



REPUBLIC OF KENYA



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**Njeri v Commissioner of Customs & Border Control (Customs Tax Appeal E001 of 2023)
[2024] KEHC 7800 (KLR) (Commercial and Tax) (24 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7800 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CUSTOMS TAX APPEAL E001 OF 2023**

JWW MONG'ARE, J

JUNE 24, 2024

BETWEEN

NELSON NDEGWA NJERI APPELLANT

AND

COMMISSIONER OF CUSTOMS & BORDER CONTROL RESPONDENT

*(An Appeal from the judgment of the Tax Appeals Tribunal at Nairobi delivered
on the 23rd day of December 2022 in Nairobi Tax Appeals No. 792 of 2021)*

JUDGMENT

1. The Appellant, Nelson Ndegwa Njeri, a used piano importer and salesman, imported goods on 16th March 2020 and declared and paid Kshs.274,083/- as the total taxes. The entry was targeted by the National Targeting Centre (NTC) because the declared unit values were low and raised suspicion of under declaration of quantities. The goods were physically verified and on 18th March 2020, the physical verification report was forwarded to Valuation officers at ICD Nairobi for guidance on the declared values. The value of the goods was raised based on values of similar importation leading to a demand for Kshs.258,904/= additional tax.
2. On 21st March 2020, the Appellant appealed to the Deputy Commissioner Valuation. The Appeal was considered by three officers appointed by the Deputy Commissioner. The Appeal Committee found that the Appellant failed to attach any supporting transaction documents to support the declared values, certified funds transfer to the supplier documents and sale contracts. It thus sustained the uplifted values and on 23rd March 2020, a report was filed onto the Simba System. Through a letter dated 25th March 2020, the Appellant requested a review of the Appeal's Committee decision. Upon review, the uplifted values were sustained and the decision was filed onto the Simba System on 31st March 2020.



3. Again, on 2nd April 2020, the Appellant appealed to the Commissioner of Customs & Border Control, who advised him to file an Appeal before the Tribunal or alternative dispute resolution.
4. On 7th December 2021, the Appellant filed an Appeal before the Tax Appeals Tribunal (the Tribunal), seeking that:-
 - a. the impugned assessment be amended to NIL and the erroneous duty paid be refunded together with the demurrage and storage incurred in the process.
 - b. that the Tribunal invokes the Tax Appeals Tribunal (Procedure) Rules Section 24 (f) and (g) in its favour.
 - c. Losses incurred in relation to port storage charges of Kshs.95,913.00/= and container retention charges of Kshs.45,980.00/= and transportation costs of Kshs.25,000.00/= reimbursement.
5. The Tribunal found that the Respondent breached Section 122 (2) of the EACCMA and that its decision to review the customs value of the Appellant was not procedural. It also found that the additional duty assessment of Kshs.258,904/= was justified. It thus directed the matter back to the Commissioner to be considered and set aside. The Tribunal also found that it lacked the jurisdiction to determine the claim for damages.
6. Dissatisfied, the Appellant initiated this Appeal by way of a Memorandum of Appeal, on the following grounds:-
 1. The Honourable Tribunal erred in law and fact at paragraph 37 after establishing that the decision by the Respondent to review the Customs value of the Appellant's goods was unprocedural and its impugned assessment was unjustified, it failed by referring the matter back to the Commissioner to consider the documents yet the Respondent contravened section 34(2) and section 122 as read together with the 4th Schedule specifically prescribed for valuation of goods ad valorem.
 2. The Honorable Tribunal erred in law and in fact at paragraph 39 in its judgment when it stated that it had no jurisdiction neither under the *Tax Procedures Act* nor the *Tax Appeals Tribunal Act* which it states limits their jurisdiction to tax decisions only, it contradicted itself at clause (c) in its judgement to disallow the claim of a refund of extra costs, and also at clause (b) order that each party each party bear its own costs.

Response

7. In opposing the Appeal, the Respondent filed a statement of facts as well as written submissions dated 2nd January 2023 and 2nd January 2024.

Analysis and Determination

8. I have considered carefully the Record of Appeal, the supplementary Record of Appeal, the Statement of Facts and the Respondent's written submissions. To my mind, the issues that arise for determination are; (1) whether the Tribunal could refer the matter back to the Commissioner for reconsideration and (2) whether the Tribunal has jurisdiction to award damages to the Appellant.
9. At the outset, it is important to note that it is a well-established principle that a court can only act within jurisdiction properly conferred on it by law. The Supreme Court in Samuel Kamau Macharia



& another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, had this to say on the issue of jurisdiction: -

“(68) A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

10. On the first issue, Section 29 (2) of the *Tax Appeals Tribunal Act*, provides that:-

“2) The Tribunal shall make a decision in writing or through electronic means—

- (a) affirming the decision under review;;
- (b) varying the decision under review; or
- (c) setting aside the decision under review and either—
- (i) making a decision in substitution for the decision so set aside;

or

(ii) referring the matter to the Commissioner for reconsideration in accordance with any directions or recommendations of the Tribunal.”

11. From the above, it is clear that the Tribunal has the jurisdiction to refer matter back to the Commissioner for reconsideration and therefore in so doing breached no law. This issue is therefore settled.

12. On the second issue, Section 3 of the *Tax Appeals Tribunal Act* provides that:-

“There is established a Tribunal to be known as the Tax Appeals Tribunal to hear Appeals filed against any tax decision made by the Commissioner.”

13. In my understanding, the above provision speaks to the jurisdiction of the Tribunal which is to hear the Appeals filed against any tax decision made by the Commissioner. Moreover, from the record, I note that the Appellant did not raise the issue of damages from losses incurred before the Commissioner at the objection stage.



14. Section 56(3) of the *Tax Procedures Act* provides:-

“(3) In an Appeal by a taxpayer to the Tribunal, High Court or Court of Appeal in relation to an Appealable decision, the taxpayer shall rely only on the grounds stated in the objection to which the decision relates unless the Tribunal or Court allows the person to add new grounds.”

15. Therefore, in view of the foregoing, I am persuaded that the Tribunal was right in finding that it did not have the jurisdiction to consider the Appellant’s claim for damages.

16. In the upshot, I find that the Appeal is without merit and it is hereby dismissed with costs. The decision by the Tax Appeals Tribunal in this matter is therefore upheld.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF JUNE, 2024.

J.W.W. MONG’ARE

JUDGE

In the Presence of:-

Ms. Chelangat for the Respondent.

Mkhan for the Appellant

Amos - Court Assistant

