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IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL NO. 192/2010
SCZ/8/251/2010

BETWEEN:

HANS WINFRED LORENZ — APPELLANT

AND

ZAMBIA REVENUE AUTHORITY — RESPONDENT

CORAM: Mwanamwambwa, AG. D.C.J, Wood, Malila, J.J.S.
On the 9th October, 2014 and 19th May, 2015

For the Appellant: *Mr S. Lukangaba of Messrs Mweemba Chashi and Partners.*

For the Respondent: *Mrs D. B. Goramota, Legal Counsel of the Respondent.*

JUDGMENT

Mwanamwambwa, Actg D.C.J., delivered the Judgment of the Court.

Cases referred to:

1. **Attorney-General V. Kakoma (1975) Z.R. 212 (SC).**
2. **Nkhata and Four Others V. Attorney-General (1966) Z.R. 124 (CA).**
3. **Undi Phiri V. Bank of Zambia (2007) Z.R. 186.**
4. **ZCCM Investments Holding Plc V. Wood gate Holdings Limited(2011) Z.R. (Volume 3) 110.**
5. **Zambia Consolidated Copper Mines Limited and Chilanga Cement Plc V. F.G Ali Transport Limited and 2 Others (2008) Z.R. 168.**
6. **Mazoka and 2 others V. Levy Mwanawasa and 2 others (2005) Z.R. 138.**
7. **Mundia V. Sentor Motors (1982) ZR 66.**
8. **Wilson Masauso Zulu V. Avondale Housing Project Limited (1982) Z.R. 172 (SC).**

This is an appeal, from the Judgment of the High Court, dismissing the Appellant's claim against the Respondent for a declaration that the Respondent's seizure of the Appellant's motor vehicle was illegal.

The brief facts of the matter are that the Appellant was a holder of a Temporary Self Employment Permit. On the 18th of June, 2004, the Appellant brought into Zambia, a Jeep Cherokee motor vehicle, Registration No. N81631W, under a Customs Importation Permit (CIP) number 80312. The Customs Importation Permit that was issued to the Appellant was valid from the 18th of June, 2004 to the 18th of September, 2004. However, on the 12th of July, 2004, the Respondent seized the said motor vehicle from the Appellant, pending customs investigations. It was later discovered that the Customs Importation Permit which had been issued to the Appellant, was issued in error following the Appellant's misrepresentation of his immigration status. The motor vehicle was finally released on the 24th of March, 2005. When it was released, the Respondent gave the Appellant a gate pass that the motor vehicle was to exit Zambia within five days.

On the 2nd of September, 2005, the Appellant brought this action against the Respondent claiming the following reliefs:

1. **a declaration that the Defendant's seizure of the Plaintiff's motor vehicle, Jeep Cherokee registration number N81631W, was illegal and unlawful and therefore null and void;**
2. **damages for the loss of use of the said motor vehicle from the 12th of July, 2004 to the 22nd of March, 2005;**
3. **consequential damages as a result of the seizure and continued detention of the motor vehicle;**
4. **interest at the current bank lending rate;**
5. **any other relief that the Court may find justifiable to grant; and**
6. **costs.**

Upon hearing the matter, the learned trial Judge found that it was not in dispute that on the 12th of July, 2004, the Respondent seized the Appellant's motor vehicle, Jeep Cherokee, registration number N81631W and that the vehicle was only released on the 23rd of March, 2005. The lower Court was of the view that the Appellant did not challenge the allegation by the Respondent. The allegation by the Respondent was that the Appellant did not qualify for a Customs Import Permit, as he was the holder of an Employment Permit in Zambia. The Court stated that, as a holder of an Employment Permit in Zambia, any motor vehicle that the Appellant brought into the Country would be treated differently from a vehicle brought in by a mere visitor. That it explains why, when the motor vehicle was released, there was a directive that the motor vehicle should exit Zambia within five days. The trial Judge found that the Appellant had not proved that the Respondent's seizure of the motor vehicle was illegal and unlawful.

Dissatisfied with the above Judgment, the Appellant appealed to this Court on the following three grounds of appeal:

Ground 1: **The learned trial Judge erred in law and fact when he took into account the assertions contained in the Defence to discount the Appellant's evidence in the absence of evidence being led to support the allegations contained in the Defence.**

Ground 2: **The learned trial Judge erred in law and fact when he failed to take into account evidence on record to the effect that Customs Import Permit was valid.**

Ground 3: **The learned trial Judge erred in fact and law when he failed to take into account evidence on record that the Appellant's car was seized because of failure to exit within the authorized period**

For convenience, we shall deal with all the three grounds of appeal together because they are interrelated.

In ground one of the appeal, counsel for the Appellant submitted that the trial Court took into account averments contained in the defence of the Respondent in finding for the Respondent. Counsel argued that the taking into account of the contents of the Defence and Documents not directly referred to in evidence by the Defendant was a misapprehension of the law and facts by the trial Court. He stated that the Defence is a pleading and does not constitute evidence. Counsel added that the Defence cannot be taken into account to prove a fact in contention. That there was no other document produced by the Respondent to show the immigration status of the Appellant. That the taking into account of the issue not placed in evidence offends the principle of he who alleges must prove.

Counsel added that the absence of evidence or opportunity to cross-examine the Respondent, on the allegation

of the status of immigration of the Appellant, shows that there was no evidence to take into account. That the trial Court ought not to have taken into account the allegation raised by the Respondents in the absence of evidence. Counsel cited the case of **Attorney-General V. Kakoma**[1] to support his argument.

Counsel submitted further that the trial Court erred when it found as a fact that the seizure of the motor vehicle was not unlawful and illegal.

In ground two and three, Counsel for the Appellant argued that contrary to the observation of the Court below that the Appellant did not address the issue of the erroneous grant of the Customs Import Permit, the witness referred to the Gate Pass which is on page 36 of the Record of Appeal. It was Counsel's argument that reference was made to the Customs Import Permit in evidence through the Gate Pass. He urged us to note that the Gate Pass was the last document issued in respect of the seizure of the motor vehicle.

Counsel went on to submit that the reason for the seizure was that the vehicle did not exit within the authorised period. He stated that however, the Customs Import Permit was still valid at the time when the vehicle was seized. He argued that the Respondent stated in their letter to the Appellant that the vehicle was seized due to failure to exit within the authorised period. Counsel submitted that the admission that the vehicle was seized because of failure to exit within the authorised

period shows that the seizure was unlawful. That further it shows that there was no evidence on record to support the trial Court's observations.

Counsel contended that the learned trial Court erred in law and fact when it failed to take into account that the Customs Import Permit was valid and that the real reason the vehicle was seized was the failure to exit within the authorised period. It was argued that the Court's findings of fact were not supported by the evidence on record. He cited the case of **Nkhata and Four Others V. Attorney-General**[(2)] to support his argument.

The Respondent argued all three grounds as one. Counsel submitted that the Appellant's grounds of appeal all hinge on the findings of fact made by the trial Judge. She went on to cite a number of authorities that give instances when an appellate Court can reverse findings of fact. Counsel argued that according to the decided authorities, an appellate Court will only interfere with findings of fact of a lower Court if such findings are shown to be perverse, made in the absence of relevant evidence or based on a misapprehension of the relevant facts.

She submitted that having pleaded that the seizure of the Appellant's motor vehicle was unlawful, the Appellant ought to have proved that the seizure was unlawful. She cited the case of **Undi Phiri V. Bank of Zambia**[(3)], **ZCCM Investments HoldingPlc V. Woodgate Holdings Limited**[(4)],**Zambia**

Consolidated Copper Mines Limited and Chilanga Cement Plc V. F.G Ali Transport Limited and 2 Others[5], to support her argument. Counsel went on to discuss the importance of pleadings. To support her argument, she cited the case of **Mazoka and 2 others V. Levy Mwanawasa and 2 others**[6] among others.

Counsel submitted that Customs Import Permits are only issued to visitors who do not hold Employment Permits in Zambia. She added that the Appellant, in his Statement of Claim, plainly concedes that he was a holder of a work permit. She stated that the Judge in the Court below found that the Appellant had produced a Customs Import Permit and that he declared that he was a visitor to Zambia. That the Court also found that the Appellant had produced a letter from the Respondent's Assistant Commissioner in charge of enforcement, which stated that the Appellant did not qualify for a Customs Import Permit as he was a holder of an Employment Permit. She added that the learned trial Judge observed that the Appellant did not address or rebut the allegation by the Respondent and that the Appellant did not address or rebut the allegation during the course of the trial. She stated that the Court below was on firm ground to have found that the Appellant had not proved that the Respondent's seizure of the motor vehicle was illegal.

She argued further that the lower Court was on firm ground to have taken into account the assertions contained in

the Defence. She added that this is because the Defence as a pleading, formed part of the Court record.

We have looked at the evidence on record and considered the submissions and authorities by both parties. The Appellant, in his Statement of Claim, pleaded that he was a holder of a Temporary Employment Permit. In the case of **Mundia V. Senator Motors**[7], it was held that:-

> **"The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties."**

Parties to an action are bound by their pleadings. This means that once an issue is settled in the pleadings, the Court will take it as it is. In the case before us, it was settled in the pleadings that the Appellant was a holder of a Temporary Employment Permit. This came from the Appellant himself.

However, when the Appellant entered Zambia with the motor vehicle in question, he declared a false immigration status to the effect that he was a visitor to Zambia. As a result of the declaration, he was given a Customs Import Permit by the Respondent. It was later discovered that he was a holder of a Temporary Employment Permit and hence not entitled to a Customs Import Permit. It is clear that the Customs Import Permit was issued as a result of misrepresentation. The Appellant was not truthful about his actual immigration status. This is exactly the finding which the lower Court made, and we

agree with it. The Customs Import Permit was issued in error. It should not have been issued in the first place.

The Appellant argued that the reasons for the seizure was that the Appellant failed to remove the vehicle from Zambia within the authorised period. That the seizure was done before the expiry of the 3 months allowed on the Customs Import Permit. We wish to state that the fact remains that the Appellant had an Employment Permit and hence the Customs Import Permit would not have been issued had the Appellant given the correct position of his employment status. Therefore, the Customs Import Permit was null and void. There is evidence on record to show that the Appellant's legal representative entered into negotiations with the Respondent for the release of the vehicle. That is how the Respondent agreed to release the vehicle, using the Gate Pass exhibited on page 36 of the Record of Appeal. The Gate Pass was issued on the condition that the vehicle exits Zambia within 5 days. This Gate Pass does not, in any way, show that the Appellant was entitled to a Customs Import Permit nor does it show any admission on the part of the Respondent that the seizure of the vehicle was illegal.

We now wish to deal with the issue of the burden of proof. At law, he who alleges must prove. This principle was elaborated in **Wilson Masauso Zulu V. Avondale Housing Project** [8]. That case decided that *"Where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed any other case where he makes any allegations, it is generally*

for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case."

In the instant case, as correctly submitted by Mrs. Goromota, the Appellant pleaded that the seizure of his motor vehicle was wrongful. So, the burden was on him to prove the alleged wrongful seizure of his motor vehicle. He failed to prove what he alleged. The mere fact that the Respondent did not call a witness in its defence, did not automatically entitle him to judgment.

Another argument by the Appellant was that the lower Court wrongly relied on assertions made in a letter to him by the Respondent's Assistant Commissioner in charge of enforcement. What we have just said in the preceding above, equally applies to this argument. It was for the Appellant to prove what he alleged and dispel the assertions in question.

We have not found any basis to reverse the lower Court's findings of fact. The evidence on record supports the findings of fact. And we uphold them.

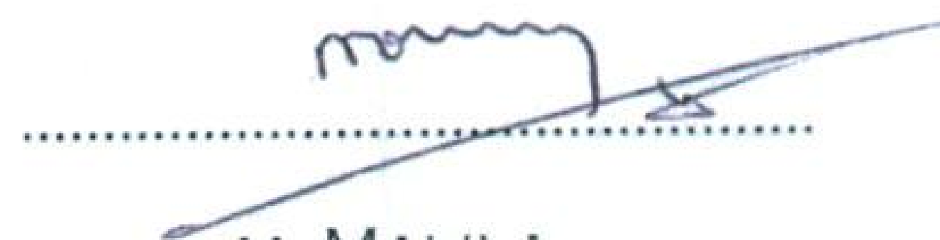
For the reasons we have given above, we hereby dismiss this appeal, for lack of merit. We award costs to the Respondent; to be taxed, in default of agreement.

M.S. MWANAMWAMBWA

ACTING DEPUTY CHIEF JUSTICE

A. M. WOOD

SUPREME COURT JUDGE



M. MALILA

SUPREME COURT JUDGE