



Acorp Gifts Kenya Limited v Aramex Gifts Kenya Limited (Miscellaneous Application E825 of 2022) [2022] KEHC 16694 (KLR) (Commercial and Tax) (20 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16694 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E825 OF 2022**

A MABEYA, J

DECEMBER 20, 2022

BETWEEN

ACORP GIFTS KENYA LIMITED APPLICANT

AND

ARAMEX GIFTS KENYA LIMITED RESPONDENT

RULING

1. This is a ruling on the application dated November 18, 2021. It was brought under article 35(1) (b) of the *Constitution*, sections 68(1) and 69 of the *Evidence Act*, sections 1A, 1B, 3 and 3A and 22 of the *Civil Procedure Act*, and orders 14 rule 7 and order 51 rule 1 of the *Civil Procedure Rules*.
2. The application sought that the respondent be compelled to produce, make discovery on oath and deliver and/or avail copies of the customs clearing documentation for the applicant's years of income 2017, 2018 and 2019 including proof of payment of taxes on behalf of the applicant to KRA within 7 days of such orders.
3. The grounds for the set out in the supporting and supplementary affidavit of Michael Botha sworn on November 18, 2022 and November 28, 2022, respectively. It was contended that the applicant was a subsidiary of Amrod Corporate Solutions (PTY) Limited registered in South Africa. The latter was in the business of manufacture of branded merchandise in South Africa which is then imported into Kenya for sale.
4. In the years 2017-2019, the applicant imported various merchandise into Kenya using the respondent as its clearing agent who cleared the consignments. In 2020, KRA conducted an audit of the applicant's taxes for 2017-2019 and issued a notice of additional assessment on August 25, 2021 for the applicant's corporate income tax and VAT.



5. The applicant appealed against the assessments to the Tax Appeals Tribunal (“the tribunal”) in TAT No 235 of 2022. The applicant requested the respondent to provide copies of the customs clearing documents for the years in question in order to support the appeal. However, the respondent failed to provide the documents.
6. It was contended that the documents sought were in the respondent’s custody and were pertinent to the appeal. That their production would not be prejudicial to the respondent. The tribunal had granted the applicant up to November 28, 2022 to file all the documents failure to which the leave to file the same would lapse.
7. It was the applicant’s case that the respondent had made admissions *vide* its response that it was the clearing agent for Amrod Corporate Solutions, the applicant’s parent company, and that it cleared *vide* its pin number, paid taxes and asked for refunds.
8. It was contended that as the clearing agent, the respondent was obliged to keep tax records and information for a 5-year period which was yet to lapse. That in the premises, it was in possession of the clearing documents. That KRA maintained records for a 10-year period from its disabled Simba system and nothing stopped the respondent from accessing those records.
9. That KRA had specified the documents it needed from the respondent *vide* the email dated June 6, 2021 being all the documents relating to imports made on behalf of Acorp Gifts Kenya for years 2017, 2018, 2019 and 2020, thus it was not unclear which documents were required from the respondent. That the documents provided by the respondent were incomplete as they did not include the years in dispute being 2017-2018.
10. The respondent opposed the application *vide* the replying and supplementary affidavit sworn by Thuo Githaiga, the respondent’s manager, on November 24, 2022 and November 28, 2022 respectively.
11. The respondent denied being the applicant’s clearing agent. It contended that it was contracted by Aramex South Africa as its clearing agent for goods imported from South Africa to Kenya by Amrod Corporate Solutions (PTY) Limited (“Amrod”), a company registered in South Africa. That the respondent cleared those goods under its pin, paid the applicable taxes and sought a refund from Aramex South Africa after attaching all the relevant documents. That it did not retain the documentation relating to the importation.
12. That Aramex South Africa would in turn invoice Amrod Corporate Solutions and recharge the taxes paid on importation of the goods. It would then forward all the supporting documentation. Copies of the invoices billed to Aramex South Africa were produced as TG 1.
13. It was further contended that Amrod would only pay the invoices billed upon obtaining proof of the shipping costs and taxes paid in Kenya. The statement of account between Amrod and Aramex South Africa was produced as TG 2.
14. The respondent thus denied acting for the applicant and stated that it had informed the applicant that it was not in possession of any import documentation. That in good faith, the respondent retrieved import documentation for 2018-2019 from KRA’s system, but could not retrieve for 2017 as KRA’s Simba system which stored documentation prior to 2018 was discontinued.
15. That the respondent advised the applicant on how it could pay and retrieve documentation for 2017 from KRA *vide* email dated November 29, 2021. That the respondent had also assisted by preparing an affidavit for filing before the Tribunal at the applicant’s request and thus denied that it had refused to provide the documentation.



16. It was also averred that KRA's assessment was a result of the applicant's self-assessment and that it was unlikely that the applicant did not have the importation documentation. That the applicant had also not demonstrated how those goods connected with the demand on VAT as VAT encompassed many other transactions.
17. It was therefore contended that there being no contractual relationship between the parties, the respondent was not obligated to provide any documents to the applicants. That it had only done so in good faith and provided all available documents and information from KRA's integrated customs management system.
18. The application was canvassed by way of written submissions. The applicant's submissions were dated December 6, 2022 and the respondent's December 13, 2022. The court has considered the entire record.
19. Whether or not a court should order discovery and production of documents is a matter of discretion to be exercised in a judicious manner for the ends of justice. Section 22 of the [Civil Procedure Act](#) provides that: -
 - a. "Subject to such conditions and limitations as may be prescribed, the court may, at any time, either on its own motion or on the application by either party;
 - a. Make such orders as may be necessary or reasonable in all matters relating to the delivering and answering of interrogatories, the admission of documents and facts and the discovery and inspection, production, impounding and return of documents or other material objects producible as evidence."
20. A party may seek to discover any fact that is not privileged but is relevant to the subject matter in the suit. The only condition is that the documents sought should be relevant to the issue before court.
21. In *Halsbury Laws of England* Vol 13 at paragraph 38, it is stated that discovery will not be ordered in respect of irrelevant allegations in the pleadings, which even if substantiated cannot affect the result of the action. Nor can it be ordered in respect of an allegation not made in the pleadings or particulars, or to enable a party to fish for witnesses or for a new case, that is to enable him start a new case.
22. In [Oracle Productions Ltd v Decapture Ltd & 3 others](#) [2014] eKLR, it was held that pre-trial discovery is so central to litigation that the entire order 11 of [Civil Procedure Rules](#) (2010) is fully devoted to it, including sanctions for non-compliance. The court was emphatic that discovery should be limited solely to matters in contention and relevance will only be gauged or tested by pleadings or particulars provided.
23. Further, in [Lustman & Company \(1990\) Limited v Corporate Business Centre Limited & 4 others](#) (Civil Suit 311 of 2018) [2022] KEHC 42 (KLR) (Commercial and Tax) the court observed that: -

"It should be added that discovery is also intended to aid a party access vital documents to his case that are solely in the custody of the opposite party, thus levelling the litigation ground. (*Ramji Megji v Kisii University* [2016] eKLR). The court emphasized in *Concord Insurance Co Ltd v NIC Bank Ltd* [2013] eKLR that only relevant documents should be disclosed and that relevance is to be tested in the pleadings, and that discovery should not be used as a fishing expedition. (*Selecta Kenya Gmbh & Co Kg & another v Peter Wanderi* [2015] eKLR)."



24. This court has seen the respondent's letter dated March 29, 2021 produced as MB1. The respondent admitted to being the clearing agent for Amrod South Africa and that it cleared the imports to Kenya using its pin number. The court also notes that the applicant's averment that Amrod South Africa was the applicant's parent company was neither denied nor challenged.
25. In an affidavit sworn by Thuo Githaiga on March 4, 2022 before the tribunal, it was deposed at paragraphs 2, 3 4 and 5 that the respondent had acted as a clearing agent for the applicant. It was also stated that the applicant's shipment were processed using the respondent's pin number PxxxxxZ, but the clearance was done on behalf of the applicant who was the importer of the goods.
26. From the said statements made on oath, it is clear that the respondent acted as the applicant's clearing agent in the importation of goods from South Africa. Even if the respondent denies that fact, there is evidence on record to show that the respondent cleared the goods on behalf of Amrod South Africa, the applicant's parent company. From the record, undoubtedly the applicant was the importer.
27. There is TAT No 235 of 2022 wherein the applicant is disputing KRA's assessments for corporation tax and VAT. The respondent admitted having assisted the applicant in that matter by swearing the affidavit dated March 4, 2022 wherein it confirmed that it was the applicant's clearing agent.
28. Though the respondent averred that it had retracted that affidavit, there was no evidence of such retraction. Such recall can only be by another statement of oath. It is instructive that the said affidavit was sworn by Thuo Githaiga who has sworn the affidavit in opposition to the present application.
29. The respondent also admitted that it had provided documentation for 2018- 2019. However, from KRA's email dated June 6, 2021, KRA asked the respondent for specific documents that needed to be provided, that is, 'all the documents relating to the imports by you on behalf of Acorp Gifts Kenya Limited for the years 2017, 2018, 2019 & 2020'. The respondent only availed documents for 2018-2019 on the basis of what it referred to as 'good faith'.
30. The respondent's case was that it forwarded all importation documents to Aramex South Africa in order to get a refund for the taxes paid and that it did not retain any documentation. It only provided documentation for 2018-2019. The explanation for not providing the documents for 2017-2018 was that KRA's Simba system had since been suspended and the respondent was unable to retrieve the documentation.
31. Section 43 of the [VAT Act 2013](#) requires a taxpayer to keep transactional records for a period of five years. The respondent as a clearing agent of the applicant and having been paid for such services, was obligated to keep the said documents for such a period. The respondent knew or ought to have known that the applicant may be required by the tax authorities to produce such documents within the period provided for by the law.
32. It has already been established that the respondent was the clearing agent in the applicant's importation. As a company which is in the daily business of custom clearance, this court is not convinced that the respondent simply forwarded all the documents to Aramex South Africa without retaining any copies thereof. That would be bad business practice and contrary to prudent record keeping.
33. The 5-year period had not lapsed by the time the respondent was requested both by the applicant and the KRA to produce those documents. As the clearing agent whose pin was admittedly used to clear the imports, it is expected that the respondent is the custodian of all those documents and information relating to the imports, and is thus under an obligation to produce the documents.



34. Even if there was no contractual relationship between the parties, the respondent as the entity whose pin was used to clear the goods, would still have a legal obligation to provide those documents to KRA when requested.
35. The respondent stated that the Simba system has since been discontinued and that it was not possible to retrieve documentation for 2017-2018. However, in its replying affidavit, the respondent stated that it had advised the applicant's tax agent in an email dated November 29, 2021 that KRA had access to the Simba system and KRA can be requested to retrieve the documents from the Simba system. This is enough proof that information retained in the old Simba system was still accessible.
36. In the view of this court, it is not the applicant to make such a request but the respondent, being the one who cleared the imports and paid the necessary taxes.
37. Having found that the respondent acted as the applicant's clearing agent either directly or indirectly through Amrod Coporate Solutions (PTY) Limited, the court finds that the respondent was the custodian of all the importation documents for the years 2017, 2018, 2019 and 2020.
38. It has therefore been established that the respondent had the duty to keep all those records for a five-year period which has not lapsed. It has further been established that it is possible for the respondent to access documents and information from KRA's outdated Simba system upon application and payment.
39. This court sees no reason why the orders sought ought not to issue. No prejudice will be faced by the respondent for producing documents which are or ought to be in its possession. It is unclear what the respondent is hiding if it really paid all the correct taxes at the time.
40. At the very least, if the respondent indeed forwarded all the documentation to Aramex South Africa as claimed, nothing is easier than requesting Aramex for copies of such documentation. The documents being sought are not only relevant but very crucial to the applicant's appeal before the tribunal.
41. In view of the foregoing, the court finds the application to be meritorious and grants the orders as sought. The documents are to be produced by the respondent within 30 days of the date hereof. Since the applicant should have foreseen the present scenario at the time it engaged the respondent as its clearing agent, I would order that each party to bear own costs.
42. The stay of TAT proceedings extended for 45 days only from the date hereof.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2022.

A. MABEYA, FCIArb

JUDGE

