



**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**REVENUE DIVISION**  
**JUDICIAL REVIEW CAUSE NUMBER 2 OF 2022**

**BETWEEN:**

ULEMU PRISCILLA CHİYENDA

CLAIMANT

AND

THE COMMISSIONER GENERAL OF  
MALAWI REVENUE AUTHORITY

DEFENDANT

**CORAM: HONOURABLE JUSTICE JOSEPH CHIGONA**

MS. CHIHANA, OF COUNSEL FOR THE CLAIMANT

MS. FRANCISCO, OF COUNSEL FOR THE DEFENDANT

FELIX KAMCHIPUTU, COURT CLERK

**CHIGONA, J.**

**JUDGMENT**

[1] The claimant, Ulemu Priscilla Chiyenda, commenced the present judicial review proceedings against the defendant. I granted the claimant permission to apply for judicial review after making a finding that the issues raised required further enquiry.

[2] The claimant is aggrieved with the decision of the defendant to sell her motor vehicle Vitz IT9651-Chassis Number SCP90-5119651, without following due process of the law. The claimant

is also aggrieved with the total disregard of her right to be heard before selling the motor vehicle thereby violating her right to property and not to be arbitrary deprived of the same.

[3] The claimant seeks a declaration that the decision of the defendant is unconstitutional, ultra vires and unreasonable in terms of wednesbury principle for not complying with the requirements under section 43 of the Constitution. She is also seeking a declaration that the said decision is unconstitutional as it violates her right to own property under section 28 of the Constitution. Further, the claimant is seeking a declaration that the decision is illegal, ultra vires, irrational, procedurally improper and unconstitutional. She seeks a like order to certiorari quashing and rescinding the said decision, and an order for costs and damages.

### **FACTS AND CLAIMANT'S CASE**

[4] The facts of the case, as contained in the sworn statement in support, are that the claimant purchased the said motor vehicle from Japan. The motor vehicle arrived at Songwe border in the month of April as evidenced by copies of a bill of lading, export certificate, telegraphic transfer marked as **TC1**, **TC2**, and **TC3** respectively. That at the border, it is stated that duty was paid amounting to MK1,200,000 and MK300, 000 storage charges as evidenced by copies of the assessment notice and proof of payment marked as **TC4** and **TC5** respectively.

[5] The claimant avers that at Songwe border, she was informed that the motor vehicle was to cleared at Chitipa border for revenue target purposes. The claimant complied with the directive and moved the motor vehicle to Chitipa where upon a second valuation, she was asked to pay an additional duty amounting to MK430, 000.

[6] The claimant avers that she appealed against the valuation and payment of the additional duty. However, she submits, that while waiting for a response on the appeal, the defendant unlawfully sold the motor vehicle at an auction held at Songwe border. Copies of the valuation appeals committee form, first notice of appeal, second notice of appeal are exhibited and marked **TC6**, **TC7** and **TC8** respectively.

[7] The claimant avers that her motor vehicle does not form part of the list of motor vehicles advertised for purposes of notifying the public and the owners of the auction sale. The claimant has exhibited the copy of the list of auctioned motor vehicles marked as **TC9**.

[8] During the hearing of the present application, counsel for the claimant adopted all the supporting documents to the present application including the sworn statement and skeleton arguments. Counsel reiterated that in resolving the present application, this court must have recourse to section 39 of the Customs and Excise Act.

### **THE DEFENDANT'S CASE**

[9] The defendant adopted the sworn statement in opposition and skeleton arguments filed in support of their case. The sworn statement is sworn by Victor Msesa, a Station Manager at Songwe border. The deponent avers that in April 2021, the defendant's Songwe border received the said motor vehicle which was imported in the name of Lawrent Banda. The deponent avers that the said motor vehicle has been at the border for 7 months, from April 2021 to 9<sup>th</sup> December 2022 without duty being paid.

[10] The deponent avers that the notice of sale was published in the Government Gazette Notice Number 163 dated 29<sup>th</sup> October 2021 as exhibited and marked **MRA1**. The deponent submitted that the said motor vehicle was sold at a public auction at Songwe border because the said motor vehicle stayed at the border beyond the 30-day customs period.

[11] The deponent avers that on 13<sup>th</sup> December 2021, three days after the sale of the motor vehicle, an agent from Townlink Freight, Louis Banda, presented at the border declaration number C17 of 6<sup>th</sup> August lodged at Chitipa Office. That the agent failed to explain the reasons why the declaration was lodged at Chitipa border and not Songwe border which was the importing station where the motor vehicle was stationed. The Declaration Form is exhibited and marked **MRA2**.

[12] The deponent avers that capturing of a declaration in the system is done remotely by a Customs Clearing Agent independent of Customs officials' interference. That accordingly, the importer of the motor vehicle was supposed to pay duty at Songwe border and not Chitipa border as the vehicle had not at any time been at Chitipa border. The deponent avers that the importer opted for Chitipa border despite having a declaration that puts Songwe border as the entry point. The deponent referred to the claimant's exhibit **TC4**.

[13] The deponent avers that at the time the motor vehicle was sold at the public auction, it had accumulated storage charges in the sum of MK1, 070, 000 as evidenced by a copy of the worksheet marked as **MRA3**. The deponent avers that at no point did the defendant advise the importer Mr.

Lawrent Banda or his clearing agent to lodge the declaration at Chitipa border for any reasons and that the importer was to provide evidence. The deponent avers that it is a matter of law that goods are cleared at their nearest border and that what the importer did was unreasonable and an anomaly to have the motor vehicle cleared at Chitipa border.

[14] The deponent avers that despite the gazette public notice that published the goods that were sold at the public auction at Songwe border, there was no any objection raised by the importer stopping or preventing the defendant from exercising its power of sale.

[15] During the hearing of the application, counsel for the defendant reiterated what the deponent stated in his sworn statement with regard to facts surrounding the sale of the motor vehicle. Counsel submitted that for the notice published through the Government Gazette, reliance was placed on section 39 of the Customs and Excise Act. Counsel submitted that the Act uses the words 'may' signaling a discretion on the part of the defendant. Counsel however admitted that the said motor vehicle was not included in the gazetted notice. She submitted that the court has to take into consideration the totality of the evidence in this matter as the claimant is responsible for the confusion that resulted in selling of the motor vehicle. Counsel referred to section 29(1) (a) of the Customs and Excise Act that refers to nearest port of importation and that breach of this provision by the claimant brought the confusion.

[16] In reply to what the defendant submitted, counsel for the claimant submitted that the reason advanced by the defendant for the sale of the motor vehicle was that the motor vehicle was at Songwe border beyond the allowable period of 30 days. Counsel pointed out that the reason in the purported Gazette is nonpayment of duty. These are different reasons from the defendant. Counsel further submitted that the motor vehicle is not included in the Gazette.

[17] Counsel submitted that the use of 'may' in section 39 of the Customs and Excise Act is not to be used to deprive a claimant of her or his property rights as enshrined in the Constitution. Counsel submitted that the defendant has a digital system and that before conducting the said auction sale, the defendant was to conduct due diligence on all listed items to avoid selling items whose duty was paid. As per section 43 of the Constitution, counsel believes that the claimant was to be accorded a chance to be heard. Counsel finally reiterated the fact that the claimant was not aware of the auction sale conducted by the defendant.

## THE LAW AND ANALYSIS

[18] The starting point is the Courts (High Court) (Civil Procedure) Rules, 2017. Order 19 rule 20 provides for grounds in which a person can apply for judicial review:

- “(1) Judicial review shall cover the review of—
- (a) a law, an action or a decision of the Government or a public officer for conformity with the Constitution; or
  - (b) a decision, action or failure to act in relation to the exercise of a public function in order to determine—
    - (i) its lawfulness;
    - (ii) its procedural fairness;
    - (iii) its justification of the reasons provided, if any;
- or
- (iv) bad faith, if any,  
where a right, freedom, interests or legitimate expectation of the applicant is affected or threatened.
- (2) A person making an application for judicial review shall have sufficient interest in the matter to which the application relates”.

[19] I remind myself that judicial review, as stated in many cases, is aimed at reviewing the decision-making process and not the merits of the decision itself. It is important to remember in every case, that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected, and that it is no part of the judiciary or individual judges for that of the authority constituted by law to decide the matters in question. Thus, a decision of an inferior court or a public authority, may be quashed where the court or authority acted without jurisdiction, or exceeded its jurisdiction, or failed to comply with the rules of natural justice in a case where those rules are applicable or where the decision is

unreasonable in the Wednesbury sense. The function of the court is to see that lawful authority is not abused by unfair treatment<sup>1</sup>.

[20] Reverting to the present case, the question that I have to resolve is whether the decision of the defendant to sell the claimant's motor vehicle followed the due process of the law. To begin with, it is not in dispute that the claimant imported a motor vehicle into Malawi. The value of the said motor vehicle as per **TC3**, payment advice Outward Telegraphic Transfer, is USD1, 300. This amount is also confirmed by **TC5**, Customs and Declaration Form 12.

[21] Both parties herein referred to section 39(1) of the Customs and Excise Act which provides as follows:

“The Controller may cause any goods which are not entered within the period provided or sold under section 38(2) or are not lawfully removed from a customs warehouse within the period allowed under section 38(4) to be sold or resold by public auction or by tender after not less than one month's notice thereof being given in the Gazette.”

[22] My reading of section 39(1) of the Customs and Excise Act shows that for the defendant to conduct a public auction of goods/items whose duty remain unpaid after prescribed customs period, there is need for a notice of not less than one month. The law demands that this notice be gazetted. Reverting to the present case, the claimant's argument is that the said motor vehicle was sold without according her an opportunity to be heard. The defendant has argued that the notice as demanded by section 39(1) of the Customs and Excise Act was provided in the gazette as evidenced by Exhibit **MRA1**.

[23] During the hearing of the application, counsel for the defendant, at first, referred this court to **MRA1** where a motor vehicle Toyota Vitz, IT 8011 is appearing on the list of motor vehicles to be sold at Songwe Border. The reason indicated for the sale is non-payment of duty. However, it has to mentioned that the claimant's motor vehicle is not the one listed as Toyota Vitz, IT 8011.

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<sup>1</sup> JAMADAR-V-ATTORNEY GENERAL [2000-2001] 175, PP 179-180. See also BLANTYRE CITY ASSEMBLY-V-KAM'MWAMBA & 6 OTHERS [2008] MLR 21, P24; COUNCIL OF CIVIL SERVICE UNIONS-V-MINISTER OF CIVIL SERVICE [1985] AC 374.

The claimant motor vehicle is Toyota Vitz, IT 9651. When counsel for the defendant was asked by the court to explain this anomaly, counsel admitted that the said motor vehicle, Toyota Vitz, IT 9651, is not listed, contrary to what Mr. Victor Msesa deponed in paragraph 5 of his sworn statement in opposition that notice was given to the public through the gazette. In essence, counsel for the defendant admitted that **MRA1**, which is the gazette, does not include Toyota Vitz, IT 9651.

[24] I am of the considered view that the defendant has no defence at all in this matter. From the admission, it is clear to me that the defendant did not follow the dictates of section 39(1) of the Customs and Excise Act. The law demands notice of not less than a month before auctioning goods whose duty was not paid. This was not done. Instead, the defendant through Mr. Victor Msesa, exhibited a notice, **MRA1**, knowing that the same does not capture the claimant's motor vehicle, Toyota Vitz, IT 9651. I am even baffled by this action by the defendant. I am of the view that this was deliberately done to mislead this court. The defendant knew that they did not follow section 39(1) of the Customs and Excise Act. Hence, the admission by counsel for the defendant.

[25] As I stated in **DENNIS GILINJALA v THE COMMISSIONER GENERAL OF MALAWI REVENUE AUTHORITY**<sup>2</sup>, the reason for a notice not less than a month is to accord last chance to the taxpayers whose goods are to be auctioned to try to resolve their issues with the defendant before their constitutional right to own property is taken away. It is therefore imperative at all times that the defendant must follow the dictates of the law. The framers of the law had the above objective in mind when they demanded such a notice. It is not even correct for the defendant to state that section 39(1) of the Customs and Excise Act uses the word "may" to denote a discretion. I am at pains to accept that argument. We are dealing with constitutional right to own property. To interpret section 39(1) of Customs and Excise Act as the defendant has done is tantamount to condoning breach of the constitutional right to own property. I am afraid that I am not ready to adopt such an interpretation. It is therefore my finding that the decision of the defendant to sell the claimant's motor vehicle Toyota Vitz Chassis Number SCP90-5119651, IT 9651, was illegal and procedurally unfair.

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<sup>2</sup> Judicial Review Cause Number 4 of 2020

[26] The sworn statement in support of the application, paragraph 6, the claimant through counsel avers that a payment of MK1,200, 000 representing duty and MK310, 000 representing storage fees was made as evidenced by the proof of payment exhibited as **TC5**. The total amount paid translates to MK1, 510, 000. The defendant has not disputed such a payment as deponed by counsel herein. What this means is that the defendant received this amount from the claimant as duty and storage fees. In the present circumstances, I am of the considered view that this amount ought to be refunded to the claimant as its objective was not fulfilled. I therefore order the defendant to refund the claimant the sum of MK1, 510, 000 paid as duty and storage fees. The payment to be made within the next 30 days. The claimant to produce valid receipt(s) of payment as evidence before the refund is processed.

[27] I am aware of the argument advanced by the defendant that the claimant is the source of the confusion since she transferred through her clearing agent the motor vehicle to Chitipa Border. The defendant submitted that there is no proof that the claimant was advised to transfer the motor vehicle to Chitipa Border for revenue target purposes. The defendant argues that the motor vehicle was supposed to be cleared at Songwe Border as the nearest station pursuant to section 29 (1)(a) of the Customs and Excise Act. While I totally agree with counsel for the defendant that there is no evidence that the claimant was advised to move the motor vehicle to Chitipa Border, I am at pains to agree with the assertion that the claimant is responsible for the confusion. My understanding is that the defendant operations are computerized and that there is share of information in this computerized system. Definitely, the defendant was supposed to undertake a due diligence to verify the payment of duty and storage fees with regard to motor vehicle IT 9651.

[28] Further, the claimant has submitted that after re-evaluation of the duty at Chitipa Border, she was informed to pay additional amount of MK430, 000 as duty. The claimant being aggrieved by this decision, appealed to the Commissioner General through a letter dated 3<sup>rd</sup> December 2021 exhibited as **TC7**. The claimant did not get a response from the Commissioner General. I am of the considered view that had the Commissioner General acted on the letter of appeal, he could have resolved the issue of having the motor vehicle transferred between border stations. But as things were, the Commissioner General did not act on the appeal until the sale by auction on 10<sup>th</sup> December 2022 as the sworn statement of Victor Msesa, paragraph 6, shows. However, I have to



mention that it seems there is a clerical error. The auction sale was on 10<sup>th</sup> December 2021 and not 2022.

[29] To make matters worse for the defendant, it seems to me that Chitipa Border officers received the documentation from the claimant and after evaluation, ordered her to make an additional payment of MK430, 000. The officers at Chitipa Border did not interrogate the claimant why she was clearing the motor vehicle imported through Songwe Border. If the defendant officers were serious in the discharge of their duties, they could have advised the claimant to go back to Songwe Border to clear her motor vehicle, Songwe Border being the nearest port pursuant to section 29 (1) (a) of the Customs and Excise Act, as submitted by counsel for the defendant. The defendant through counsel did not disown the processes that took place at Chitipa Border. The claimant has exhibited documents in support bearing official stamps of Chitipa Border, for instance, **TC6**. I therefore find it interesting that the defendant is pointing fingers at the claimant for the confusion whilst themselves condoned such confusion despite having a chance to resolve the same.

[30] Having sold the motor vehicle without following due process of the law, I therefore grant a like order to certiorari quashing the defendant's decision to sell the motor vehicle. However, pursuant to section 154 (2) of the Customs and Excise Act, I am of the view that since the motor vehicle was already sold, the claimant is only entitled to the value of the said motor vehicle. For avoidance of doubt, section 154(2) of the Customs and Excise Act provides as follows:

“Where any proceedings may be brought by or against the Controller under the customs laws and judgment is given against the Controller then, if the court before which such proceedings are heard is satisfied that there were reasonable grounds for the action giving rise to the institution of the proceedings, the plaintiff shall be entitled to recover anything seized, or the value thereof, but shall not otherwise be entitled to any damages, and no costs shall be awarded to either party.”

[31] Hence, my position that the claimant is entitled to get equivalent of the value of the motor vehicle. The value of the motor vehicle as alluded to above is USD1,300. I therefore order a refund, within the next 30 days, of this amount at the prevailing exchange rate when the motor vehicle was imported into Malawi. The Commissioner General is to deduct any allowable storage fees. The

period between the payment of the duty (to be refunded as ordered above) and sale of the motor vehicle through auction be exempted as both parties contributed to the confusion that ensued. Pursuant to section 154(2) of the Customs and Excise Act, the claimant is not entitled to any damages.

[32] Each party to bear its own costs.

**MADE IN OPEN COURT THIS 12<sup>TH</sup> DAY OF MAY 2022 AT PRINCIPAL REGISTRY,  
REVENUE DIVISION, BLANTYRE.**

  
JOSEPH CHIGONA

**JUDGE.**