Ripple Pharmaceuticals Limited v Commissioner, Customs and Border Control (Commercial Appeal E038 of 2024) [2025] KEHC 806 (KLR) (Commercial and Tax) (17 January 2025) (Judgment)

Neutral citation: [2025] KEHC 806 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL E038 OF 2024

MN MWANGI, J

JANUARY 17, 2025

BETWEEN

RIPPLE PHARMACEUTICALS LIMITED ..... APPELLANT

AND

COMMISSIONER, CUSTOMS AND BORDER CONTROL ..... RESPONDENT

JUDGMENT

1. The appellant deals in products known as electronic cigarettes and cartridges, classified under H.S Code 8543.70.00 which attracts a Customs Duty of 10% and VAT of 16%. Following a post clearance audit as provided for under Section 135 of the East Africa Community Customs Management Act (EACCMA), the respondent issued the appellant with a demand notice dated 20th May 2022 demanding taxes of Kshs.5,916,000/=. The demanded sum was made up of Kshs.5,100,000/= Excise Duty, and Kshs.816,000/= VAT for the period 2017-2022. The appellant neither objected to the said demand nor paid the respondent the demanded sum, thus on 20th July 2022, the respondent issued the appellant with an enforcement notice for an outstanding tax of Kshs.6,330,120.00 comprising the principal tax, penalties and interest.

2. The appellant claimed that the respondent's decision was premised on the wrong tariff classification of the electronic cigarettes and cartridges despite the fact that the respondent had configured the simba system to accept Customs Duty and VAT under H.S Code 8543.70.00 for the period under review. Aggrieved by the said enforcement notice, the appellant vide a letter dated 21st July 2022 objected to the enforcement of the purported outstanding tax on the ground that all taxes due were paid, and sought for time to enable it deliberate on the issue. The appellant stated that on 22nd July 2022 the respondent rejected its request by stating that the appellant had not met the requirements

for consideration provided for under Section 229 of the EACCMA, and the respondent demanded immediate payment of the outstanding sum.

3. Dissatisfied with the respondent's decision, the appellant filed an Appeal with the Tax Appeals Tribunal through a Notice of Appeal dated 22nd July 2022. The appellant then filed a Memorandum of Appeal and Statement of Facts both dated 25th July 2022. The appellant's contention was that the respondent's decision was illegal since it failed to recognize that electronic cigarettes and cartridges are classified under H.S Code 8543.70.00. It claimed that it had paid all the taxes due between 2017-2022 as per the duty rate computed by the respondent's Tradex system, hence the respondent's tax decision was erroneous and lacked a legal and factual basis. The appellant asserted that by issuing the decision rejecting the appellant's request, the respondent acted not only unreasonably but also ultra vires its mandate under the *Kenya Revenue Authority Act*.

4. After consideration of the pleadings and rival submissions filed by Counsel for the parties, the Tribunal framed two issues for determination being: whether the Appeal before the Tribunal was valid, and whether the respondent's assessment of the appellant's imports on Excise Duty were justified. On the first issue, the Tribunal found that the appellant did not object to the demand notice issued to it on 20th May 2022, but tried to address it in the letter dated 21st July 2022 which was headed, "Notice of objection to enforcement on outstanding tax", contrary to the provisions of Section 229(1) of the EACCMA. The Tribunal also noted that despite not having objected to the respondent's demand notice on time, the appellant also failed to make an application for extension of time within which to file an application for review as provided for under Section 229(3) of the EACCMA.

5. The Tribunal asserted that the appellant's argument that the notice of enforcement is a tax decision as per Section 3 of the *Tax Procedures Act* capable of being objected to and being appealed against could not be sustained since the notice of enforcement flowed from the failure by the appellant to object to the assessment but was not a determination per se. In the end, the Tribunal found that the appellant's Appeal was improperly filed, rendering it invalid. The Tribunal did not therefore delve into the determination of the second issue.

6. Dissatisfied with the Tribunal's decision, the appellant lodged an Appeal against it in this Court vide a Memorandum of Appeal dated 13th February 2024 raising the following grounds of Appeal –

    i. That the Tribunal erred in law and fact in its interpretation of what constitutes a tax decision as per the provisions of Section 229 of the East African Community Customs Management Act, 2004 (hereinafter called "EACCMA");

    ii. That the Tribunal erred in law and fact in failing to appreciate that a Notice of Enforcement is a tax decision capable of being objected to and appealed against as per the provisions of Section 3 of the *Tax Procedures Act*;

    iii. That the Tribunal erred in fact and law in failing to appreciate that the appellant had on various occasions sought clarity on the applicable taxes and duty rate and the respondent's actions to impose additional taxes without justification was contrary to the law;

    iv. That the learned Tribunal erred in law by failing to make a determination on the violation of the appellant's right to fair administrative action and legitimate expectation by the respondent contrary to Articles 10, 47 and 48 of *the Constitution* of Kenya;

    v. That the learned Tribunal misdirected itself in law when it decided that the applicant never submitted an application for review as per Section 229(1) of the EACCMA; and

vi. That the Tribunal erred in law and fact in failing to appreciate that the appellant followed all the requisite legal procedures in law.

7. The appellant's prayer is for this Court to allow the Appeal with costs, set aside the Tax Appeal's Tribunal judgment in its entirety, as well as the respondent's demand notice.

8. The Appeal herein was canvassed by way of written submissions which were highlighted on 29th July 2024. The appellant's submissions were filed by the law firm of Rachier & Amollo LLP on 9th July 2024, whereas the respondent's submissions were filed on 23rd July 2024 by Leparashao Patricia, Advocate.

9. Dr. Arwa, learned Counsel for the appellant cited the provisions of Section 3 of the *Tax Procedures Act* and submitted that a notice of enforcement qualifies as a valid tax decision. He contended that the appellant's prompt response to the notice of enforcement constituted a valid objection. Counsel criticized the Tax Appeals Tribunal for erroneously concluding that the appellant failed to object to the respondent's assessment. He relied on the case of Geothermal Development Company Limited v Attorney General & 3 others [2013] eKLR, and argued that the demand notice dated 20th May 2022 did not meet the requirements of a proper notice as it did not outline the implications of non-compliance or inform the taxpayer of available appeal or review mechanisms.

10. He asserted that requiring the appellant to object to the said demand notice would violate the principles of fair administrative action and access to justice. Dr. Arwa stated that even if the respondent's demand notice were deemed valid, the appellant made an application under Section 229(3) of the EACCMA, He further stated that the appellant being dissatisfied with the respondent's refusal to set aside the notice of enforcement, was entitled to appeal from the said decision to the Tribunal under Section 230 of the EACCMA, which Appeal was filed within the timelines prescribed by Section 13(2) of the *Tax Appeals Tribunal Act*.

11. Dr. Arwa argued that taxes are determined by the respondent's digital systems, which are updated to reflect tax policy changes, and that the respondent configured its system to charge 10% customs duty and 16% VAT for the appellant's goods, making it impossible to pay different rates. He contended that in the impugned demand, the respondent claimed that adjustments to the excise duty rate under HS Code 8543.70.00 were made between 2018 and 2021 but failed to update the system accordingly. He also contended that despite repeated inquiries from the appellant in 2018 and 2022 seeking clarity on the changes, the respondent remained unresponsive and failed to update the tariff in its system, thus making it unfair and unjust to demand short-levied taxes retroactively. Counsel relied on the Court of Appeal case of Krish Commodities Limited v Kenya Revenue Authority [2018] eKLR, to support the said contention.

12. In submitting that the determination of the applicable duty rate and assessment of payable taxes was entirely managed by the respondent's Simba System, over which the appellant had no control, Dr. Arwa submitted that it was unreasonable for the respondent to blame the appellant for not applying the correct rate. He referred to the case of Export Trading Company v Kenya Revenue Authority [2018] eKLR. He cited the Supreme Court case of *Kenya Revenue Authority v Export Trading Company Limited (Petition 20 of 2020)* [2022] KESC 31 (KLR), and asserted that it was unlawful and against the right to administrative action for the respondent to conduct a post clearance audit on the appellant four (4) years later.

13. Ms. Naeku, learned Counsel for the respondent cited the provisions of Section 229(1) of the EACCMA, 2004, and submitted that the appellant failed to provide evidence of having filed an objection within the 30-day timeline stipulated under the EACCMA, as the only evidence adduced

by the appellant was of an objection to the notice of enforcement dated 21st July 2022. She further submitted that the appellant did not dispute having received the demand notice or failing to object to the said demand within the required timeframe. To buttress her submissions, she relied on the decisions rendered in Republic v Investment Ltd (interested party) Ex parte SDV Transami Kenya Limited [2012] eKLR and Republic v Commissioner of Custom Services Exparte Tetra Pak Limited [2012] eKLR. Counsel argued that the appellant's reasons for filing a late objection were insufficient under the law.

14. She contended that the appellant only objected after receiving a notice of enforcement, indicating no prior intention to challenge the demand. She asserted that the *Tax Procedures Act* does not govern customs duties and levies, as defined in Section 3 of the said Act, making the EACCMA the applicable law in this case. She maintained her position that the Tribunal correctly found that the Appellant failed to submit a review application under Section 229(1) of the EACCMA, 2004. Ms. Naeku argued that the Tribunal's judgment delivered on 9th February 2024 focused on determining whether the appellant's appeal was valid, and since the Tribunal found the Appeal incompetent and struck it out, the merits of the appellant's Appeal were not addressed, hence they cannot be subject to Appeal before this Court.

15. In a rejoinder, Dr. Arwa submitted that the respondent's demand was made pursuant to the provisions of Sections 235 & 236 of the EACCMA which provides for 90 days within which the appellant was to provide documents. He further submitted that as at 20th July 2022 when the notice of enforcement was issued, the aforesaid 90 days had not lapsed, thus the notice of enforcement was issued prematurely.

Analysis and Determination

16. This Court is alive to the provisions of Section 56(2) of the *Tax Procedures Act* which provides that an Appeal to the High Court from the decision of the Tax Appeals Tribunal or to the Court of Appeal shall be on a question of law only. For the said reason, this Court is not permitted to substitute the Tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts unless where additional evidence has been adduced with leave of the Court pursuant to the provisions of Section 78 of the *Civil Procedure Act*, Order 42 Rule 27 of the Civil Procedure Rules, 2010, and Rule 15 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015.

17. Upon consideration of the Memorandum of Appeal, Record of Appeal and supplementary Record of Appeal, the statement of facts filed by the respondent alongside the written submissions filed by Counsel for the parties, the issues that arise for determination are –

    i. Whether the appellant complied with the provisions of Section 229 of the EACCMA 2004; and

    ii. Whether the respondent's additional assessment of the appellant's imports was justified.

Whether the appellant complied with the provisions of Section 229 of the EACCMA 2004.

18. The respondent issued the appellant with a demand notice for Kshs. 5,916,000/= dated 20th May 2022. The appellant submitted that the said demand was issued pursuant to the provisions of Sections 235 & 236 of the EACCMA which provides for 90 days within which the appellant was to provide documents. The appellant contended that the notice of enforcement was issued prematurely, as it was issued before the lapse of the said 90 days.

19. Upon perusal of paragraph 1 of the said demand, it is evident that it resulted from a post clearance audit carried out on the appellant's importation of electronic cigarettes and cartridges under tariff

identification No. 8543.70.00, pursuant to the provisions of Sections 235 & 236 of the EACCMA. Further, at paragraph 3 of the said demand, the respondent clearly indicated that the appellant was requested to pay the demanded taxes as per the provisions of Section 135 of the EACCMA, 2004. In the premise, this Court finds that it is the post clearance audit that was done pursuant to the provisions of Sections 235 & 236 of the EACCMA, that gave rise to the demand that was issued pursuant to the provisions of Section 135 of the EACCMA which states that –

1. Where any duty has been short levied or erroneously refunded, then the person who should have paid the amount short levied or to whom the refund has erroneously been made shall, on demand by the proper officer, pay the amount short levied or repay the amount erroneously refunded, as the case may be; and any such amount may be recovered as if it were duty to which the goods in relation to which the amount was short levied or erroneously refunded, as the case may be, were liable.

2. Where a demand is made for any amount pursuant to sub-Section (1), the amount shall be deemed to be due from the person liable to pay it on the date on which the demand note is served upon him or her, and if payment is not made within thirty days of the date of such service, or such further period as the Commissioner may allow, a further duty of a sum equal to five percent of the amount demanded shall be due and payable by that person by way of a penalty and a subsequent penalty of two percent for each month in which he or she defaults.

20. Being guided by the foregoing provisions of the law, it is my finding that all that the respondent was required to do upon concluding that there were short levied duties on the appellant's account was to demand for payment of the said duties.

21. It is not in contest that in compliance with the provisions of Section 135(1) of the EACCMA, the respondent demanded for the short levied taxes of Kshs.5,916,000/= from the appellant vide a letter dated 20th May 2022 which is clearly referenced 'Desk Audit Demand Notice of KSHS. 5,916,000/=’. In the circumstances, I find that the respondent's demand having complied with the provisions of Section 135(1) of the EACCMA was a proper demand as it did not leave anything to speculation. Section 135(2) of the EACCMA provides that upon making such a demand, the demanded amount shall become due on the date on which the demand note is served, and if payment is not effected within thirty (30) days of service of the demand, it shall attract a penalty interest at the rate of 5%, and a further 2% penalty interest for each month that the demanded sum remains unpaid.

22. The respondent was therefore within its rights to issue the appellant with the notice of enforcement on outstanding taxes dated 20th July 2022. Upon perusal of the EACCMA, 2004, this Court notes that a notice of enforcement is not provided for. The contents of the respondent's notice of enforcement is very clear that it was communication to the appellant that if it failed to pay the taxes demanded within seven (7) days from the date of the notice, the provisions of Section 135(2) of the EACCMA would apply. This Court is of the finding that the notice of enforcement by the respondent to the appellant was sent purely out of courtesy since the EACCMA does not require the respondent to issue any further notices after making the demand for short levied taxes.

23. It is not disputed that the appellant neither objected to the demand notice dated 20th May 2022 nor complied with it. Instead, it objected to the notice of enforcement vide a letter dated 21st July 2022. The respondent's position is that the appellant ought to have objected to the demand notice as provided for under Section 229 of the EACCMA, and not the notice of enforcement. The appellant on the other hand emphasized that its objection to the respondent's notice of enforcement was valid since the said notice is a tax decision. Section 229 of the EACCMA provides that -

1. A person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to Customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission.

2. The application referred to under subsection (1) shall be lodged with the Commissioner in writing stating the grounds upon which it is lodged.

3. Where the Commissioner is satisfied that, owing to absence from the Partner State, sickness or other reasonable cause, the person affected by the decision or omission of the Commissioner was unable to lodge an application within the time specified in subsection (1), and there has been no unreasonable delay by the person in lodging the application, the Commissioner may accept the application lodged after the time specified in subsection (1)... (Emphasis added).

24. Sub-section 1 above provides that a person directly affected by the Commissioner's decision or omission shall within thirty (30) days of the date of the decision lodge an application for review of that decision/omission. The appellant's case is two pronged, on one hand it contends that the notice of enforcement is a tax decision, and as such, its notice of objection to the respondent was valid. On the other hand it contends that in its notice of objection it gave sufficient reasons for the delay in objecting to the demand notice, thus the respondent was duty bound to consider its objection on merits.

25. The appellant in its submissions has relied on the definition of a tax decision in Section 3 of the *Tax Procedures Act* which states that it means –

a. an assessment;

b. a determination under Section 17(2) of the amount of tax payable or that will become payable by a taxpayer;

c. a determination of the amount that a tax representative, appointed person, director or controlling member is liable for under Section 15, Section 17 and Section 18;

d. a decision on an application by a self-assessment taxpayer under Section 31(2);

e. deleted by *Act No. 4 of 2023*, s. 49 (a);

f. a decision under Section 48 requiring repayment of a refund; or

g. a demand for a penalty or late payment interest;

26. On perusal of the contents of the notice of enforcement dated 20th July 2022, I am not persuaded that it was a tax decision within the meaning of the definition of Section 3 of the *Tax Procedures Act*. This is because it was not a demand for payment but a reminder to the appellant that failing to make payment of the short levied tax demanded in the letter dated 20th May 2022 together with penalty interest, would lead to the amount continuing to accrue interest as per Section 135(2) of the EACCMA. In view of the above finding, it was not open to the appellant to make an objection to the notice of enforcement, as a proper objection would have been grounded on the demand notice.

27. It was the appellant's case, that in as much as it failed to object to the demand notice and/or file an application for review against it within the prescribed timelines, it made an application pursuant to the provisions of Section 229(3) of the EACCMA. It is not disputed that the aforesaid Section provides that the Commissioner has the power to extend the time within which a Taxpayer can comply with the provisions of Section 229(1) of the EACCMA on application by a Taxpayer. On perusal of the appellant's notice of objection to enforcement dated 21st July 2022 which it claims to have been an

application made pursuant to the provisions of Section 229(3) of the EACCMA, I am not persuaded that it qualifies as an application within the meaning of the provisions thereunder.

28. The reason for saying as much is that at paragraph 2 of the said letter, the appellant expressed its regret in the delay in responding to the respondent's letter dated 20th May 2022 and cited reasons for the said delay. The appellant then went ahead and gave reasons as to why it thought the respondents' demand for short levied taxes was erroneous. I however did not seek extension to comply with the provisions of Section 229(1) of the EACCMA for the respondent to determine whether or not to grant the appellant the said extension. The above notwithstanding, the reference of the appellant's letter dated 21st July 2022 reads 'Notice Of Objection To Enforcement On Outstanding Tax KSHS.6,330,120/='.

29. In view of the above, this Court finds that the appellant did not comply with the provisions of Section 229 of the EACCMA 2004. I therefore agree with the Tribunal's finding at paragraph 59 of its decision that no application for review was made by the appellant as per Section 229 of the EACCMA, thus the Appeal filed before the Tribunal was invalid.

30. Based on the above finding, and the fact that the issue of whether the respondent's additional assessment of the appellant's imports was justified was not dealt with by the Tribunal, I hold that I cannot determine the 2nd issue which I had listed for determination in this appeal. The reason being that the Tribunal did not address the said issue in order for this Court to determine whether the said Tribunal applied the law in regard to Excise Tax and VAT appropriately.

31. The upshot is that the Appeal herein is devoid of merits. It is hereby dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JANUARY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Maina h/b for Dr. Arwa for appellant

Ms Naeku for the respondent

Ms B. Wokabi – Court Assistant.

NJOKI MWANGI, J.