

bought a motor vehicle a Freelander Land Rover Registration Number R761LKV which he imported into the country for his personal use in Malawi under duty free status. The plaintiff submitted his application for clearance and authority to waive import duty but the defendant refused citing the main reason that there was no transfer of ownership from previous owner as indicated on the registration certificate. Subsequently, the defendant sold the motor vehicle at an auction when the plaintiff failed to pay duty. By reason of the sale, it is submitted by the plaintiff that he lost ownership and use of the motor vehicle from August 2008 to date for which the plaintiff claims damages.

Particulars of the loss are as follows:

- Market value of the said vehicle in Malawi Kwacha equivalent to 2, 800 pounds
- Loss of use of the motor vehicle at the rate of MK8, 500 per day from August 2008 to the date of replacement of the said vehicle

The plaintiff is seeking the following:

- The sum in Malawi Kwacha equivalent to 2, 800 pounds as the date of payment or replacement of the said vehicle
- Damages for loss of use at the rate of MK8, 500 per day from August 2008 to the date of replacement of the said motor vehicle.
- Costs of the action

THE PLAINTIFF'S CASE

The plaintiff, Mr Elisha Vitsitsi, was the only witness paraded by the plaintiff's side. Upon taking oath, the witness told the court that he is a Lecturer at Bunda College of Agriculture and that he specialises in agricultural engineering. He adopted his witness statement as part of his evidence and tendered in evidence all exhibits attached thereto from EV1 to EV9.

In cross-examination, the plaintiff the plaintiff told the court that he went to United Kingdom for his PHD studies which he did not finish due to the death of his mother and son within a period of three

days. He told the court that he was granted leave to come back to Malawi to sort out issues following the death of his mother and son. He said he was in the United Kingdom for 10 months before events started unfolding. He told the court that upon purchase of the motor vehicle, he was issued with a hand written registration certificate, **EV 2a**. He told the court that in the United Kingdom, registration is done by hand. He admitted that there are also certificates that are well typed. He said he was given the hand written certificate by the seller of the motor vehicle, ATS Motor Company. He told the court that the seller does not work in government. He said **EV 2a** is dated 01/01/07. He told the court that **EV 3**, which is a certificate of permanent export was sent to him in Malawi. He said he wanted to use this certificate in his application for duty waiver since the purchase was done in the United Kingdom. The witness told the court that he met Mrs Mchepa (DW1) in March 2009. He said that the certificate was sent to him in June 2009 and that date of acquisition is shown to be 21-06-2007. The witness told the court that he does not agree with the certificate of permanent export on the date of acquisition. He, in other words, disputed the fact that he bought the motor vehicle on 21-06-2007. He told the court that between the seller and the government documents, the documents from the seller are the ones to be used herein. He advised the court to disregard the 21-06-2007 date of acquisition as government has no shops to sell goods. He said as per **EV 3**, the date of export was 30-04-2008 and that it arrived in Malawi on 27th May 2008, almost 11 months from the date of export.

The witness told the court that he is aware that for one to qualify for duty waiver in cases of this nature, he must have used the vehicle for a period of not less than 12 months. He denied that he used the motor vehicle before exportation for 11 months. He disputed the assertion from the defendant that he did not submit a registration certificate on the ground that he was not given.

The witness told the court that as per **EV 8** the reason for no transfer of ownership was because there was no registration certificate. He said he started using the vehicle on 1st January

2007. He told the court that SM Development Agents contacted him at the border and agreed with them to clear his motor vehicle. The witness told the court that he advised his agents to seek a duty waiver from the defendant. He said the vehicle was not cleared at Songwe border. He told the court that he drove the vehicle to his agents in Lilongwe. The witness denied the contents of the letter that was written by his agents. He said he drove the vehicle from Songwe on 27th and arrived at SM Development on 28th May 2008 as per **EV 6**. He disputed the assertion by the defendant that the motor vehicle arrived on 2nd May 2008 at Songwe Inland Port. He told the court that between 2nd May and 27th May, the motor vehicle was in transit from the United Kingdom to the port of Dar Es Salaam. He told the court that the date of shipment is indicated 22nd March 2008 as per the Bill of Lading. He told the court that as per the documents, the Songwe border stamped the documents on 30th April 2008 and Inland Port stamped them on 2nd May 2008. The witness insisted that he deposited the motor vehicle at SM Development Agents on 28th May 2008. He said upon the deposit, he was not given any document. He told the court that when the defendant seized the vehicle, it had the engine, disputing the assertion by his agents that the vehicle had no engine when it was seized.

He told the court that while in the United Kingdom in 2009, he sent his son to meet Mrs Mchepa. He told the court that he communicated with her through text message once in 2009. He said he was not aware that the motor vehicle was put on sale. He told the court that he was told to deposit MK200, 000 as duty, which he failed. He told the court that he never cleared the motor vehicle until its sale through the auction. He said he was in discussions with the defendant. He told the court that he did not declare the motor vehicle for purposes of duty as he was not advised by his agent to do so. He told the court that he did not submit any declaration. He told the court that it was wrong for the defendant to seize the motor vehicle when there were issues in contention. He told the court that the motor vehicle was seized from SM Development Agent.

In re-examination, the witness insisted that he bought the vehicle on 1st January 2007. He said the seller was the one to send necessary documentation to the UK Agency for issuance of the certificate of registration. He said for no reasons, he was not issued the certificate. He told the court that the motor vehicle was exported to Malawi in May 2008, arrived at songwe border on 2nd May 2008 and that he drove it himself to Lilongwe arriving on 3rd May 2008. He told the court that he asked the officer of the agent to apply for duty waiver. He told the court that his application was not approved as there was no change of ownership. The witness told the court that he did not declare for duty as he was not advised to do so. He said he wrote the defendant again to ask them consider him the duty waiver but no response came. He said he was told to pay MK200, 000 as duty through the manageress account which he refused as this was not a government account. He said the motor vehicle was surrendered at SD Management with the engine.

After re-examination, the plaintiff's side closed its case.

DEFENDANT'S CASE

The defendant paraded one witness, who answers to the name of Mrs Bertha Mchepa, a Customs Officer based at Kamuzu Airport as Deputy Station Manager. The witness adopted her witness statement as her evidence-in-chief and the exhibit attached thereto.

In cross-examination, the witness told the court that she had dealt with the plaintiff regarding his motor vehicle. She told the court that she did not deal with the plaintiff's application for duty waiver and that the same was handled by Patrick Kachingwe who is based in Blantyre. She said as per the letter written by Mr Kachingwe, the reason for rejecting the duty waiver application was lack of evidence of change of ownership. The witness told the court that she assisted the plaintiff after the rejection and she was not aware of any appeal against the rejection by the plaintiff. She told the court that the plaintiff came for an enquiry only and she was not aware of whereabouts of the motor vehicle at that point.

The witness told the court that the plaintiff wanted to know the procedure for duty waiver of a returning resident.

The witness told the court that she realised that the motor vehicle was already in Malawi when she saw it on the list of vehicles earmarked for auction. She said in her assistance to the plaintiff, she advised him to bring supporting documents. She said the plaintiff brought a copy of a permanent export and that she advised him to bring registration certificate. She told the court that she was not aware as to whether the permanent export certificate would suffice as she is not the one responsible for those issues. She told the court that for him to be accorded duty waiver, he was supposed to be resident in Malawi. She said that the enquiry was on procedures of duty waiver not knowing that the motor vehicle was already in Malawi. She told the court that she was invited by her boss, Mr Kachala, to a meeting on the same issue. She said at the end of the meeting she was advised to write a report. She told the court that she does not remember the defendant accepting responsibility. She told the court that she is not aware as to what happened to the appeal as the same is dealt with in a different office. She told the court that she was not aware as to whether the motor vehicle had the engine or not as she did not inspect it. She said she contacted the plaintiff when she saw his motor vehicle on the auction list. She denied asking the plaintiff to pay MK200, 000 but rather, it was the station manager. She said even motor vehicles on duty waiver status, a declaration form is required within 10 days. The witness told the court that she was not sure whether a sale can proceed in circumstances where an appeal is lodged by a taxpayer.

In re-examination, the witness told the court that she did not advise him that the export certificate was enough. She told the court that she advised him to furnish the defendant with registration certificate and other supporting documents. She said the time she was assisting him, she was not aware that the motor vehicle was already in the country and that duty waiver was declined. She told the court that the plaintiff was not honest. She told the court that had she known that the duty waiver

application was rejected, her advice could have been different. She told the court that there was no declaration from the plaintiff. She said the MK200, 000 was, as a matter of procedure, to be paid to the cashier.

After re-examination, the defendant's side closed their case.

I am aware of the standard of proof in civil cases, as well stated by Denning J, as he then was in the case of **Miller V Ministry of Pensions**¹, when he said the following:

"That degree is well settled. It must carry a reasonable degree of probability, not so high as is required in criminal cases. If the evidence is such that a tribunal can say 'we think it more probable that not' the burden is discharged but if the probabilities are equal it is not".

ISSUES FOR DETERMINATION

I have noted that both parties have come up with issues for determination. However, I am of the humble view that only two issues emerge from the facts of the present case. The issues are:

- (i) Whether in the circumstances, the plaintiff was entitled to duty waiver
- (ii) Whether the defendant was legally entitled to dispose of the said motor vehicle through an auction

THE LAW AND THE EVIDENCE

Customs Procedure Code 400.430 of the Customs and Excise Tariffs Order provides as follows:

"The following goods when imported by a person on his arrival in Malawi or within six months of that date or within such further period as the Commissioner General may allow, on a bona fide transfer of residence to Malawi when such goods are not intended for sale, commercial use or for disposal to any other person in Malawi, and are in such quantities and as the Commissioner General of such kinds considers reasonable:...

(c) Motor vehicles and caravans not exceeding two for each family or not exceeding one for an unmarried adult person who is

¹ [1947] 2AllER 372

employed, which has been owned and used by the person for not less than one year prior to importation or to the arrival of the person, whichever is the earlier; but so, however, that if the person lends, hires, gives away or otherwise dispose off such motor vehicle or caravan, he may be required to pay such duty on the motor vehicle or caravan as he would have paid at importation”.

From the Customs Procedure Code 430, the following conditions are to be satisfied by a returning resident for duty waiver:

- (a) The goods must not be for sale and not for commercial use nor intended for disposal to another person
- (b) The goods must be in reasonable quantities as determined by the Commissioner General
- (c) In case of motor vehicles and caravans, they must be owned and used by the importer for at least twelve months prior to importation

Reverting to the present case, I am of the considered view that conditions (a) and (b) are satisfied. The evidence adduced in court by the plaintiff, which was not disputed, was that the motor vehicle was to be used by the plaintiff and his family. Further, I am of the humble view that since it was only one vehicle, it fits in the description, “reasonable quantities”.

The most critical condition is on ownership and use by the importer for at least twelve months prior to importation. My reading of Code 430 is that a returning resident is not entitled to duty waiver, in case of motor vehicles and caravans, if there is no proof of ownership of the motor vehicle/caravan and if the same is not used by the importer for at least twelve months prior to importation.

Reverting to the present case, the plaintiff produced in evidence **EV 2a**, a purported registration certificate as evidence of ownership of the motor vehicle. The plaintiff told the court during cross examination that **EV 2a** was given to him by the seller of the motor vehicle, ATS Motor Company and not Driver and Vehicle Licencing Agency (DVLA) of the United Kingdom, a public body responsible for registration of motor vehicles and issuance of

driving licences. Perusal of **EV 2a** shows that it is manually done. When the same was presented to the defendant for the purposes of proving ownership, it was rejected. The question that I have to resolve is whether **EV 2a** is sufficient proof of ownership.

I am at pains to accept the assertion by the plaintiff that **EV 2a** is sufficient proof of ownership as certificate of registration. The plaintiff told the court that the seller gave him such a document, hand written, to constitute a registration certificate. The plaintiff accepted in cross examination that DVLA did not and has not until now issued him a proper registration certificate. I am of the considered view that the certificate of registration is to emanate from DVLA in case of the United Kingdom and not the seller. Issuance of the certificate of registration by responsible authorities in different countries serve different purposes. One of such purposes is that the responsible authorities are accorded an opportunity to check the history of the motor vehicle and certify that there are no any other suspicious or criminal activities with respect to the seller. Imagine a situation where sellers issue registration certificates without the knowledge of responsible authorities. I am of the humble view that situation will lead to thriving of criminal activities between or amongst countries. I do not accept the position of the plaintiff at all. Doing so, in my mind, will be tantamount to aiding and abetting criminal activities, which as a court, I am not prepared to do. The plaintiff even proceeded to tell the court in cross examination that the proper certificate of registration was not issued to him up to now due to other reasons, which I am not aware of as the plaintiff did not disclose. I am of the view that the onus of getting a proper certificate of registration rests with the plaintiff and not the defendant. One wonders why the defendant since 2008 has failed to contact the relevant/responsible authorities in the United Kingdom for the certificate. He has placed much reliance on a document that has no any value to him. The whole scheme raises suspicions. I do not think that the defendant is to accept any certificate of registration issued by sellers outside Malawi. Doing that will be dangerous for Malawi especially nowadays when business of selling second hand cars is one of the recognised

economic activities. I am also not convinced that the United Kingdom with its vast technological advancement can allow sellers to be issuing hand written registration certificate. I am of the humble view that the defendant was correct to reject **EV 2a** as certificate of registration. In the absence of any properly issued certificate of registration by the DVLA, it was and still remains difficult for the defendant to ascertain ownership of the said motor vehicle. I do not think that certificate of permanent export can be used as certificate of registration. In other words, there is no proof of change of ownership from the seller to the plaintiff, as to accord him enjoyment of the duty free status. In conclusion, on this point, the defendant cannot be faulted in rejecting **EV 2a**.

The second issue is on period the plaintiff used the motor vehicle before its importation. The law is clear that the period has to be at least 12 months. Reverting to the present case, I totally agree with the defendant that **EV 3**, which is certificate of permanent export shows the date of acquisition to be 21st June 2007 and not 1st January 2007, as **EV 1** will show. **EV 3** is a properly issued document by the DVLA. **EV 1** is a receipt issued by the seller, ATS Motor Company. I am inclined to believe the contents of **EV 3** than **EV 1**. **EV 3** seems to me a proper document from the responsible authority showing date of acquisition to be 21st June 2007. I am of the humble view that the plaintiff failed to explain to the court the reasons for such a serious discrepancy. I am of the view that the plaintiff was the one to correct whatever mess is appearing on the documents. He chose not to.

Further, **EV 3** shows that date of export from the United Kingdom is 30th April 2008, 10 months after its acquisition. I totally agree with the defendant that the required 12 months was not satisfied in these circumstances. It is therefore correct for the defendant to reject the plaintiff's application for duty waiver as a returning resident. I was not convinced with the explanations of the plaintiff on various dates on several documents. It was difficult to believe his story as he, in certain instances, failed to explain his own documents. The defendant was correct to reject his application

for duty waiver as the motor vehicle was used for less than 10 months.

Let me also mention that **EV 5**, which is a bill of lading shows that the motor vehicle arrived at songwe inland port on 2nd May 2008. **EV 6**, advice of goods received by SM Developments, shows that the motor vehicle was received on 27th May 2007. The plaintiff told the court that he drove the motor vehicle from songwe border on 2nd May and deposited the same at his agent on 3rd May 2008. This is contrary to **EV 6** which shows that his agent received the motor vehicle on 27th May 2008, almost a month after its arrival in the country. I have to mention that the plaintiff was at pains to explain this development. He did not even invite his agents as witnesses to explain this discrepancy. This made the defendant to reasonably conclude that the plaintiff tampered with the motor vehicle before he took it to his agents. Looking at this evidence, I am of the view that the plaintiff failed to explain the whereabouts of the motor vehicle for a month. It was even up to the defendant to institute proceedings against him for contravening customs law, in the absence of any convincing reasons.

Having decided that the plaintiff was not qualified for duty waiver as a returning resident, I have to decide whether the actions of the defendant in selling the motor vehicle were legal. The plaintiff was advised of the rejection through a letter dated 12th August 2008, which is **EV 8**. In my considered view, it was required of the plaintiff now to commence processes of paying duty to the defendant, which he did not. There was a mention of appeal. I do not think that lodging of an appeal acted as a stay of payment of duty. The plaintiff was still under a continuous obligation to pay duty. The unfortunate thing is that the plaintiff did not even declare the motor vehicle for duty purposes. It was adduced in evidence by the defendant witness that whether goods are under duty waiver or not, a declaration has to be made. This was not disputed by the plaintiff. In his response, he accepted that he failed to declare as he was not advised by his agent, SD Management. I am therefore at pains to understand why the plaintiff wants the defendant to bear responsibility of the

negligence of his agents. Hence, the defendant was at liberty to auction the motor vehicle under Section 39 (1) of the Customs and Excise Act.

CONCLUSION

In conclusion, it is my finding that the plaintiff did not provide a proper registration certificate to the defendant. Secondly, it is my finding that the plaintiff did not use the motor vehicle for at least 12 months as required under the law for him to qualify for duty waiver as a returning resident. Lastly, the defendant was within the law when they auctioned the motor vehicle for non-payment of duty. I therefore dismiss the plaintiff's action in its entirety.

COSTS

I also condemn the plaintiff in costs.

MADE IN OPEN COURT THIS 16TH DAY OF AUGUST 2018 AT LILONGWE REGISTRY, LILONGWE.



JOSEPH CHIGONA

JUDGE