Ola Energy Kenya Limited v Commissioner for Investigations and Enforcement (Income Tax Appeal E031 of 2021) [2022] KEHC 16006 (KLR) (Commercial and Tax) (25 November 2022) (Judgment)

Neutral citation: [2022] KEHC 16006 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E031 OF 2021

A MABEYA, J

NOVEMBER 25, 2022

BETWEEN

OLA ENERGY KENYA LIMITED ..... APPELLANT

AND

THE COMMISSIONER FOR INVESTIGATIONS AND ENFORCEMENT ..... RESPONDENT

(An appeal from the Judgment of the Tax Appeals Tribunal at Nairobi delivered on 16/4/2021)

JUDGMENT

1. The appellant is a limited liability company incorporated in Kenya under the *Companies Act* and deals with petroleum products selling them to customers seeking to export the same to neighboring countries.

2. The respondent is a principal officer established under the KRA Act and is responsible for the collection and administration of revenue on behalf of the Government.

3. In February 2017, the respondent carried out investigations on transit consignment including Entries T810 2017MSA6312118 and 2017MSA6312094. The same encompassed various transit outward entries –(T812) declared by the appellant.

4. He established that the appellant had imported transit petroleum destined for South Sudan but there was no evidence that the same exited Kenya to South Sudan. He therefore demanded tax of Kshs. 7,992,415/= vide letter dated 22/3/2018 for the 170,384 Litres of Mogas that did not exit Kenya to South Sudan.

5. The appellant objected vide letter dated 18/4/2018. Vide a letter dated 29/5/2018, the respondent noted that the consignment had been sold to Lupain Investment (K) Limited and demanded that it be directed to Lupain. That if Lupain failed to act on the tax demand, the appellant would be responsible for the taxes as a guarantor pursuant to section 109 of the East African Community Customs Management Act ("EACCMA").

6. Thereafter, the respondent issued an objection decision dated 12/11/2019 and demanded taxes of Kshs. 8,152,700/=. The appellant filed an appeal before the Tribunal on 16/12/2019 challenging the decision. Vide its judgment of 16/4/2021, the Tribunal ruled in favor of the respondent.

7. The appellant was aggrieved by that decision and filed the instant appeal vide the Memorandum of Appeal dated 21/5/2021 raising 17 grounds.

8. In ground 1, it was contended that the Tribunal erred in holding that the appellant was liable to pay Kshs. 8,152,700/= in custom duties as opposed to Lupain Investment (K) Limited to whom it had transferred a consignment comprising of 210M3 of Premium Motor Spirit (PMS) under C17 Forms number 2017MSA6312094 for 37,639 litres and 2017MSA6312118 for 172,361 litres (the consignment).

9. In grounds 2-17, it was contended that the Tribunal erred in failing to find that the respondent had denied the appellant an opportunity to defend itself. That the respondent had refused to provide the appellant with the full report of the investigations that was relied on to conclude that the 170,384 litres of the consignment did not leave Kenya for South Sudan as intended. That the appellant contravened sections 203, 85(1) of the EACCMA as read together with Regulation 104(20) of the EACCMA Regulations 2010.

10. That the respondent's allegation was not supported by evidence as the investigation report was not availed. That on the other hand, the Tribunal erred in failing to find that the appellant had provided the respondent all the documents reasonably required as proof that the consignment had been exported out of Kenya. That the Tribunal erred in finding that the appellant had not transferred the consignment to Lupian and that the consignment had not been exported.

11. It was also contended that the tribunal erred in failing to find that the duty of an exporter ends when the Certificate of Export is issued (COE). That the Tribunal erred in finding that pursuant to section 133 of the EACCMA, the bond issued to the appellant had not lapsed and failed to find that pursuant to section 107(3) EACCMA, a bond is only valid for three years or sooner. That in the premises, the appellant's bond having been executed on 20/5/2015, it lapsed on 19/5/2018.

12. That the Tribunal erred in failing to find that the tax liability was on Lupain and not the appellant. The appellant therefore prayed that the decision of the Tribunal be set aside and the respondent's decision of 12/11/2019 be dismissed.

13. The respondent filed his Statement of Facts dated 21/1/2020 and contended that the judgment of the Tribunal was correct. That the consignment never changed ownership, and if it did, the correct legal process provided under section 51(1) EACCCMA and Regulation 71 of EACCMR had not been followed. That in the premises, the appellant was the legal owner and therefore liable to pay the taxes.

14. That the appellant had signed the bond to guarantee taxes pursuant to section 106 of the EACCMA and the same has never been discharged. That regardless whether the consignment was sold or not, the guarantor was obligated to ensure that the consignment would exit the country. That pursuant to section 107(3) of EACCMA, the Commissioner had a discretion to discharge the bond after 3 years as the provision used the word 'may' not 'shall'.

15. It was further contended that it was never a ground of appeal before the Tribunal that the appellant was never served with an investigation report. That ground could not therefore be introduced on appeal. That in any case, the appellant was served with the investigation findings vide the letter dated 14/10/2019 to which it objected to vide its letter dated 22/10/2019.

16. The respondent further contended that the judgment was correct as the Uganda Revenue Authority had confirmed that the consignment was never sighted in Uganda where the goods were meant to transit through.

17. The appeal was canvassed by way of written submissions. The appellant's submissions were dated 21/7/2021 and 2/11/2021, while those of the respondent were dated 14/9/2021. From the Memorandum of Appeal and the submissions, the grounds of appeal may be summarized as follows: -

    a. That the Tribunal erred in finding that the ownership of the consignment was not properly transferred to Lupain.

    b. That the Tribunal erred in finding that the consignment did not exit the Kenyan boarder and was thus not exported to South Sudan.

    c. That the Tribunal erred in finding that the bond executed by the appellant was still in force.

    d. That the Tribunal erred in finding the appellant liable to pay the demanded tax.

18. On the first ground, the Tribunal found that though the appellant submitted that it had transferred ownership of the consignment to Lupain, the shift of obligation was conditional on Lupain's cooperation failure to which the appellant remained responsible. The Tribunal also found that the appellant had not complied with the provisions of EACCMA in transferring ownership of the oil and thus rejected the ownership argument fronted by the appellant.

19. It was the appellant's case that it was not the owner of the consignment and that the tax demands made by the respondent should have been directed to Lupian. That ownership in the goods passed when the sale agreement was made. That there was sufficient evidence that Lupian was the owner due to the supporting documents including the sale agreement, commercial invoice, amended outturn report, entries with Lupian's name as owner, loading instructions and receipts. That under section 130 EACCMA, liability to pay duty rested on the owner of the goods.

20. The main question at hand is not whether the consignment was sold or not, but whether the transfer of ownership was done in accordance with the law. This being a tax matter, it is the tax laws that are applicable.

21. Though the appellant relied on the sale agreement with Lupian to establish when the title and risk in the goods passed to Lupian, the proper position is that parties cannot contract themselves out of legal provisions, procedures and obligations. The laws which regulated the consignment were specific on how transfer of property and change of name ought to occur. It was therefore upon the appellant to reflect the same in the agreements and follow the strict procedure provided by the EACCMA.

22. The applicable procedure is to be found in section 51(1) of the EACCMA as read together with Regulation 71 of EACCMR. The section provides: -

> " Where any goods are warehoused, the Commissioner may, subject to such conditions as he or she may impose- (c) permit the name of the owner of such goods in the account taken under section 47 to be changed if application is made in the prescribed form and signed."

23. Regulation 71 of EACCMR requires that where the owner of any goods deposited in a warehouse desires to transfer them to another person, he or she and the person to whom it is desired to transfer the goods, shall each complete and sign in the appropriate places a form of transfer in Form C16.

24. From the foregoing, it is clear that goods cannot be transferred without the Commissioner's involvement, and indeed, his approval. It is also clear that such permission will only be granted if the application is made on the prescribed Form C16 and signed. There was no evidence that the appellant followed this procedure. Despite having a sale agreement with Lupian, it could not effectively transfer the ownership of the consignment to Lupian without following the procedure set out above.

25. Consequently, ownership remained with the appellant as correctly found by the Tribunal. In any case, even though the respondent noted that the goods had been sold to Lupian, he imposed a condition that he would re-direct his demand to Lupian, and if the said Lupian was not cooperative, then he would hold the appellant liable to pay. Lupian failed to act, thus the responsibility shifted back to the appellant.

> Issue 2: Whether the tribunal erred in finding that the consignment did not exit the Kenyan boarder and was thus not exported to South Sudan.

26. As regards ground 2, at paragraph 79-83 of the judgment, the Tribunal considered the provisions of section 2(1) of EACCMA. It made a finding that under that provision, goods exported over land are deemed to have been duly exported when they cross the boundary of the exporting state to the receiving state. That there was no strict requirement that the goods must be entered in the customs system of the receiving state for them to be deemed duly exported.

27. It further held that the Commissioner was however, empowered under section 78(3) of the Act to request the owner of the goods to provide such documents including a certificate of landing to prove that the goods were indeed exported. That such power was replicated in the bond executed by the appellant.

28. It further made a finding that when the respondent wrote to the Busia weigh bridge to confirm whether the trucks carrying the consignments had passed through the weighbridge, KeNHA responded in the negative. That vide a letter dated 5/03/2021, Uganda Revenue Authority confirmed that the entries did not exist in the Ugandan ASYCUDA system hence there was no evidence that the consignments transited through Uganda. The tribunal thus found that the appellant had not satisfactorily demonstrated that the goods crossed the border to Uganda for export to South Sudan as destined.

29. The appellant submitted that the respondent's Customs & Boarder Control Department Brochure set out the procedure to be followed in the export of goods. That it ends with an issuance of a Certificate of Export (COE). It was submitted that the officers at the boarder exit first confirm that the goods have been exported/crossed the boarder before issuing the COE. That in the premises, the COE was conclusive proof that the consignment crossed the border.

30. It was further submitted that the seven T812 entries were fully rotated and rotation numbers issued, meaning that the trucks were physically verified and cleared by KRA and URA Customs officers. That the respondent had himself confirmed this position in Republic vs KRA & Another Ex-Parte Pwani Oils Products Limited (2016). Accordingly, that the provision of COE was sufficient evidence that the consignment was exported.

31. On his part, the respondent submitted that the onus of proofing export lay with the appellant as he was the rightful owner of the goods. That though the appellant adduced evidence that the goods were

in transit, there was no evidence that the consignment exited the border of a partner state and received into the customs system of the transiting partner state. That the COE was provided on 3/3/2021 when the matter was already before the tribunal. That in any case, the COE only showed that the goods were cleared on the Kenyan side, thus it was necessary for the appellant to proof that the consignment actually entered into the transiting country and finally received at the country of final destination in terms of section 78(3) of the EACCMA.

32. Section 2 of the EACCMA provides: -

> 2(1) "export" means to take or cause to be taken out of the Partner States
>
> (2) For purposes of this Act –
>
> ...
>
> (d) the time for exportation of goods shall be deemed to be
>
> (i) ...
>
> (ii) in the case of goods exported overland, the time at which the goods pass across the boundaries of Partner States;

33. From the foregoing, it is clear that in order for goods to be exported, they must pass across the boundaries of the partner states. In my view, the procedures and documentation imposed by the EACCMA and the East Africa Community Customs Management Regulations, 2010 are intended to ensure that goods leave the respective partner states by crossing the border.

34. Further, section 10(2) of the EACCMA requires the Commissioners of Partner States to, "establish common border posts, carry out joint customs controls and take joint steps as may be deemed appropriate to ensure that goods exported or imported through common frontiers pass through the competent and recognized Customs offices and along approved routes."

35. Sections 235 and 236 of the EACCMA empower the Commissioner to conduct inspection or audit o satisfy himself as to the accuracy and authenticity of declarations through examination of the relevant records held by persons concerned. This is in order to ensure compliance with the law, investigate, prevent and suppress offences.

36. Section 235 provides: -

> " 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 transshipment of the goods, as the proper officer may deem fit."

37. In addition to the power to conduct a post-export audit, the Commissioner is empowered to co-operate with partner states by requesting and obtaining information under section 10 of the EACCMA. The powers set out under the EACMMA are further supplemented by the powers conferred on the to inspect goods and records of any person, require any person to produce goods and records, conduct searches and seizures in order to enforce payment of taxes.

38. Once the Commissioner has conducted investigations and has put his findings to the taxpayer, the tax payer bears the burden of showing that the goods crossed the border and left the country. This position is supported by section 223 of the EACCMA which provides: -

> " In any proceedings under this Act—
>
> a. the onus of proving the place of origin of any goods or the payment of the proper duties, or the lawful importation, landing, removal, conveyance, exportation, carriage coast- wise, or transfer, of any goods shall be on the person prosecuted or claiming anything seized under this Act;
>
> b. the averment by the Commissioner-
>
> ....
>
> (iv) that the Commissioner, or proper officer is or is not satisfied as to any matter as to which it is required to be satisfied under this Act... shall be prima facie evidence of such fact;"

39. This is the same position under sections 30 of the Tax Appeal Tribunal Act, 2013 and 56 of the TPA. See also Republic v Kenya Revenue Authority Ex Parte United Millers Limited NRB HC JR No. 323 of 2013 [2015] eKLR.

40. In this appeal, the respondent's position was that the consignment was never exported to South Sudan as there was no evidence that it left the Kenyan boarder into Uganda in transit to its final destination.

41. The Court has carefully considered the documents produced before the Tribunal. Undoubtedly, there is overwhelming evidence that the consignment was in transit. That is an undisputed fact. What is in dispute is whether the consignment actually exited the Kenyan boarder into Uganda, and finally into South Sudan.

42. Though the appellant submitted that its duty ended when it was issued with a Certificate of Export (COE), and that it was not under any duty to provide any certificate from the Ugandan or South Sudan's customs office, it failed to consider that the Commissioner was empowered under section 78(3) of the Act to request the owner of the goods to provide such documents including a certificate of landing to prove that the goods were indeed exported.

43. It was established that the appellant was the owner of the consignment. In that regard, the provisions of section 78(3) of the Act is applicable. This power was replicated in the bond executed by the appellant. In the premises, the appellant cannot run away from the responsibility of producing the said documents.

44. If indeed the consignment was exported either by the appellant or by Lupian, nothing could have been easier than to provide clearance certificates from Uganda and South Sudan, and a certificate of landing.

45. Before this Court as was before the Tribunal was communication from KeNHA Busia weigh bridge to the effect that the trucks carrying the consignment did not pass through to enter into Uganda.

Worse still, Uganda Revenue Authority (URA) confirmed that the consignment did not exist in its ASYCUDA system. To that extent, there was no evidence to show that the consignment had exited from Kenya.

46. Accordingly, it is the Courtss finding that the Tribunal correctly found that the consignment did not exit the Kenyan boarders in line with section 2(2) of EACCMA.

47. On ground three, the appellant executed a bond of Kshs. 65,447,171/- on 20/5/2015. The bond secured the export of goods to Congo and South Sudan. The Tribunal found that it was conditional that the appellant provides satisfactory proof of export to the respondent, and that the Commissioner was granted discretion to request for a certificate of landing if he deemed it necessary. That these obligations were to be discharged within the period permitted by the law.

48. The appellant submitted that in accordance with section 107(3) of EACCMA, a bond was only valid for three years unless discharged sooner. That since it was executed on 20/5/2015, the bond lapsed on 19/5/2018. The tribunal however found that the provision provided that the bond may be discharged by the Commissioner on the expiration of three years but without prejudice to the Commissioner's right to require fresh security. The tribunal thus found that the use of the word may created an optional/discretionary obligation and not a mandatory obligation on the part of the Commissioner to discharge a bond upon the expiry of three years.

49. Sections 106 to 108 of EACCMA provide for and govern bonds. Section 107 (3) provides: -

> " All bonds required to be given under this Act shall be so framed that the person giving the bond, and any surety thereto, is bound to the Commissioner for the due performance of the conditions of that bond, and any such bond may, unless sooner discharged by the due performance of the conditions thereof be discharged by the Commissioner on the expiration of three years from the date thereof, without prejudice to the right of the Commissioner to require fresh security."

50. From the foregoing, the surety is bound to the Commissioner for the due performance of the conditions of that bond. The Commissioner may discharge the bond after three years, though the same is discretional on the due performance of the conditions.

51. Indeed, section 109 (1) provides that where the conditions have not been met, the Commissioner may give notice in writing and require the surety to pay the secured amount within 14 days of the notice. The question now is, did the appellant comply with the conditions of the bond it executed?

52. The bond dated 20/5/2015 provided that: -

> " ... We understand that a condition of this obligation is that within the period allowed by the law, the goods and every part thereof shall be exported and proof of exportation satisfactorily given to the Commissioner shall be produced within that period and further, in any case in which the Commissioner requires it, prove satisfactorily to the Commissioner as to the landing of goods at the port of destination as may be required within the period allowed by the law. That we further understand that the fulfilment of this condition shall discharge this obligation, but that this obligation shall be and remain in force in the event of non-fulfilment of this condition."

53. It has already been established that the appellant failed to satisfactorily proof to the Commissioner that the export was done. The bond clearly empowered the Commissioner to request for the certificate of landing in South Sudan. When such request was made, the appellant failed to honor the terms of

the bond. The bond was also clear that only the fulfillment of the condition to export the goods and provision of satisfactory proof of export would discharge the bond That the bond would remain in force in the event of non-fulfilment of this condition.

54. Having failed to fulfill the conditions of the bond, the question of discharge of bond upon expiry of three years cannot arise. The bond continues to remain in force until the conditions for discharge are met. In any case, the dispute arose before the expiry of three years, thus the bond was still in force.

55. In this regard, ground three fails as the Tribunal was correct in finding that the bond executed by the appellant was still in force.

56. Having found that the ownership of the consignment was vested in the appellant, and that there was no proof of export, and, the bond being still in force, the Tribunal correctly found that the appellant was liable to pay the demanded taxes. This court sees no justification for interfering with the decision of the Tribunal.

57. The upshot is that the appeal is without merit and the same is dismissed with costs.

It is so decreed.

DATED AND DELIVERED THIS 25TH DAY OF NOVEMBER, 2022.

A. MABEYA, FCIArb

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR