



**Be Energy Limited v Commissioner of Customs & Border Patrol  
(Income Tax Appeal E088 of 2021) [2022] KEHC 13521 (KLR)  
(Commercial and Tax) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13521 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E088 OF 2021  
A MABEYA, J  
SEPTEMBER 30, 2022**

**BETWEEN**

**BE ENERGY LIMITED ..... APPELLANT**

**AND**

**COMMISSIONER OF CUSTOMS & BORDER PATROL ..... RESPONDENT**

**JUDGMENT**

1. The appellant is a limited liability company incorporated in Kenya pursuant to the *Companies Act*. Its principal business is marketing and distribution of petroleum products.
2. The respondent is a principal officer appointed under the *Kenya Revenue Authority Act*, cap 469 Laws of Kenya. The authority has the mandate to collect and receive all government revenue.
3. The respondent carried out an audit on the appellant for the period December 1, 2015 and August 31, 2016 and established failure on the part of the appellant to pay excise duty on the supply of Jet A1 fuel sold locally. Upon coming into force of the *Excise Duty Act 2015* on December 1, 2015, excise duty became payable on Jet A1 local supplies.
4. The respondent sent a demand to the appellant on October 2, 2019 to pay excise duty in relation to Jet A1 deliveries between December 2015 and August 2016. The appellant objected to the assessment on November 14, 2019 and the respondent made an objection decision on November 18, 2019 upholding the assessment of Ksh 58,215,148/-.
5. Aggrieved by the decision, the appellant appealed to the Tax Appeals Tribunal (“the Tribunal”). Vide its judgment delivered on June 11, 2021, the tribunal dismissed the appeal and allowed the excise duty



demand by the respondent for the period December 1, 2015 to August 31, 2016 in the sum of Ksh 58,215,148.00 plus accrued interest and penalty.

6. Aggrieved by that decision, the appellant appealed to this court setting out the following grounds: -

- “i) The tax appeals tribunal erred in law by finding that the appellant had not established the principle of legitimate expectation.
- ii) The tax appeals tribunal erred in law by failing to determine who between the appellant and respondent had the obligation in law to shift the customs procedure code from c421 (exempt) to c410 (ex-warehouse duty paid).
- iii) The tax appeals tribunal erred in law by finding that the respondent was justified in demanding excise duty for the period December 1, 2015 to 31st August 2016 yet the respondent had not put in place operationalization procedures to facilitate the collection of the said taxes.
- iv) The tax appeals tribunal erred in law and fact by not finding that the appellant’s right to fair administrative action had been violated by the respondent.
- v) The tax appeals tribunal grossly misdirected itself by treating the appellant’s submissions superficially thus arriving at an erroneous decision.”

7. In opposition to the appeal, the respondent filed statement of facts dated November 2, 2021. He contended that he did not act unreasonably or irrationally in demanding taxes for the period December 1, 2015 to August 31, 2016. That the appellant is a tax collection agent with the mandate to collect taxes on behalf of the respondent from the purchases of its products. The appellant was well aware that the [Excise Act 2015](#) came into force on December 1, 2015 and was therefore required to collect and remit the taxes.

8. That failure by the respondent to put in place mechanisms to collect taxes as alleged by the appellant did not exempt the appellant from collecting the same. He denied having abrogated the appellant’s right to fair administrative action or having violated the principle of legitimate expectation.

9. That the appellant had not made any specific request for tax abandonment. The Oil Marketing Companies (OMCs) had requested for a waiver as a group but there is no legal backing for an industry request for tax waiver/abandonment. That the appellant had failed to file its objection to the assessments as required by law contrary to section 51 (1) (2) and (3) of the [Tax Procedures Act, 2015](#).

10. This being a first appeal, this court is enjoined to review and evaluate the evidence afresh and come to its own independent conclusions and findings. See [Selle & another v Associated Motor Boat Co Ltd & others](#) (1968) EA 123.

11. The 5 grounds of appeal can be collapsed to one, namely, whether the respondent was justified in demanding excise duty on Jet A1 for the period December 1, 2015 to August 21, 2016.

12. The appellant case was that, for the period in which the respondent claimed excise duty on Jet A1, there was no procedure for collection of the said taxes thus the appellant and all Jet A1 suppliers could not charge the airlines who were the end users of the product.

13. On the other hand, the respondent contended that the [Excise Duty Act](#) came into force on December 1, 2015. In that regard, the appellant was duty bound to remit excise duty on the Jet A1 for the taxable period since the law had unambiguously imposed the tax. That the appellant claimed that it sought



a tax waiver/abandonment for the taxes due, however such authority could only be granted by the cabinet secretary to the national treasury which was not granted; that therefore, the respondent had no authority to vacate the demand for taxes.

14. In its judgment, the tribunal was of the view that since the *Excise Duty Act* required the appellant to charge and remit excise duty on its sales during the period, the tax became due and payable. Further, the tribunal found that the only way the appellant's liability could be discharged was if a waiver was granted by the cabinet secretary of the national treasury which did not happen.
15. The *Excise Duty Act 2015* ("the Act") came into operation on December 1, 2015. The First schedule to the act provides that the rate of excise duty on jet fuel is ksh 5,775.00 per 1000 litres.
16. Vide a letter dated February 10, 2017 that appears at page 94 of the record, the respondent wrote to the principal secretary of the national treasury. In the letter, he noted that upon the commencement of the act on December 1, 2015, the customs computer system was appropriately configured to enable the collection of excise duty on jet A1 and that all stakeholders were notified and advised on the appropriate customs procedure to use.
17. He further noted that the OMCs had requested for the waiver of the taxes as the product had been sold before they received the demand and the extra excise duty had not been factored into the price of the product at the time of the sale to their customers.
18. He concluded by recommending that he be authorized to abandon the recovery of the tax. He stated; "Meanwhile the demand made to the airlines by our investigations and enforcement department has been put on hold to await the waiver approval."
19. Various correspondence found under annexure 22 of the record of appeal, indicates that the ministry of petroleum and mining wrote to the national treasury seeking feedback on the waiver for the Jet A1 demand notes as recommended by the respondent. However, in its characteristic don't care attitude, the national treasury remained reticent.
20. In *Kenya Revenue Authority & 2 others v Darasa Investments Limited* [2018] eKLR, the court quoted with approval Pollard, *Parpworth And Hughes, 4<sup>th</sup> Constitutional And Administrative Law: Text With Material*, 4<sup>th</sup> Edn at page 583 wherein it is noted thus: -

"Legitimate expectation refers to the principle of good administration or administrative fairness that, if a public authority leads a person or body to expect that the public authority will, in the future, continue to act in a way either in which it has regularly (or even always) acted in the past or on the basis of a past promise or statement which represents how it proposes to act, then, prima facie, the public authority should not, without an overriding reason in the public interest, rescile from that representation and unilaterally cancel the expectation of the person or body that the state of affairs will continue. This is of particular importance if an individual has acted on the representation to his or her detriment."
21. In *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] Eklr, the Supreme Court set down the principles of legitimate expectation as follows: -
  - a) there must be an express, clear and unambiguous promise given by a public authority;
  - b) the expectation itself must be reasonable;



- c) the representation must be one which it was competent and lawful for the decision-maker to make; and
- d) there cannot be a legitimate expectation against clear provisions of the law or the Constitution.”

22. In *Total Kenya Limited v Kenya Revenue Authority; Barclays Bank of Kenya Limited & 2 others (Interested Parties)* [2020] eKLR, in similar circumstances as the present one, the court held: -

“The respondent made a recommendation to the cabinet secretary for the national treasury for waiver of the excise duty and stated that it would not pursue the unpaid tax until the cabinet secretary responds to the same. However, no decision has been made to date by the cabinet secretary and therefore the promise by the respondent conveyed a valid expectation that no demand for the taxes would be made until the cabinet secretary made a decision. This is on top of the statutory enactment that an objection to a tax assessment not responded to within sixty days is deemed to have been allowed by the respondent. Therefore, the respondent has indeed breached the petitioner’s legitimate expectation. i therefore agree with the petitioner that there was violation of its legitimate expectation that its objection had been allowed by the operation of the law. Additionally, that the tax would not be demanded before a decision was made on the respondent’s recommendation to the cabinet secretary for the national treasury for the abandonment of the same.”

- 23. In the present case, the tax authorities had not put in place procedures on how the excise duty tax was to be recovered. The appellant sold the subject fuel without recovering the said taxes from the airlines. The respondent recommended to the national treasury to waive the excise tax on the OMCs including the appellant. The cabinet secretary of the treasury never responded.
- 24. It is the respondent who has the authority in law to recommend tax waiver. This he did. Despite the fact that the waiver was not granted, the Court is of the view that the respondent gave a legitimate expectation to the appellant that he would not pursue the unpaid excise duty until the Cabinet Secretary of the National Treasury responded to his recommendation.
- 25. In the view of this court, the requirements for legitimate expectation set out the case of Communications Commission of Kenya (supra) have been met in this case.
- 26. It was therefore a breach of the appellant legitimate expectation for the respondent to turn around and demand the excise duty plus interest and penalties before the cabinet secretary had communicated on the waiver.
- 27. In view of the foregoing, I find that the tribunal erred in finding that legitimate expectation was not established and/or breached by the respondent.
- 28. Another issue for consideration is whether the appellant’s right to fair administrative action were violated by the respondent.
- 29. Under article 47 of the *Constitution*, every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.



30. In *Vivo Energy Kenya Limited v Commissioner of Customs & Border Control, Kenya Revenue Authority & another* [2020] eKLR, it was held: -

“From the cited decision, it is clear that for one to establish that an action or decision is unreasonable it must be shown that the reasoning is illogical or irrational. Herein the applicant argues that the 1st respondent’s actions were irrational as he continued to send out demand notices even though he was fully aware that the excise duty could not be redeemed from the applicant’s customers. Further, that there was a suspension of the demand for the excise duty by the 1st respondent pending the decision of the 2nd respondent.

By way of a letter dated February 10, 2017 addressed to the 2nd respondent, the 1st respondent admitted that the “additional tax burden will cripple local airlines” and recommended that the 2nd respondent exercises the powers conferred upon him by section 37(2) of the *TPA* to authorise the 1st Respondent to abandon and refrain the recovery of the tax in line with the provisions of section 37(1)(a), (b) and (c) of the TPA. The 1st Respondent went on to confirm that the demands made had been put on hold to await the approval of the proposed waiver.

It therefore goes against all logic that the 1st respondent, having made the recommendation for the abandonment of the tax and assured that the demand for the same would be put on hold until the 2nd respondent approved the recommendation, went ahead to demand payment of the same tax from the applicant.”

31. The above case was on all fours with the present case. The court reiterates the said holding and finds that the respondent’s decision was, in the circumstances, unreasonable and illogical. It was procedurally unfair having made the recommendation for the abandonment of the tax.
32. Accordingly, I find that the appellant’s right to fair administrative action was infringed upon.
33. In view of the foregoing, the appeal is found to be merited and is allowed. The judgment and order of the tax appeals tribunal made on June 11, 2021 is vacated and set aside. The costs of the appeal are awarded to the appellant.

It is so decreed.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**A. MABEYA, FCIArb**

**JUDGE**

