



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION

HCCOMMCTA/E001/2021

EL-AMIGOS.....APPELLANT/APPLICANT

VERSUS

COMMISSIONER INVESTIGATIONS AND ENFORCEMENT...RESPONDENT

RULING

Introduction

1. The appellant's Memorandum of Appeal dated 8th April 2021 and the Notice of Motion dated 14th April 2021, the supporting affidavit and Certificate of Urgency are all drawn and filed by a one Christine Makungu Muakangi/ Magot Freight Services Ltd for and on behalf of the appellant. A strikingly disturbing question arises touching on the competence of the said pleadings which are admittedly filed by a non-advocate on behalf of a litigant.
2. Interestingly, that is the same ground upon which the appellant/applicant lost its case before the Tax Appeals Tribunal (the TAT) in Misc. Application No. 12 of 2019 where the same person represented the appellant. The TAT in its ruling dated on 1st April 2021 was emphatic that she is not a registered tax agent pursuant to section 25(1) of the Tax Appeals Tribunal Act, [1] (The TAT Act) and therefore she lacked audience before the TAT to conduct matter on behalf of a taxpayer.
3. One would have expected that the appellant would have taken the cue from the ruling and retrace its steps to reconstruct its case. However, despite the fact that the TAT went a step further and advised the appellant to secure a registered tax agent, if it deemed it necessary, the appellant moved to this court represented by the same person whose competence had been questioned before the TAT and as stated above, she prepared all the pleadings and appeared in court and even argued the application before me.
4. Before addressing the competence of the appellant's pleadings which are drawn by the said Christine Makungu Mukangi, it is useful to highlight, albeit briefly, the litigation which culminated in the TAT's ruling dated 1st April 2021 which the applicant seeks to stay pending the hearing and determination of its appeal against the said ruling.
5. On 2nd March 2019, the applicant imported a consignment comprising of used motor motorcycle spare parts. It paid duty **Kshs. 316,454/=** and **Kshs. 130,204/=** for uplift of duty and customs where house rent of **Kshs. 32,509/=**. On 1st March 2019, it evacuated the container to Nakuru where the Respondent supervised offloading of the goods and it sealed the premises without issuing a Seizure Notice and left two police officers to guard the premises. Aggrieved by the Respondent's decision, on 11th March 2019, the applicant lodged an Objection Notice through its advocate and demanded the release of the goods. However, on 14th March 2019, the Respondent showed up in the premises armed with Form F.89 being the Seizure Notice showing reasons for the seizure as "goods suspected to have been mis-declared" and requested the applicant to furnish several documents relating to the consignment.
6. On 20th August 2019, the applicant filed an application before the TAT seeking release of the consignment pending its hearing and determination; waiver of warehouse storage charges and demurrage costs pending the hearing and determination of the application, and any other orders the court may deem fit and costs of the application. However, the Respondent filed a Notice of Preliminary Objection on 29th September 2020 on a point of law on grounds that the said Christine Makungu Mukangi, could not conduct the matter by virtue of section 25 (1) of the TAT Act. The TAT upheld the objection. It held: -

25. In view of the foregoing, the Tribunal finds that the applicant's representative herein, one Christine Mukangi is not a registered tax agent pursuant to section 25 (1) of the Tax Appeals Tribunal Act, hence lacks audience before the Tribunal to conduct a matter on behalf of taxpayer and further that the applicant has not exhausted the internal mechanisms set down by the relevancy statutes before making its application.

The appeal

7. Aggrieved by the above decision, the applicant appealed to this court faulting the TAT for *inter alia* finding that Christine Makungu Mukangi was not a licensed Tax Agent under section 25 (1) of the TAT Act, for ignoring sections 145, 146 & 147 of the *East African Customs Management Act (EACCMA)* and Customs Regulations 150 (b). It also faulted the TAT for ignoring the power of Attorney and customs license which it claims authorized Christine Makungu Mukangi to represent the appellant and for determining a ruling before parties submitted on the same. Lastly, the appellant faults the TAT for dismissing her application without the parties' responses, and for observing that no Notice of Objection was filed and failing to consider its application.

The application

8. By a Notice of Motion dated 14th April 2021, drawn and filed by the same Christine Makungu Mukangi/Magot Freight Services Ltd, the appellant seeks orders that the said ruling be stayed pending the hearing and determination of the appeal. It also Prays for an order that the goods be released pending the hearing and determination of the appeal. Lastly, it prays for costs of the application to be provided for. Prayers (1) & (2) of the application are spent.

9. The application is founded on the grounds that the goods were released to the applicant by the Customs & Border Control after being satisfied that the appellant had complied with all the provisions of the EACCMA, namely, Sections 35, 41 and 122 read together with the fourth schedule. It also states that it paid import duty, VAT and uplift duty but at Nakuru, the Commissioner of Investigations & Enforcement without a warrant or a letter from the Commissioner of Customs & Border Patrol contrary to section 60 (1) (5) of the Tax Procedure Act^[2] (The TPA Act) seized the goods but never issued a notice or reasons. Further, the applicant contends that the Commissioner of Investigations & Enforcement issued an F 89 No. 202358 dated 14/03/2019 for 15 disassembled motor cycle spare parts as if the goods had been seized on that day, then stored the goods in a premises where rent is **Kshs. 50,000/** = prompting the applicant to file its application before the TAT culminating in the impugned ruling. Lastly, the applicant states that no prejudice will be suffered by the Respondent if the orders are granted and if no stay is granted, other 10 related cases will be affected and the applicant will suffer irreparable loss.

The Respondent's Replying affidavit

10. The Respondent's response is contained in the Replying Affidavit of Thea Mwai, dated 6th May 2021. The nub of the affidavit is that Christine Makungu Mukangi / Magot Freight Services Ltd is not allowed to represent and or appear for the appellant because under Order 9 Rule 1 of the Civil Procedure Rules, appearance or acting in any court should be by a party in person, or by his recognized agents, or by an advocate duly appointed to act on his behalf. The Respondent states that the appellant is a business name registered by James Mucheru Kaguora and Njung'e Kimani Geoffrey on 3rd August 2017 under the Registration of Business Names Act trading as El Amigos Autos Enterprises.

11. It is the Respondent's position that under Order 9 Rule 1 of the Civil Procedure Rules, the applicant does not qualify to represent the appellant because she is neither an advocate, nor a recognized agent, nor a party in person. Further, that Magot Freight Services Ltd is a custom clearing agent, which represent the appellant in clearing of goods and therefore it cannot act for the appellant and that the section 34 (1) (f) of the Advocates Act prohibits unqualified persons from preparing certain documents or instruments, hence, the applicant cannot prepare court documents.

12. It is also deposed on behalf of the Respondent that the appellant's consignment was impounded on 14th March 2019 and the Notice of Goods Deposited in Customs Warehouse No. 202358 issued because the appellant had imported used motor cycles and mis-declared them as motor cycle parts, and, that Notice described the goods deposited as "15 disassembled motor bikes of various types from Japan."

13. Also, it is the Respondent's position that the Certificate of Conformity indicates an HS Code of 871150.00 for the motor cycle units which is the tariff for motor cycle units and that in the declaration / Entry the applicant classified the motor cycles under tariff 840820.00, which is the tariff for classification of engines which was a misclassification contrary to section 203 of the EACCMA, and that the misclassification was confirmed during the offloading where on verification the Respondent found full-assembled motorcycles missing only the seats and wheels.

14. Additionally, that the appellant's entry (exhibit TM-4), at page 4 & 5, confirms the Respondent's position that the goods are "15 disassembled motor bikes," and the appellant's entry (exhibit TM-4), describes the goods as "15 pieces of used fuel tanks" and "15 pieces of used motor bike engine with frames." The Respondent contends that if the 15 fuel tanks and the 15 pieces of used motor bike engine with frames are assembled, they will assemble 15 motor bikes and vide her undated letter marked as TM-5, the appellant accepted that the parts have an essential character of full bikes. The Respondent maintains that the appellant has contravened section 203 (a), (b) and (e) of EACCMA.

15. It is also the Respondent's position that the appellant made an incorrect entry and fraudulently evaded payment of duty. Further, under section 60 (2) of the TPA, the Respondent may secure the building, place, property, documents or data storage device to which access is sought under subsection (1) before obtaining a warrant. Further, that the Respondent only secured the 15 motor bikes parts and placed the same in a different premises. Additionally, that the goods were deposited for the appellant to provide further information and documents as required by the Respondent's vide letter dated 13th March, 2019. Regarding the plea to release the goods, the Respondent opposes the same on grounds that the appellant is represented by unqualified person, that the parts have an essential character of full bikes and if released the motor bikes will operate without being properly registered by National Transport and Safety Authority.

The Applicant's submissions

16. Christine Makungu Mukangi, appearing for the applicant urged the court to stay of the impugned ruling and order the goods to be

released. She argued that the ruling has affected other cases before the TAT. She faulted the TAT for failing to recognize that she had a Power of Attorney and for ignoring section 145, 146 & 147 of the EACCMA and for dismissing her appeal before the parties made submissions. Further, she argued that the goods were seized without warrants contrary to law. She pleaded with the court to grant an interim stay and order the release of the goods.

The Respondent's advocates submissions

17. The Respondent's counsel, Mr. Twahir pointed out that before this court is an application for stay and urged the court to ignore the applicant's submissions outside the issue of stay. He submitted that before the TAT the applicant applied for the release of its consignment pending the hearing of its application, and also prayed that the warehouse charges be waived. He argued that the Respondent filed a Preliminary Objection on Point of Law dated 29th September 2020 challenging the capacity of Christine Mukangi to represent the appellant before the TAT. Counsel submitted that under Section 25 (1) of the TAT Act, the appellant may appear in person or be represented by a tax agent or by an advocate. He argued that the TAT found that Christine Mukangi, is not a registered tax agent pursuant to Section 25 (1) of the TAT Act, hence she could not represent a tax payer before the TAT.

18. Counsel cited Order 9 Rule 1 of the Civil Procedure Rules and argued that Christine Makungu Mukangi has no capacity to represent the applicant. He argued that the Advocates Act[3] requires unqualified persons not to prepare certain documents or instruments while under Section 34 (1) (f) of the Advocates Act, no unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument relating to any other legal proceedings. He relied on *Samuel Gioche t/a Sagio Contractors v Stanley Mwangi Kiboro & another*[4] and submitted that before this court are legal proceedings prepared by an unqualified person and ought to be dismissed.

19. Regarding the consignment, counsel submitted that the appellant's consignment was impounded on 14th March 2019 and the Notice of Goods Deposited in Customs Warehouse No. 202358 and that the reason for impounding was that the appellant had imported used motor cycles and mis-declared them as motor cycle parts. Further, that the Notice described the goods deposited as "15 disassembled motor bikes of various types from Japan." He argued that the appellant contravened section 203 (a), (b) and (e) of EACCMA.

20. Additionally, he submitted that under section 60 (2) of the TPA, the Respondent may secure the building, place, property, documents or data storage device to which access is sought under subsection (1) before obtaining a warrant, and that the Respondent only secured the 15 motor bikes parts and placed the same in a different premise. Lastly, counsel submitted that the Respondent opposes the release of the goods on grounds *inter alia* that the parts have an essential character of full bikes and if released the motor bikes will operate without being properly registered by National Transport and Safety Authority, and, that fully assembled motor bikes attract higher duty than the parts, thus, the government risks losing revenue.

Determination

21. All the pleadings in this matter were drawn and filed by a non-advocate. She also appeared in court (online) and argued the application on behalf of the applicant. A pertinent question of law which this court cannot ignore arises touching on the competence of the pleadings and her competence to appear in court and argue the application on behalf of the applicant. This scenario brings into sharp focus the provisions of sections 34 of the Advocates Act[5] which prohibits an unqualified person from drawing pleadings and 31 which provides:-

31. Unqualified person not to act as advocate

(1) Subject to section 83, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.

22. The above provision is couched in peremptory terms. In mandatory terms, it bars unqualified persons from acting as advocates. To underscore the seriousness of this provision, Parliament in its wisdom inserted sub-section (2) of the said section which creates an offence for breach of the said section. It provides: -

(2) Any person who contravenes subsection (1) shall—

(a) be deemed to be in contempt of the court in which he so acts or in which the suit or matter in relation to which he so acts is brought or taken, and may be punished accordingly; and

(b) be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting; and

(c) in addition be guilty of an offence.

23. The key question then is whether this court can shut its eyes to such a glaring illegality and treat documents filed in contravention of an express statutory provision as properly filed. In my view, I would be abdicating my duty if I were to shut my eyes to such a fundamental question of law. It is public policy that citizens obey the law of the land. Likewise, it is good policy that courts enforce the law and avoid perpetuating acts of illegality. It can only effectively do so if acts done in pursuance of an illegality are deemed as being invalid. The applicant lacks the capacity to prepare and file court pleadings on behalf of a litigant and also to represent a litigant in this court in contravention of the above provision. She lacks capacity to represent a client before a court of law. She is not competent to address the court on behalf of a client. Her acts are barred by sections 31 & 34 of the Advocates Act. She is courting a prosecution under the above section. On this ground alone, the appeal before me and the application are incurably defective. This finding effectively determines both the appeal and the application.

24. The applicant anchored her capacity on the provisions of sections 146, 146 and 147 of the EACCMA which provide: -

145. (1) *The Commissioner may license persons to act as agents for transacting business relating to the declaration or clearance of any goods or baggage other than accompanied non-manifested personal baggage of a person travelling by air, land or sea.*

(2) *The Commissioner shall not license any person to act as agent under this Act unless the Commissioner is satisfied that, that person has the capability, office equipment, a registered office and documents to effectively transact business in accordance with the provisions of this Act and any other conditions as may be prescribed by regulations.*

(3) *The Commissioner may refuse to issue a licence or may by order, suspend, revoke or refuse to renew, any such licence on the ground that the applicant or holder has been found guilty of an offence under the Customs laws or has been convicted of an offence involving dishonesty or fraud, or for any other reason that the Commissioner may deem fit.*

146. (1) *Where under the provisions of the Customs laws the owner of any goods is required or authorised to perform any act then such act, unless the contrary appears, may be performed on his or her behalf by authorised agent.*

(2) *A person shall not be the duly authorised agent or any owner unless—*

(a) such person is exclusively in the employment of the owner; or

(b) such person is a Customs agent duly licensed as such in accordance with this Act, and, in either case, such person is authorised in writing by the owner, either generally or in relation to any particular act, to perform the act on behalf of the owner.

(3) *The proper officer may require from any person purporting to be the duly authorised agent of any owner the production of his or her written authority and in default of the production of such authority the proper officer may refuse to recognise such person as a duly authorised agent.*

147. *A duly authorised agent who performs any act on behalf of the owner of any goods shall, for the purposes of this Act, be deemed to be the owner of such goods, and shall, accordingly, be personally liable for (be payment of any duties to which the goods are liable and for the performance of all acts in respect of the goods which the owner is required to perform under this Act: Provided that nothing herein contained shall relieve the owner of such goods from such liability.*

25. A reading of the above provisions leaves no doubt the nature and scope of the agency created by the provision(s). In particular, section 145 (1) is clear that the Commissioner may license persons to act as agents for transacting business relating to the declaration or clearance of any goods or baggage other than accompanied non-manifested personal baggage of a person travelling by air, land or sea. Before this court is not a business relating to the declaration or clearance of goods or baggage. That is a business before customs officers. That is the ambit and scope of the agency created by the said section. It does not create “advocates to act in court on behalf of importers.” Clearly, the said provisions do not create agents to represent persons in court or drawing court pleadings. Christine Makungu Mukani has totally misread and misunderstood her mandate. As a result, she has contravened sections 34 and 31 of the Advocates Act thereby risking prosecution. The power of Attorney she claims to possess cannot confer authority to contravene the law.

26. Equally important is the fact that there is a clear difference in law between the agency created by the above provisions and a Tax Agent. The TPA defines a Tax Agent as: -

“tax agent” means a person licensed as a tax agent under section 20. Section 20 of the TPA provides : -

20. *Licensing of tax agents*

(1) *The Commissioner shall issue a licence to an applicant under section 19 if the applicant is a fit and proper person to prepare tax returns, notices of objection, or otherwise transact business with the Commissioner under a tax law on behalf of a taxpayer.*

(2) *The Commissioner shall issue a licence to a partnership under section 19 if— (a) a partner in the partnership or an employee of the partnership is a fit and proper person to prepare tax returns, notices of objection and transact business with the Commissioner on behalf of a taxpayer; and (b) every partner in the partnership is of good character and integrity.*

(3) *The Regulations under this Act may provide for guidelines for determining whether or not a person is a fit and proper person to prepare tax returns, notices of objection, or transact business with the Commissioner on behalf of taxpayers.*

(4) *The licence issued to a tax agent shall be valid until it is cancelled under section 22.*

(5) *The Commissioner shall notify in writing an applicant under section 19 of the decision on the application.*

(6) *The Commissioner may, from time to time, publish, a list of persons issued with licenses to act or operate as tax agents.*

27. Section 19 of the TPA provides: -

(1) An individual or a partnership may apply to the Commissioner for a licence as a tax agent.

(2) An application under subsection (1) shall be in the prescribed form and accompanied by the prescribed fee.

(3) An applicant shall, in addition to the requirements set out in subsections (1) and (2), be required to be recommended for registration by the Tax Agents Committee.

28. Also relevant is section 21 of the TPA which provides: -

21. Limitation on the performance of tax services for taxpayers

(1) A person, other than a tax agent, shall not— (a) represent another person as that other person's tax agent; or (b) offer assistance to another person for a reward in respect of that other person's rights or obligations under a tax law.

(2) Subsection (1) (b) shall not apply to a legal practitioner acting in the ordinary course of the person's profession. 22. Cancellation of tax agent's licence (1) A tax agent who ceases to carry on business as a tax agent shall notify the Commissioner in writing at least seven days before ceasing to carry on business as a tax agent

29. I find nothing before me to show that the said Christine Makungu Mukangi is a tax agent as provided under the above provisions, and even if she was, that does not confer her authority to file pleadings before this court on behalf of a client and represent a client as she did. Regarding appearance before the TAT, Section 25(1) of the TAT provides:

25.(1) For the hearing of proceedings before the Tribunal, the appellant may appear in person or be represented by a tax agent or by an advocate.

30. The above provision only relates to proceedings before the TAT and not before this court. Section 230 of EACCMA provides for appeals to the TAT. The appeals are subject to the provisions of the TAT hence, section 25 (1) of the TAT applies. A clear reading of the tax laws cited above leaves no doubt that the Christine Makungu Mukangi has no right audience before this court nor can she draw an file pleadings on behalf of a client. Sadly, the appellant not only misconstrued the law, but also ignored clear advise by the TAT at paragraph 24 of the impugned ruling in which the TAT stated “consequently, we are inclined to and look at substance over form and exercise our discretion in giving the applicant an opportunity to get a registered tax agent, if it deems necessary, so to do, in the interests of justice.” Had the applicant acted on the said advise, it could have repaired its case.

31. Having concluded that the said Christine Makungu Mukangi has no capacity to prepare and file pleadings or to represent the applicant in court, it follows that the pleading filed by the said Christine Makungu Mukangi are fatally and incurably incompetent. I find no reason to address the application on merits. The applicant’s contention that the TAT dismissed her application without considering submissions is equally legally frail. She has failed to understand that the TAT ruled on a Preliminary Objection which determined her case without delving into merits, just like this ruling. I strike out both the appeal dated 8th April 2021 and the application dated 14th April 2021 with no orders as to costs.

Orders accordingly

Signed, Dated, Delivered at Nairobi this 2nd day of August 2021

John M. Mativo

Judge

[1] Act No. 40 of 2013.

[2] Act No. 29 of 2015.

[3] Cap 16, Laws of Kenya.

[4] {2017} e KLR.

[5]Cap 16, Laws of Kenya.