



Red Dot Distribution EPZ Ltd v Kenya Revenue Authority & another (Commercial Petition 005 of 2022) [2023] KEHC 26179 (KLR) (Commercial and Tax) (30 November 2023) (Ruling)

Neutral citation: [2023] KEHC 26179 (KLR)

(FORMERLY PETITION NO. E477 OF 2022)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL PETITION 005 OF 2022**

JWW MONG'ARE, J

NOVEMBER 30, 2023

IN THE MATTER OF ARTICLE 22 OF THE CONSTITUTION

AND

**IN THE MATTER OF CONTRAVENTION, AND THREAT OF CONTRAVENTION
OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 40, 47 AND
50 AS READ TOGETHER WITH ARTICLES 2 (4) & (5), 10, 19, 20, 21, 22, 23, 24, 25,
26 (1) & (3), 201, 209, 210, 258, 259 & 260 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF EXPORT PROCESSING ZONE ACT

AND

IN THE MATTER OF EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT

AND

IN THE MATTER OF ARTICLE 210 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF KENYA REVENUE AUTHORITY ACT

BETWEEN

RED DOT DISTRIBUTION EPZ LTD PETITIONER

AND

THE KENYA REVENUE AUTHORITY 1ST RESPONDENT

COMMISSIONER OF CUSTOM SERVICES 2ND RESPONDENT



RULING

1. This matter was first filed in the High Court Constitution and Human Rights Division before being transferred to the Commercial and tax Division of the High Court. Before the court is the Petitioner's petition dated 14/10/2022 supported by the affidavit sworn by Bindi Shah, the Finance Officer of the Petitioner. The Petitioner's case was that having been approved to operate as an enterprise under the [Export Processing Zone Act](#), it was open to enjoy certain statutory benefits such as exemption from making VAT payments and payments of certain customs and duty taxes under the Customs and Excise Act.
2. That however, the 1st Respondent demanded that the Petitioner should file and remit payments concerning VAT and Excise Duty contrary to the [Constitution](#) and statutory provisions guiding EPZ enterprises and that the 1st Respondent informed the Petitioner that it can seek for a refund of the taxes it had unconstitutionally collected from it.
3. The Petitioner asserted that it applied for VAT refunds totalling ksh8,257,302.00/- and refunds for goods exported under Drawback of ksh4,080,008.00/- however the Respondents have ignored the refund claims and refused to give it audience on its claim of refunds for more than a decade thus violating its right to fair administrative action and fair hearing under the [Constitution](#).
4. The Petitioner contended that the Respondents breached its constitutional right to access to justice by refusing and denying the Petitioner any audience to get the refund for money collected from it in the form of tax, which the Respondents did not have legislative backing to collect from it.
5. Further that the Respondent by imposing VAT and withholding Drawback Duty tax without any law that allows it breached Article 209 and 210 of the [Constitution](#) which provides that no tax would be imposed without a legislative framework and that the Respondent's breached its right to property under Article 40 as read together with Article 260 of the [Constitution](#) when they unlawfully collected VAT from the Petitioner and refusing to refund the same.
6. The Petitioner therefore prayed for the following orders:-
 - a. A declaration be and is hereby issued declaring that the Respondents' demand requiring the Petitioner to pay taxes on goods destined for the Export Processing Zone for export was unlawful and contrary to the express provisions of the East African Community Customs Management Act and the [Export Processing Zones Act](#) and therefore illegal, null, void and unconstitutional.
 - b. A declaration be and is hereby issued declaring that the Respondents' demand requiring the Petitioner to pay taxes on goods destined for the Export Processing Zone for export was unlawful and contrary to the express provisions of the Customs and Excise Act and the [Export Processing Zones Act](#) and therefore illegal, null, void and unconstitutional.
 - c. A declaration be and is hereby issued declaring that the Respondents' demand requiring the Petitioner to pay taxes on goods destined for the Export Processing Zone for export was unlawful and contrary to the express provisions of the [Value Added Tax Act](#) and the [Export Processing Zones Act](#) and therefore illegal, null, void and unconstitutional.



- d. A declaration be and is hereby issued declaring that the Respondents' demand requiring the Petitioner to pay taxes on goods destined for the Export Processing Zone and subsequent rejection of the Petitioner's claim for refund of the amounts claimed in the petition is unlawful, arbitrary and violation of the Petitioner's rights to property guaranteed under Article 40 and a violation of Article 210 of the Constitution.
 - e. An order be and is hereby issued directing the Respondents, their agents and or servants to refund to the Petitioner the sum of ksh8,257,302.00/- Value Added Tax and ksh4,080,008.00/- Import duty/Drawback Duty being the sums unlawfully collected from the Petitioner which sums were not payable under the East African Community Customs Management Act and the Export Processing Zones Act.
 - f. That further and or in the alternative, judgement be and entered in favour of the petitioner against the Respondent jointly and severally for the total sum of ksh12,337,310.00/- plus interests thereon at court rates from the date of filing suit until payment in full.
 - g. Any other relief that the Honourable Court deems fit to grant in favour of the Petitioner.
 - h. Cost of the Petition to be borne by the Respondents."
7. In opposition to the Petition, the Respondents filed Grounds of Opposition dated 22/11/2022. The Respondents contended that the Petitioner paid the alleged VAT and drawback duty in the years 2009 and 2011 respectively therefore the Value Added Tax (Cap 476) was applicable noting that the Value Added Tax Act, 2013 had not been enacted.
 8. That section 24 of Value Added Tax (Cap 476) provided that no refund would be made unless the claim in respect thereof is lodged within twelve months from the date the tax became due and payable under section 13. That in the instant case, the VAT liability was incurred in the year 2009 and the request for refund was lodged on 31/1/2012.
 9. Further that a cursory reading of section 151(2) (c) of the Customs and Excise Act provides that a claim for drawback refund should be lodged within a period of twelve months from the date of the exportation of the goods or the performance of the conditions on which drawback may be allowed.
 10. In light of the foregoing, the Respondent averred that the Petitioner has not availed to the Respondent any proof of exportation to warrant processing of the refund and that the Petition is therefore fatally defective and ought to be struck out.
 11. Both parties filed their submissions for and against the Petition which the court has duly considered. To my mind, the issues that emerge for determination are as follows:-
 - i) Whether there was a breach of fair administrative action and fair hearing contrary to Article 47 and 50 of the Constitution resulting in breach of the Right to Access to Justice contrary to Article 48 of the Constitution?
 - ii) Whether the Respondents breached the Petitioner's right to property guaranteed by Article 40 as read together with Article 260 and Article 210 of the Constitution?



Issue 1: Whether There was a Breach of Fair Administrative Action and Fair Hearing Contrary to Article 47, 50 of the Constitution Resulting in Breach of the Right to Access to Justice Contrary to Article 48 of the Constitution?

12. On this issue, the Petitioner submitted that the Respondents refused to engage it since 16/1/2012 as per its letter of which the Respondents confirmed receipt of on 31/1/2012. Further that the Petitioner was condemned unheard on its refunds which the Respondents claimed could not be provided by them because the refund claim was declared late, there is no information to show the items were exported and the claim is not in the iTax System
13. On the other hand, the Respondents submitted that the Petitioner's letter dated 16/1/2012 requesting VAT refund was addressed to the Commissioner-Customs Department instead of the VAT refunds section. That when the Petitioner wrote to the VAT refunds section on 23/6/2021, the Commissioner reached out via emails dated 18/8/2021 acknowledging the same and queuing the same for action.
14. It is not in dispute that the Petitioner has been operating as an EPZ company since 2009. Through a letter sent in 2009, the Petitioner informed the Respondents that it had been operating as an EPZ entity and that it had the intention to claim refunds for the taxes it had paid in due course. On 16/1/2012 the Petitioner wrote a letter to the VAT Refunds Section claiming a refund of VAT (annexed as RDD-006 and RDD-008 in the Petitioner's supporting affidavit). The 2nd Respondent acknowledged receipt of the letter on 31/1/2012. On 23/6/2021, the Petitioner wrote a follow up letter to the Respondent requesting an update on its refund claim noting that the Respondent had not responded to the Petitioner despite the fact that it had made several attempts to get feedback from them. This letter was also acknowledged as received on 9/7/2021 by the 2nd Respondent.
15. Further the court notes the email correspondence (annexed as RDD-009 in the Petitioner's supporting affidavit) between the Petitioner and an employee of the Respondents dated 18/8/2021 which indicated that the Petitioner's Finance Officer held a meeting with the Respondents on the issue and the Respondent promised to work on it and keep the Petitioner posted.
16. Article 47(1) of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 50(1) thereto states that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
17. From the documents above, it is clear that the Petitioner continuously sought to have its VAT refund claim paid by Respondents and that as early as 2009, the Petitioner had informed the Respondents of its intention to claim refunds for the taxes it had paid. However, the Respondents outrightly ignored the claims for years and refused to engage the Petitioner.
18. The Respondents did not address the Petitioner's claims since 2012. Under Articles 47, 48 and 50, the Respondent had the obligation, after receiving the VAT claim, of responding to the Petitioner, considering the claim put forth and communicating the way forward in terms of paying out the same.
19. I find therefore that the actions of the 2nd Respondent violated the Petitioner's right to fair administrative action and fair hearing which resulted in limiting the Petitioner access to justice.



Issue 2: whether the Respondents Breached the Petitioner’s Right to Property Guaranteed by Article 40 as Read Together With Article 260 and Article 210 of the Constitution?

20. The Petitioner submitted that collection of VAT was unlawful and unconstitutional and withholding such amounts collected is a violation of ownership of property as per Article 40 as read together with Article 260 of the Constitution. Further that the requirement to have the Petitioner pay the drawback duty was contrary to the provisions of section 106, 107 & 170 (2) of the East African Community Customs Management Act and, therefore, the Respondents need to refund ksh4,080,008/- as the same was collected contrary to the tax laws of the Republic of Kenya.
21. Conversely, the Respondents submitted that the Petitioner had the obligation to notify the respondent of the EPZ license. That the Respondent only did so on 17/11/2009, 5 months later and that the taxes were paid during the period before they notified the Respondent. That the taxes were paid between September 2009 and October 2009 when the Respondent was notified of the EPZ.
22. Section 29 of the EPZ Act states:-
- “The export processing zone enterprises, the export processing zone developers and the export processing zone operators shall be granted exemption from all existing and future taxes and duties payable under the Customs and Excise Act (Cap. 472) and Value Added Tax Act on all export processing zone imports for use in the eligible business activities of the export processing zone enterprise ...”
23. The provision above explicitly exempts the Petitioner as an EPZ entity from payment of duties under the Customs and Excise Act and the VAT Act. In this case however, the Petitioner, despite its status as an EPZ entity, paid taxes, which they claim was demanded by the Respondents.
24. The Petitioner claimed a refund of the same from 2012 but the Respondent has been evasive and continues to ignore their claim. The court is cognizant of Article 210 of the Constitution which states that no tax may be imposed, waived or varied except as provided by legislation.
25. In this case, the Respondents contended that the Petitioner paid the said taxes voluntarily and that there was no demand for payment of the same from then. It is not clear whether the Respondents demanded the payments or whether it was paid voluntarily however it is undisputed that the Petitioner paid the said taxes as illustrated in the petition. There is no statutory justification for the Petitioner to pay such taxes contrary to Article 210(1) of the Constitution therefore the said taxes ought to be refunded as claimed by the Petitioner.
26. I find therefore that the Respondents in refusing to refund the taxes paid by the Petitioner have violated the Petitioner’s right to property under Article 40. Further the Respondents’ infringed on the Petitioner’s right to fair administrative action and fair trial by failing to respond to its tax refund claims nor to give audience to it.
27. The upshot of the above is that the Petition has merit and is allowed as prayed save for prayer f, being an alternate prayer to the rest of prayers sought, the same is denied.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2023.

J.W.W. MONG’ARE



JUDGE

In the Presence of:-

Ms. Ong'anya for the Petitioner.

Mr. Kinyua for the Respondent.

