

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
REVENUE DIVISION
JUDICIAL REVIEW CAUSE NO. 24 OF 2017**

**THE STATE
AND**

**THE INSPECTOR GENERAL OF POLICE1ST RESPONDENT
THE COMMISSIONER GENERAL OF THE
MALAWI REVENUE AUTHORITY 2ND RESPONDENT**

EX-PARTE:

HONOURABLE KAMLEPO KALUA APPLICANT

CORAM: HON. JUSTICE R. MBVUNDULA

Hara, Counsel for the Claimant

Maulidi, Chisiza, Counsel for the 1st Respondent

Mwangwela, Counsel for the 2nd Respondent

Chimang'anga, Official Interpreter

RULING

In this judicial review the applicant seeks some orders, declarations and reliefs to the effect that certain decisions taken by the respondent affecting the applicant are unreasonable, actuated by malice, perverse, malicious, politically influenced, an abuse of office and of prosecutorial discretion and a violation of the applicant's right to liberty, privacy, property, security of the person under section 43 under the Constitution. The decisions complained of are presented as follows:

- 1 "The prosecutorial decisions of the Respondents causing the search, and plotting the arrest of the Applicant regarding Motor vehicles Jeep Grand Cherokee Registration number CS31-MK GP, Chassis Number IJ8HDE8MO5Y5743 and Mercedes Benz Chassis Number WDD2040222R00207 Registration Number RU5734..."
- 2 "The prosecutorial decisions of the Respondents causing the search, and plotting the arrest of the Applicant regarding his son's Motor vehicle Toyota Land Cruiser V8 Registration Number KA89669..." (which belongs to the applicant's son, Penjani Fred Kalua).

The applicant ultimately seeks an order quashing the decisions in their entirety, further or other relief and an order for costs. The application is opposed by both respondents.

The applicant deposes that he is, *inter alia*, a veteran politician and a member of the Malawi Parliament elected in 2014 on a People's Party candidature. He states that he served the Public Affairs Committee and that he was part of a team that inquired into the procurement of maize between the governments of Malawi and Zambia, at the centre of which, he says, was Dr. George Chaponda the then Minister of Agriculture under the Democratic Progressive Party led government, and that he has at all material times been a constructive critic of the current government.

It is the applicant's account that on or around 25th April, 2017, Maganizo Chinkono, a Senior Tax Investigations Officer at the Malawi Revenue Authority, made an application to the Blantyre magistrate court, by affidavit, for a search warrant under section 15 of the Customs & Excise Act, alleging that the applicant imported the aforesaid three motor vehicles into

Malawi without paying customs duty and that the same were in the applicant's custody at Nkolokosa in the city of Blantyre. Mr Chinkono's affidavit is produced and marked KK 4. Based on the foregoing, the court issued the search warrant (), which was subsequently discharged by the same court with an order (KK 6) prohibiting the seizure and detention of the vehicles, which order, according to the applicant, the 2nd respondent did not comply with for the ostensible reason that the 1st respondent had obtained another search warrant in regard to the same vehicles and as such whereas the 2nd respondent had no problem releasing the vehicles they could not do so because of the second search warrant. KK 7 is a copy of the search warrant obtained by the police.

The applicant laments that in obtaining the search warrant the 2nd respondent did not disclose that there was due compliance with customs laws in the process of clearing the motor vehicles despite the 2nd respondent having all this information in their custody. Further that the 2nd respondent failed to disclose that the applicant as a Member Parliament was privileged to import two motor vehicles into the country duty free with the approval of the Commissioner General.

Following the granting of the search warrant to the 2nd respondent, so the applicant deposes, on the night of 26th April, 2017, dispatched Mr Chinkono and a team of armed police officers and customs officers to the applicant's house at Nkolokosa to search for the three motor vehicles, and subsequently placed an embargo on the Jeep Grand Cherokee. **KK 5** is a copy of the embargo. He states that the officers also went to Penjani's residence at Namiwawa in search for the motor vehicles.

In relation to the search Mr Chinkono informs the court that the 2nd respondent received allegations by an informant that the applicant was in possession of various motor vehicles which had not been properly cleared with customs. On that basis the 2nd respondent obtained a search warrant from the magistrate court at Blantyre and launched investigations into the said allegations, which investigations revealed that the applicant imported into Malawi two motor vehicles, namely a Mercedes Benz registration number RU 5734 Chassis number WDD2040222R00207 and a Jeep Registration Number CS31-MK GP Chassis Number IJ8HD8MO5Y5743 and the applicant was also in possession of a Toyota Land Cruiser V8 Registration number KA 8966.

The applicant believes that the 1st and 2nd respondents are working hand in hand in plotting to cause searches as well as the arrest and prosecution of the applicant and that the same are being orchestrated by the government. He also believes that the 2nd respondent deliberately refused to release the motor vehicles in order to allow the 1st respondent to get search warrants and seize the motor vehicles already detained. In this connection he tells the court that on 29th April, 2017, Penjani received communication and telephone calls from Hon Harry Mkandawire who indicated that Minister Hon Kondwani Nankhumwa and member of the Democratic Progressive Party who is also the Leader of the House in the National Assembly had informed him that there was an impending arrest of the applicant over the weekend beginning 29th April, 2017. The applicant therefore believes the foregoing shows that the decisions of the respondents are actuated by bad faith, political influence, are wednesbury unreasonable in an open and democratic society. The applicant also believes that the searches to his home and personal property and that of his son are motivated by the irrelevant consideration of his strong stand against the government and therefore made in bad faith. I should promptly point out that these allegations are mere hearsay and not evidence that the allegation was true. It is cardinal that an affidavit shall only contain facts which the deponent is able to prove of his own knowledge. Bearing in mind that the affidavits were sworn prior to the promulgation of the Courts (High Court) (Civil Procedure) Rules 2017 Order 41 rule 5(1) of the Rules of the Supreme Court is authority for this proposition, as well as *National Democratic Alliance v The Electoral Commission and others* [2004] MLR 217. However the 2017 Rules have a similar provision under Order 18 rule 6 (1). The applicant, his son as well as Hon Mkandawire cannot, by reason of the rule against hearsay, testify to the fact that such a decision had been made as they all only heard about it from someone else.

The applicant asserts that the two motor vehicles belonging to him were cleared on a duty free basis. In this respect he states that on 17th November, 2014, the 2nd respondent approved the clearance of the Mercedes Benz (exhibit KK 1 is a copy of the approval), and that on 16th November, 2015, the 2nd respondent approved a similar application in respect of the Jeep Grand Cherokee, KK 2 being a copy of that approval. That the vehicles were cleared as alleged by the applicant is disputed by the 2nd respondent. In his affidavit Mr Maganizo Chinkono states that the mere fact that the Commissioner General of the Malawi Revenue Authority granted approval does not mean that the vehicles were actually cleared as approved. He states that in respect of the Mercedes Benz, although the same was cleared with customs, the applicant was instructed to pay a fine of K300, 000.00 for clearing a motor

vehicle that was imported on a Temporary Importation Permit (TIP) and there was no evidence that the said amount was paid before clearing the said motor vehicle. And as for the Jeep Mr Chinkono states that although the applicant obtained approval for its duty free clearance the applicant did not clear it with customs such that it remains under customs control until all formalities are duly complied with. Mr Chinkono states that it is an offence to use a motor vehicle which has not been cleared with customs, and that the motor vehicle is liable to seizure. These assertions by Mr Chinkono have not been disputed by the applicant. Thus the 2nd respondent believes that in view of the above the applicant has no cogent reason for seeking the Judicial Review nor cogent evidence to substantiate the serious allegations made against the 2nd respondent. The 2nd respondent also believes that the 2nd respondent has the legal mandate to conduct searches in cases of suspected tax evasion or non-compliance with customs laws, and to exercise the powers within the customs laws with respect to cases of tax evasion and non-compliance with the said laws, and further that in light of the averments above, the present proceedings are bent at suffocating the process of the 2nd respondent in the discharge of its duties under the customs laws. The 2nd respondent therefore prays that the application for judicial review herein be dismissed for being unarguable, frivolous, vexatious and purely an abuse of the court process as the 2nd respondent acted reasonably and within its legal mandate under the customs laws, the warrants of search having procedurally obtained and executed and not being neither illegal nor irrational.

The 2nd respondent also prays for damages as the *ex-parte* stay order at the leave stage in this matter was wrongfully obtained, and costs of this action.

The Toyota Land Cruiser is owned by the applicant's son Penjani Fred Kalua who, according to the applicant, holds title and ownership thereof having changed ownership into his name in December, 2014. The applicant asserts that the 2nd respondent could easily have established this fact by accessing records at the Road Traffic Directorate as MRA and the Directorate are electronically connected. KK 3 is a copy of the registration certificate of the Land Cruiser. In regard to the Land Cruiser Mr Chinkono avers that their investigations were not completed as they were not able to inspect the chassis number of the motor vehicle because the keys for the said vehicle were not available and the applicant could not provide them with the keys since at that time the applicant had obtained an order cancelling the search warrant obtained to establish the status of the vehicles. He states that that notwithstanding when they inspected the records of motor vehicle KA 8966 (which the Land Cruiser bears),

at the Road Traffic Directorate so that they could get hold of the chassis number which could then be used to search in the 2nd respondent's customs system to verify if the motor vehicle was cleared by customs, it was discovered that the said registration number was for a Nissan Vanette belonging to a Mr. Mwalwanda and not the said Land Cruiser. In the premises, Mr Chinkono avers, it is therefore still necessary for the second respondent to verify the status of the Land Cruiser with customs so that they establish whether the same was duly cleared with customs, and that in view of the circumstances the search conducted by the 2nd respondent revealed information which was credible to deduce reasonable suspicion of alleged non-compliance with customs laws.

The applicant takes great exception with the fact that the 2nd respondent targeted the Land Cruiser when it did not belong to him. He seems to be of the view that only those vehicles which belong to him should have been the subject of the search warrant. However, as I understand it, the tip the second respondent received was that the applicant had in his possession vehicles which had not been cleared and the Land Cruiser was one of the vehicles he then had in his possession despite who owned them. It does not seem then that there grounds for treating that vehicle as an exception since it was one of the vehicles in his possession. Indeed the warrant of search obtained by the 2nd respondent refers to the "vehicles by or in respect of which offences of tax evasions" which are "in fact, or according to reasonable suspicion, at the residential premises of" the applicant. There is no reference to ownership thereof.

For the 1st respondent there is an affidavit sworn by Barbra Mchenga, Officer in Charge of INTERPOL in the Malawi Police Service (MPS), who deposes that around April 2017 MPS received a tip that the applicant was in possession of some motor vehicles suspected to have been stolen in the Republic of South Africa (RSA) and that their preliminary investigations revealed that the applicant owned a Mercedes Benz motor vehicle registration number RU 5437 bearing chassis number WDD2040222R0002072 which was reported to have been stolen from RSA on 5th October 2014 and the details of the motor vehicle were posted on the INTERPOL stolen motor vehicle database on 9th October 2014.

The deponent avers further that the vehicle is registered in the name of the applicant and the electronic records at the Road Traffic Department indicate that there is a police clearance report number BL001799.

In addition to the foregoing, so states Ms Mchenga, there were other motor vehicles which were subject to police investigations including a Jeep Grand Cherokee-CS1MKGP and a Toyota Land Cruiser V8 and it was recommended in their report that the two vehicles “had to be assessed for evaluation purposes and duty to be demanded”. She states that it was further recommended that the investigations should be extended to RSA in a bid to verify the authenticity of all documents presented. She emphasises that the police acted in regard to these vehicles as they would in all cases where there is suspicion of criminal conduct and that this was within the mandate of the police and therefore disputes the allegations of malice and bad faith.

This court had occasion to consider the law pertaining to the exercise of investigative and prosecutorial discretion and its amenability to judicial review in *The State and The Commissioner General of the Malawi Revenue Authority, ex parte Yeremia Chihana* Judicial Review Cause No 17 of 2015 where it was shown that in the absence of dishonesty, *mala fides*, or some exceptional circumstance, a decision to investigate and prosecute a suspect cannot be challenged by way of judicial review.

In *The State and Director of Anti-Corruption Bureau ex p Tayub and others* Judicial Review Cause No. 29 of 2017 (a case where corrupt practices were alleged, but nonetheless relevant to the present) the court said:

“... the court would wish to state with a lot of emphasis that conducting investigative and prosecutorial processes lies in the discretion of the investigative and prosecutorial authority ... Such being the case, the court should only stop the authority in its tracks, by way of judicial review, if there is something latently and glaringly amiss with the processes undertaken.”

The court further said:

“The court entirely agrees on the need for caution when faced with a case of this nature considering that the decision to investigate and prosecute those suspected to be involved in corrupt practices is the preserve of the respondent. It is the considered estimation of this court that it would be against public policy and indeed public interest to have those suspected to indulge in corrupt practices brought to book if the court unnecessarily intervenes in the investigative and prosecutorial processes under the guise of judicial review. The court would also hasten to say that the law through the criminal justice system provides a forum the respondent’s investigations and decision to prosecute would be tested and if found wanting, the applicants would be acquitted.”

This court in *Yeremia Chihana's case* held that unless the applicant establishes illegality, irrationality, impropriety, dishonesty, *mala fides*, or some other exceptional circumstance, on the part of the investigative and prosecutorial authority, the prosecutorial process must not be curtailed by judicial review.

In the case now under consideration, notwithstanding that the applicant is an outspoken critic of the government, the respondents have demonstrated that there are matters warranting some investigation, that there is reasonable suspicion warranting further probe as to what may have transpired. It is quite apparent from the affidavits of Mr Chinkono and Ms Mchenga that there are alleged violations of the law relating to the vehicles that are worth investigating. Mr Chinkono has shown, in the case of the Mercedes Benz belonging to the applicant, that not all the conditions upon which the duty free clearance was approved were met. In that case there is no evidence that the K300 000.00 fine was paid. The vehicle is therefore still under customs control. In the case of the Jeep Mr Chinkono shows that there is no evidence that duty was at all paid. In both cases the applicant has not disputed what Mr Chinkono alleges, or brought evidence proving payment. And in respect of the Land Cruiser that the registration number of the vehicle is assigned to a Nissan Vanette belonging to another raises reasonable suspicion about its status, including whether or not it was duly cleared with customs. On the part of the 1st respondent it is the court's view that it is not unreasonable for the police to follow up on a tip that some or all of the vehicles may have been stolen and to institute investigations in that respect. On the contrary it would be dereliction of duty on the part of the police not to follow up and investigate an alleged crime reported to them. The issue of political interference has already been dealt in that there is no evidence thereof as no person with first-hand information provided evidence to this court. This court therefore finds nothing in the conduct of the respondents which could reasonably be said to be actuated by dishonesty, *mala fides*, or some exceptional circumstance warranting the court's interference. The evidence does disclose a reasonable basis for the respondents' respective decisions to investigate the matters in question.

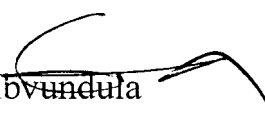
This court is ultimately of the view that the respondents should not be hindered in their tracks, by way of judicial review, as there is nothing latently and glaringly out of order with the processes they have undertaken. The respondents having the mandate to take the course they did, and their conduct not amounting to a violation of the applicant's rights, constitutional or otherwise as they were carrying out their lawful functions, this court declines to grant the orders, declaration and reliefs sought by the applicant.

In granting leave to move for judicial review this court also granted the applicant an order restraining the respondents from proceeding against the applicant as far as the vehicles were concerned until a further order of this court. The said order is hereby discharged in its entirety.

The 2nd respondent prayed for damages arising from the granting of the order now vacated. The said prayer is granted. The damages will be assessed by the Registrar.

The applicant shall also bear costs.

Made in chambers at Blantyre this 22nd day of May 2018.


R Mbvundula

JUDGE