is the considered view of this court that if registration of a motor vehicle under the Road Traffic Act is proof that due processes including payment of duty were

followed such proof is rebuttable. In the present case, it is deposed in the affidavits filed on behalf of the respondents, and nothing to the contrary has been deposed by the applicants, that when a search was done at the Road Traffic Directorate, it was discovered that the vehicles were not in the registration system thereby discrediting the authenticity of the Motor Vehicle Registration Certificates relied on by the applicants. Therefore, the position of this court is that the applicants having failed to produce CCCs for the vehicles as evidence of payment of duty coupled with the absence of the vehicles in the Road Traffic Department Motor Vehicle Registration System tends to show that no duty was paid for the vehicles the subject of these proceedings and by virtue of section 91 of the Customs and Exercise Act which allows the respondent to demand payment of unpaid duty from either the importer of the person in possession of the goods in respect of which duty is unpaid, the applicants has no arguable case fit for judicial review as regards the respondent's decision to issue detention and seizure notices on the vehicles in order to enforce payment of duty as such the application to move for judicial review is dismissed.

As it has come to light, it is the same one Tonny Ngalande who imported the vehicles for which duty was allegedly not paid both in this case and in the ***ex-parte*** **Suleman** case, the court would in passing, implore the respondent to make deeper investigations in the scheme he uses to beat the system to the extent of obtaining Motor Vehicle Registration Certificates for vehicles which ought not be issued with such certificates.

The applicants' application having been abortive, the applicants are condemn in costs of the application.

Made this day of September 16, 2016, at Blantyre in the Republic of Malawi.

H.S.B. POTANI
JUDGE