Eldama Technologies Limited v Commissioner of Customs & Border Control (Tax Appeal E200 of 2021) [2023] KEHC 20762 (KLR) (Commercial and Tax) (26 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20762 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

TAX APPEAL E200 OF 2021

DAS MAJANJA, J

JULY 26, 2023

BETWEEN

ELDAMA TECHNOLOGIES LIMITED .... APPELLANT

AND

COMMISSIONER OF CUSTOMS & BORDER CONTROL .... RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 3rd December 2021 in Tax Appeal No.357 of 2019)

JUDGMENT

Introduction and Background

1. The Appellant carries on the business of providing information technology solutions to businesses in Kenya and in this regard imports a wide range of telecommunication equipment. In 2019, the Respondent ("the Commissioner") evinced its intention and carried out a Customs Post Clearance Audit on the Appellant's business operations for the period between January 2014 to January 2019 in relation to customs procedures pursuant to the provisions of the East African Community Customs Management Act,2004 ("EACCMA").

2. The Commissioner communicated its findings on 1st April 2019. It raised additional assessments and taxes in respect of Import Duty, VAT, Import Declaration Fees(IDF) and Railway Development Levy (RDL) amounting to Kshs. 31,733,260.00. While the Commissioner observed that sampled documents did not reveal instances of non-compliance with East African Community Common External Tariff, it stated that it was unable to reconcile all importation documents with foreign supplier payments since the Appellant had failed to produce fund remittances records. The Commissioner also held that the Appellant failed to produce requested books of accounts including purchase ledgers,

accounts payables and bank record, and therefore it could not ascertain whether the Appellant maintains an accurate books of accounts.

3. On customs valuation, the Commissioner stated that goods imported into the partner states are valued under the Fourth Schedule of the EACCMA and that the preferred basis of valuation is transaction value defined as the, “price actually paid or payable for the goods when sold for export to the partner state” adjusted in accordance with the provisions of Paragraph 9. The Commissioner stated that the examination of the sampled documents confirmed that the Appellant’s declarations were based on transaction values. However, that the accuracy of applied transaction values could not be fully ascertained as the Appellant failed to produce the documents requested.

4. The Commissioner found that there were variances between declared values in the Customs Simba System and those declared in the itax system and that in such cases, the taxable values that the Appellant self—assessed in itax were higher than those declared at the time of Customs clearance. That this indicated mis-declaration in violation of section 203 of the EACCMA. Further, that some Customs entries in itax were not the Appellant’s imports and that a check in the Customs Simba system confirmed that these entries were of other importers which indicated falsification of documents.

5. The Commissioner also identified some cases where entries in itax were non-existent in the Simba system which implies falsification of taxation documents in contravention of the law mentioned above and it further observed that some commercial invoices that the Appellant provided did not have corresponding entries in both Simba and itax and that probably, these imports were cleared through Direct Assessment, which the Appellant declined to produce documents.

6. The Commissioner therefore concluded that due to the Appellant’s failure to produce all documents and records necessary for the audit, it relied on the taxable values self-assessed in itax to come up with the extra taxes payable and that the computation given is based on the assumption that all the entries attract import duty at a rate of 10%.

7. The Appellant objected to the Commissioner’s findings through its letter dated 29th April 2019. It contended that it had settled all taxes due, that the duty assessed on certain imports was inaccurate and that the Demand Notice was materially and factually incorrect. With respect to each of the relevant imports under the various entry numbers, the Appellant stated that it had used the steps and the required procedures including duly completing and submitting the Import Declaration Form and paying the relevant import declaration fees, obtaining a certificate of conformity from the Kenya Bureau of standards (KBS) with respect to all goods imported under the various entries as set out in the Demand Notice, obtaining Forms C. 17B from the Appellant’s portal on the Simba system with respect to all the entries confirming the customs valuations of the goods and the taxes payable, preparing and generating payment authorisations with respect to the payment of taxes for each entry and following payment of all taxes assessed and obtaining clearance from the Commissioner to clear the goods into Kenya for home use.

8. The Appellant stated that it had attached the import documentation it held with respect to the importation of the goods set out in the Demand Notice. It admitted that while in the earlier periods there were some gaps, it stated that it was in the process of retrieving the missing documents which would clearly show that the Respondent followed the due process for the importation of such goods into Kenya and paid all the applicable taxes as assessed and confirmed by the Commissioner at the time of clearance into Kenya for home use. That these documents included the commercial invoices from its clients’ suppliers, the payment authorization forms and the payment receipts or remittance with respect to the payment of taxes to the Commissioner.

9. The Appellant thus asserted that in view of the aforesaid, it followed the due process and paid the applicable taxes and that in any event, it is established in law and practice that the Commissioner is not allowed to issue final release orders for the importation of goods into Kenya until it is satisfied that all applicable taxes and fees have been paid. That as all the goods were cleared for home use, the inherent assumption was that the Commissioner was satisfied that all taxes were paid.

10. The Appellant stated that it had followed the legal procedure and administrative practices established by the Commissioner. It contended that the Demand Notice was erroneous in that some of the items for which the additional duty has been demanded was incorrect. That duty had been computed at the rate of 10% of the customs value whereas the correct duty rate was 0% as per the Commissioner's tariff ruling dated 21st July 2016. The Appellant urged the Commissioner to consider this tariff ruling as disregarding it would be prejudicial to its legitimate expectation. It urged the Commissioner to vacate the demand for taxes where the duty rate for the imported items is 0%.

11. The Appellant further stated that whilst the values it declared by its client itax for input VAT claim purposes match the customs values declared and/or assessed or confirmed by the Commissioner in the customs entries, the importers' names differ. That the Demand Notice indicated other entities as the importers of record whilst the customs entries as recorded in the Form C.1 7Bs held by the Appellant, indicated that it was the importer of record. It averred that such a discrepancy in its view, leads to the conclusion that the either the Demand Notice has clerical errors or that the discrepancy arises out of the Simba system used to process the Forms C. 17B. That some of the inaccurate items included the items that reflect Dimension Data, RGB Flowers, Arrow Rubber Stamp, and Intercontinental Hotels among others as the importers of record but that it was the importer of record in all the documents held by it. It added that some of the customs entries had several items, which had different duty rates rather than the 10% rate that the Commissioner had used to calculate duty. The Appellant stated that it had tabulated a few of such entries for the Commissioner's review and confirmation but that despite the existence of different duty rates, the Appellant had still paid all the import taxes due on the same. The Appellant urged the Commissioner to consider all the clarification it had provided and called for meeting to resolve any other issues.

12. By its letter dated 9th May 2019, the Commissioner ascertained that the taxes demanded had not been paid and that the entries attached did not originate from the Commissioner's Simba system. The Appellant and Commissioner held a meeting on 23rd May 2019 and the Appellant, in its letter dated 28th May 2019, agreed to furnish the Commissioner with additional information to clarify its objection. The Appellant added that from the meeting, four key issues arose which included; customs duty which had been incorrectly levied in the assessment, proof of payment of some of the taxes demanded, duplications of taxes assessed and alleged commission of fraud which it sought to address in its letter.

13. On the issue of customs duty which had been incorrectly levied, the Appellant indicated that a large number of the items were imported as knocked-down kits which are exempt from customs duty and that this exemption was confirmed by the Tariff Ruling dated 21st July 2016. In this regard, the Appellant requested the Commissioner to adjust its assessment and reduce the duty by Kshs. 8,021,707.00 as evidenced by the spreadsheet identifying the items in respect of which customs duty had been inaccurately assessed.

14. On the issue of proof of payment, the Appellant stated that it had obtained confirmation that the payment for Invoice 874 for the amount of Kshs. 1,533,062.00 was paid and received by the Commissioner and that payment was made via Commercial Bank of Africa on 3rd January 2018 and received by the Commissioner on 4th January 2018. The Appellant also produced proof of payment and stated that this was the correct duty amount payable on account of the applicable duty rates for

knocked-down kits. The Appellant requested the Commissioner to adjust the demand by removing the Kshs. 2,319,248.00 from the demand. The Appellant also requested that the Commissioner adjust its demand by Kshs. 3,070,334.00 which was a duplicated demand under invoice 667 yet the correct figure for this invoice was Kshs. 1,453,059.00.

15. On the incorrect customs value, the Appellant stated that it identified a list of 12 items in respect at which the Commissioner had assessed the Appellant based on incorrect customs values. It summarised the correct customs value and provided copies of the commercial invoices in support each item. That these values were also reflected on "Simba current" value and the Appellant thus requested the Commissioner to adjust the demand by applying the correct customs values on these items.

16. On the issue of alleged fraudulent dealings in the customs clearance process, the Appellant stated that the Commissioner noted during the meeting that there appeared to be the possibility that a fraud occurred using invoices with values lower than the customs values to obtain clearance of goods associated with properly issued Import Declaration Forms (IDFs). That if this were to be the case, it would imply that the Commissioner received some funds being an underpayment arising at out of a lower customs value declaration and for such clearances the Commissioner would ordinarily retain the Forms C 17 Bs in the Simba System. The Appellant stated that in order to curb the alleged fraud, the Commissioner was willing to support any action taken by the Appellant and as such, the Appellant requested certain information from the Commissioner including any records of alternative Forms C 17Bs, if any, to the ones presented to the Commissioner by the Appellant which the Appellant received from the clearing agent; clearance documents from JKIA and details of any payments in respect of duty, VAT, etc that had been received by the Commissioner. The Appellant also sought information on some listed invoices.

17. The Commissioner responded to the Appellant through its letter dated 7th June 2019. On the customs duty incorrectly levied on zero-rated products, the Commissioner requested to be provided with IDFs, CoC, commercial invoices, airway bills, funds remittance records and any other documents that would enable the Commissioner review its products' classification. On proof of payment for some of the taxes demanded, the Commissioner stated that the duty paid and received was recognized and deducted from the demanded amount and that it did not levy any duty on the said transactions as there was no variance between the Simba declaration and the itax self-assessment. On the incorrect customs values, the Commissioner stated that the values in the demand notice were derived from the Appellant's self-assessed values in itax. On the alleged fraudulent dealings in customs clearance process, the Commissioner stated that as per section 148 of the EACCMA the Appellant was liable for all acts undertaken by its clearing agent and that the Appellant was to liaise with its agent to obtain the clearance documents. The Commissioner set aside the assessment amounting to Kshs. 8,021,707.32 pending provision of documents by the Appellant and thus demanded the balance of Kshs. 23,711,552.70.

18. The Appellant responded to the Commissioner by its letter of 22nd July 2019. It referred to a meeting held on 18th July 2019 where it was apparently agreed that the Appellant was to forward documents supporting the assertion that no duty was payable on certain items it had imported. It asserted that it had forwarded the said documents to the Commissioner to confirm that no duty was payable. The Appellant urged the Commissioner to set aside the assessment of Kshs. 8,021,707.32. It also reiterated it had paid all taxes under all the tax heads and that it had furnished all the necessary documents through its letters of 29th April 2019 and 28th May 2019.

19. The Appellant also decided to file an appeal against the Commissioner's decision dated 7th June 2019 to the Tax Appeals Tribunal ("the Tribunal"). The Tribunal rendered a judgment on 3rd December

2021. It identified two issues for determination; whether there were admitted taxes by the Appellant and whether the Commissioner erred in its assessment of taxes on the Appellant.

20. On the first issue, the Tribunal found that there was insufficient proof that the Appellant admitted to owing any taxes because from the Appellant's documents, it was disputing the entire amount of taxes assessed. On the second issue, the Tribunal stated that it had perused through the bundle of documents attached to the Appellant's appeal documents and noted the Appellant attached sets of documents pertaining to the imports including commercial invoices, certificates of conformities, customs declaration documents, payment authorization and payment slips to KRA, import entry Forms C.17, Import Declaration Forms, shipping documents and KEBS documents including payments. It held that the foregoing documents provided by the Appellant demonstrated that indeed the Appellant had paid some taxes and levies.

21. However, the Tribunal noted that from the Appellant's list of documents tabled before the Tribunal, the Appellant did not submit the documents mentioned in the Commissioner's letter dated 1st April 2019 relating to its books of accounts including purchase ledgers, account payables and bank records which were meant to confirm whether the Appellant maintains accurate books of accounts. The Tribunal was of the view that since the Commissioner had cast doubt on the Appellant's declared values for customs purposes, the Appellant ought to have provided such documents to the Tribunal in order to prove its case as provided for under sections 235(1)(a) and (b) of the EACCMA and that in addition, the Appellant, having been served with an assessment is enjoined to provide the necessary documents and information that suggest that such an assessment is erroneous, misplaced and not justifiable in the circumstances as provided by section 30 of the *Tax Appeals Tribunal Act* which squarely places the burden of proof upon a taxpayer to discredit any tax assessment or decision.

22. The Tribunal therefore concluded that having failed to produce the documents required to prove that it had indeed paid the requisite taxes, the Appellant failed to discharge its burden of proof. It dismissed the appeal and upheld the Commissioner's assessment contained in the demand dated 7th June 2019.

23. The Appellant has not filed this appeal grounded on the Memorandum of Appeal dated 6th January 2022. The Commissioner responded to the appeal by filing its Statement of Facts dated 10th February 2022. The parties have filed written submissions in support of their positions, which mirror the facts and arguments I have already highlighted hence I will not summarize the same but make relevant references in my analysis and determination below.

Analysis and Determination

24. It is well settled that the appellate jurisdiction of this court is circumscribed by section 56(2) of the *Tax Procedures Act* ("the TPA") which provides that "An appeal to the High Court or to the Court of Appeal shall be on a question of law only". Thus the court is required to pay homage to the finding of fact by the Tribunal and only depart from them when it finds that no reasonable tribunal considering the same would come to the same conclusion or where the conclusion is bad in law (see Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others SCK Petition No. 2B of 2014 [2014] eKLR and M'Iriungu v. R [1983] KLR 455B).

25. The Appellant's raised fourteen issues for determination but from its submissions, it has narrowed them down to the following five issues which I shall consider:

    a. What information was requested in the Commissioner's letter of 1st April 2019?

    b. Did the Appellant provide this information?

c. Did the Appellant discharge its burden of proof as required by Section 30 of the *Tax Appeals Tribunal Act*?

d. Does the fact that the goods were cleared for entry into Kenya further support the Appellant's case that it provided the necessary documents?

e. Did the Commissioner provide particulars of fraud and has the Respondent adduced any evidence to meet the standard of proof required where fraud has been alleged?

Information requested by the Commissioner

26. I do not think it is in dispute that to ensure compliance with the law, investigate, prevent and suppress offences, sections 235 and 236 of the EACCMA empower the Commissioner to conduct inspections or audits as a measure to satisfy itself as to the accuracy and authenticity of declarations through examination of the relevant records held by persons concerned. These provisions state, in part, as follows:

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(1) The proper officer may, within five years of the date of importation, exportation or transfer or manufacture of any goods, require the owner of the goods or any person who is in possession of any documents relating to the goods —

(a) to produce all books, records and documents relating in any way to the goods; and

(b) to answer any question in relation to the goods; and

(c) to make declaration with respect to the weight, number, measure, strength, value, cost, selling price, origin, destination or place of transhipment of the goods, as the proper officer may deem fit.

236. The Commissioner shall have powers to—

(a) verify the accuracy of the entry of goods or documents through examination of books, records, computer stored information, business systems and all relevant customs documents, commercial documents and other data related to the goods;

(b) question any person involved directly or indirectly in the business, or any person in the possession of documents and data relevant to the goods or entry;

(c) inspect the premises of the owner of the goods or any other place of the person directly or indirectly involved in the operations; and

(d) examine the goods where possible for the goods to be produced.

27. On 13th February 2019, the Commissioner issued a notice of its intention to carry out a customs Post Clearance Audit on the Appellant's business operations under the aforementioned provisions. It required the Appellant to furnish the Commissioner with the following books/records/documents: Import and export entries plus all supporting documents, Bank statements, deposit slips, transfer slips and cheque counterfoils, VAT records and returns, Audited Accounts for the period under audit, Stock records, Sales and purchase journals, Cash books and Ledges (all types). It is these documents that were requested by the Commissioner that are referenced in the letter of 1st April 2019.

Did the Appellant provide this information?

28. The Appellant submits that it provided all information requested by the Commissioner both before and after the letter of 1st April 2019 and as requested and there were no further requests from the Commissioner for any missing information. However, the Commissioner submits that the Appellant did not submit all the documents requested.

29. In its letter of 1st April 2019, the Commissioner stated that the Appellant had failed to provide funds remittances record, books of accounts and that in the absence of these documents, the accuracy of applied transaction values could not be fully ascertained. In its subsequent letters and emails, the Appellant attaches and encloses various documents but none of them are the Bank statements, deposit slips, transfer slips and cheque counterfoils and Audited Accounts for the period under audit previously requested by the Commissioner. The Tribunal's perusal of the same also revealed that the aforementioned documents had not been provided. Having gone through the said documents, I do not find any reason to depart from the Tribunal's finding that the Appellant did not provide all the information requested for by the Commissioner.

Did the Appellant discharge its burden of proof as required by Section 30 of the *Tax Appeals Tribunal Act*?

30. Section 30 of the *Tax Appeals Tribunal Act*, 2013 provides as follows:

    30. Burden of proof

        In a proceeding before the Tribunal, the appellant has the burden of proving—

        a. where an appeal relates to an assessment, that the assessment is excessive; or

        b. in any other case, that the tax decision should not have been made or should have been made differently.

31. This means that it is the Appellant, as the taxpayer who is expected to surmount the burden of proving that the Commissioner was wrong in its assessment. In this case, the Commissioner raised the assessment due to the failure by the Appellant to produce all documents and records necessary for the audit. I have already found that indeed, the Appellant did not provide all the documents requested by the Commissioner, meaning that it failed to discharge its burden of proof as required by section 30 of the *Tax Appeals Tribunal Act*, 2013

Does the fact that the goods were cleared for entry into Kenya further support the Appellant's case that it provided the necessary documents?

32. Absolutely not. As I have stated earlier, as per section 235 and 236 of the EACMMA, even after goods have been imported into the country, the Commissioner is still empowered to conduct post-clearance inspections or audits as a measure to satisfy itself as to the accuracy and authenticity of the declarations through examination of the relevant records held by persons concerned. It is only after the Commissioner has satisfied itself by going through examination of books, records, computer stored information, business systems and all relevant customs documents, commercial documents and other data related to the goods that the taxpayer can be said to be off the hook (see Commissioner for Investigations and Enforcement v Menengai Oils Limited ML ITA No. 40 of 2020 [2021] eKLR).

33. I therefore hold and reiterate that the fact the goods were cleared for entry does not mean that the Appellant provided the necessary documents requested for by the Commissioner.

Did the Commissioner provide particulars of fraud and has the Commissioner adduced any evidence to meet the standard of proof required where fraud has been alleged

34. As stated, the Commissioner had alleged fraud, falsification of records and misdeclaration on the part of the Appellant as there were variances between the declared values in the customs Simba system and those declared in the itax system. In response, the Appellant through its letter of 28th May 2019, while not actually dismissing the Commissioner's allegations appeared to lay blame on its clearing agent and requested for some information from the Commissioner to be able to contemplate the next course of action.

35. To answer the question whether the Commissioner provided particulars of fraud, I note that the Commissioner, in its letter of 1st April 2019 stated that there were variances between declared values in the Customs Simba System and those declared in the itax system and that in such cases, the taxable values that the Appellant self—assessed in itax were higher than those declared at the time of Customs clearance. That this indicated mis-declaration in violation of section 203 of the EACCMA. Further, it was noted that some Customs entries in itax were not the Appellant's imports and that a check in the Customs Simba system confirmed that these entries were of other importers, which was an indication of falsification of documents.

36. The Commissioner also identified some cases where entries in itax were non-existent in the Simba system which implied falsification of taxation documents in contravention of the law mentioned above and it further observed that some commercial invoices that the Appellant provided did not have corresponding entries in both Simba and itax and that probably, these imports were cleared through Direct Assessment, which the Appellant declined to produce documents. I find that the above were sufficient details and particulars of the allegations of fraud.

37. On whether the Commissioner adduced any evidence to meet the standard of proof required where fraud has been alleged, I find that it was incumbent upon the Appellant to prove the Commissioner's allegations wrong and not on the Commissioner to prove the fraud. This is in line with section 30 of the *Tax Appeals Tribunal Act*, 2013 I have expounded on above and section 56(1) of the TPA which places the burden of proof on the taxpayer. This position of who between the Commissioner and the tax payer bears the burden of proof in instances where allegations of fraud have been pleaded by the Commissioner have been considered by the court in a number of decisions. The Court has always taken the position that once the allegation of fraud has been made against a taxpayer and there is sufficient evidence to support the allegation, it is the taxpayer to prove the Commissioner wrong by producing competent and relevant evidence countering the allegations (see Commissioner of Domestic Services v Galaxy Tools Limited ML HC ITA No. E088 OF 2020 [2021] eKLR and Commissioner of Domestic Taxes v Trical and Hard Limited (Tax Appeal E146 of 2020) [2022] KEHC 9927 (KLR) (Commercial and Tax) (8 July 2022) (Judgment)).

38. In this case, the Appellant did not challenge or rebut the Commissioner's allegations of fraud meaning that the said allegations were proved. The Court of Appeal, in Total Kenya Limited v Kenya Revenue Authority NRB CA Civil Appeal No. 148 of 2013 [2018] eKLR also dealt with a similar issue where the appellant therein had claimed to have paid import duty and submitted copies of Import Entries of the consignments it claimed to have paid. Investigations by the respondent therein revealed a different story in that the import documents as well as the receipt were all forgeries since they related to a different consignment altogether, as opposed to the subject of the demand. This position was not countered by the appellant and the appellate court found that indeed fraud had been proved. This ground by the Appellant therefore fails.

Disposition

39. The Appellant's appeal lacks merit. It is dismissed.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2023.

D. S. MAJANJA

JUDGE

Mr Manani instructed by Coulson Harney LLP Advocates for the Appellant.

Mr Chabala instructed by Kenya Revenue Authority for the Respondent.