



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 2451 of 1988

DR. RAJENDERA SINGH GOHIL.....PLAINTIFF

VERSUS

COMMISSIONER OF CUSTOMS & EXCISE1ST RESPONDENT

F.A. ABDALLA.....2ND RESPONDENT

RULING

This case has been in court for the last 18 years and it came before me for hearing on 2nd May 2006. Mrs. Owino the learned Deputy Chief Litigation counsel successfully applied for adjournment on the ground that the officer who swore the affidavit in reply to the Originating Summons on 30th October 1991 has since left the service and he cannot be traced and the state required time to identify a suitable witness to come and testify on behalf of the Attorney General.

On granting the adjournment I ordered that the parties do take a hearing date in the registry on priority basis and they were given 11th and 12th July 2006.

But when the matter came up for hearing on 11th July 2005 the parties elected not to adduce evidence but recorded a consent order to put in written submissions at the strength of the affidavits on record.

Mr. Odera learned counsel for the plaintiff submitted that after protracted Cause of Proceedings that landed in the Court of appeal and back to the High Court, the parties in 2005 agreed to have the originating summons converted to a plaint and the Replying Affidavit to a defence. In seeking to vindicate his claim the plaintiff relied on the documents contained in the annexures and specifically the judgment of the Court of appeal dated and delivered on 7th October 1994 vide which the Court of Appeal ordered the remission to the High Court for trial of the instant suit which had been dismissed.

He submitted that from the said judgment of the Court of Appeal it emanates that the purported Seizure Notice issued by the 1st defendant over the subject motor vehicle was illegal and the procedure of dealing with the items subject of the seizure upon the plaintiff's issuance of Notice of Claim was not followed. He submitted that the 1st defendant was not justified in declaring the subject motor vehicle condemned and forfeited.

Mr. Odera further submitted that the Sale of the subject motor vehicle was illegal and as a result the

plaintiff has since 1987 suffered and continued suffering immense losses arising from the illegal sale of the personal effects that were imported together with the subject motor vehicle.

In conclusion Mr. Odera submitted that the plaintiff is entitled to compensation assessed for the value of the subject motor vehicle and personal effects which were imported together with the subject motor vehicle.

The subject motor vehicle was valued at Ksh.695,000/= local market and the other personal effects at Shs.576,900/=.

He prayed for judgment in favour of the plaintiff and against the defendants for the sum plus costs and interest.

Mrs. Owino the learned Deputy Chief Litigation counsel submitted that one Mohamed Sameer Khan who is described in the importation documents as a British National residing in London 168 London road HOUNSLOW, Middlesex England applied to be allowed to be accompanied with his personal effects which included the subject motor vehicle duty free on the ground that he was relocating to Kenya. The provision applies to Kenya Citizens residing overseas and who intend to relocate back home and includes personal effects and a motor vehicle if any which he has used for at least more than one year since the time of purchase. But he changed his mind and did not relocate to Kenya and instead he appointed the plaintiff through a Power of Attorney to receive the subject motor vehicle including other personal effects.

Mrs. Owino submitted that the proprietor of the subject motor vehicle being one Mohamed Sameer Khan is the one who would have under the allowing circumstances been allowed to import the subject motor vehicle duty free. Under the provisions of the Customs Act the person who would enjoy a waiver of duty would be the proprietor if the surrounding circumstances so permit. But Mr. Khan being a British National residing in London and did not relocate to Kenya no waiver of duty under the relevant laws was allowable.

Further Mrs. Owino submitted that when the plaintiff was importing the subject motor vehicle, certain documents were filed with the 1st defendant which documents bore such wide discrepancies that defy logic and irresistible conclusion would be that the plaintiff had every intention of evading payment of duty. For instance it is indicated in the import documentation that the subject motor vehicle was manufactured on 9th February 1987 but was bought in June 1986 which would therefore appear that the subject motor was purchased even before it was manufactured.

No explanation had been given for this kind of discrepancy.

Further even assuming that the plaintiff was entitled to a waiver of duty which is denied the plaintiff or the proprietor ought to have had ownership of the subject motor vehicle for at least one year prior to such importation. The subject motor vehicle having been manufactured in 1987 and the same being imported into the country the same year obviously meant that the proprietor was not entitled to a waiver of duty.

Mrs. Owino further submitted that the plaintiff had made a claim for personal effects that were in the boot of the subject motor vehicle among them electronic goods. This had not been declared in the importation documents and no evidence was led viva voce or through affidavit to prove the existence of the alleged goods.

Mrs. Owino went on to submit that the plaintiff's claim that the subject motor vehicle was illegally seized and auctioned and as a result he suffered loss, should be rejected by the court because the plaintiff is not the proprietor of the subject motor vehicle.

The proprietor in claiming that he was entitled to a waiver of duty indicated that he was returning back to the country and he went as far as providing his new postal address in Kenya yet this suit is not in the name of the proprietor but that of the alleged attorney. If the proprietor had relocated to the country he

should have been named as the plaintiff in this suit. Since the proprietor of the subject motor vehicle did not relocate to Kenya accompanied with his personal effects he was not entitled to a waiver of duty and therefore the said motor vehicle was imported into the country illegally and she concluded that an act done in contravention of the provisions of an Act of Parliament cannot be made a subject matter of an action. To support this contention she referred the court to the case of **DAVID TAYLOR & SON LTD V. BARNETT [1953] CA 843** where the Court of Appeal held that what is done in contravention of the provisions of an Act of Parliament cannot be made the subject matter of an action.

It is unfortunate that this suit did not proceed by way of viva voce evidence. There are issues raised that could have been clarified i.e. whether the proprietor of the subject motor vehicle did relocate and whether he did accompany his personal effects to the country; and the other issue is the discrepancy contained in the import documentation that the subject motor vehicle was manufactured on 9th February 1987 but was bought in June 1986 could have been clarified either through oral evidence or by filing a further affidavit but they remained unresolved.

The plaintiff's evidence in this suit is extremely unsatisfactory. He has failed to prove his case on a balance of probabilities. The suit is dismissed with costs.

DATED at Nairobi this 23rd day of February, 2007.

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J.L.A. OSIEMO

JUDGE