Commissioner Customs and Border Control v Ripple Mart Limited (Customs Tax Appeal E026 of 2024) [2025] KEHC 4477 (KLR) (Commercial and Tax) (8 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4477 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CUSTOMS TAX APPEAL E026 OF 2024

BM MUSYOKI, J

APRIL 8, 2025

BETWEEN

COMMISSIONER CUSTOMS AND BORDER CONTROL ..... APPELLANT

AND

RIPPLE MART LIMITED ..... RESPONDENT

(Being an appeal from the judgment of the Tax Appeals Tribunal at Nairobi delivered on the 24th day of May 2024 in its appeal number E414 of 2024)

JUDGMENT

1. A desk review of imports by the respondent for the period between 2nd August 2018 and 8th February 2022 was said to have revealed a short of levy taxes due from the respondent as a result of application of a wrong duty rate. Following the desk review, the appellant on 1-02-2022 and 7-02-2022 sent letters to the respondent demanding the said levies. The respondent applied for review of the decision and before the appellant could make a decision on the objection, the respondent rushed to the Tax Appeals Tribunal to challenge that decision vide appeal number 193 of 2022. In that appeal, the tribunal noted that the appeal was filled before the appellant's decision on the application for review was made and could therefore not have been in respect of that review as a taxpayer can only appeal after determination of application for review. The tribunal therefore noted that there was no appealable decision and struck out the appeal.

2. As the above appeal was pending, the respondent made its decision on application for review on 15th March 2022. On 5th June 2023, the appellant issued a demand for payment of Kshs 16,749,855.00 stating that the judgement in the TAT appeal number 193 of 2022 had been delivered in its favour. By a letter dated 8th June 2023, the respondent through its advocates filed an objection to that demand. In reply to the objection, the appellant wrote a letter dated 7th July 2023 in which it communicated that

the Commissioner had already issued its review decision on the issue vide its letter dated 15th March 2022 and sought to clarify that the application for review was unsuccessful and attached a copy of the decision. It is against the letter that the appeal before the tribunal in the matter now before this court was premised.

3. The tribunal rendered its judgement on 24-05-2024 where it allowed the appeal and held that the application for review by the respondent had been deemed allowed by operation of the law pursuant to Section 229(5) of East African Community Customs Management Act (hereinafter referred to as ÉACCMA). It is this decision which sparked this appeal whose grounds are as follows;

    1. That the Honourable Tribunal erred in law by failing to objectively consider the appellant's pleadings and submissions that there is no appealable decision for its jurisdiction.

    2. That the Honourable Tribunal erred in law and in fact in its findings that the appellant's application for review had been allowed by operation of the law.

    3. That the Honourable Tribunal erred in its finding that the appellant did not communicate the review decision in accordance with the provisions of Section 229(4) of EACCMA.

    4. That the Honourable Tribunal erred in law and fact in its finding that the review decision dated 15th March 2022 was transmitted on 7th July 2023.

    5. That the Honourable Tribunal erred in fact and law by shifting the primary burden of proof to the Commissioner to demonstrate that the review decision dated 15th March 2022 was transmitted to the respondent on time when there is no denial of the postal address.

4. I have noted that there is a notice of motion application dated 18th July 2024 which has not been dealt with. The same sought to have time for filing appeal extended and the appeal herein be deemed as duly filed because it had been filed three days after the statutory period. The reason given for the late filing was that the advocate handling the matter had made an error in computing time. When the parties appeared before the Deputy Registrar on 25-09-2024, the appellant brought the pendency of the application to the attention of the Deputy Registrar and in reply to that, the respondent's advocate indicated that it was not opposed to the application. The Deputy Registrar did not make a substantive order in respect to the application. When the parties appeared before me for directions on 17-10-2024 and 25-11-2024, they did not inform the court that the application was still pending as there was no order disposing the same. In order to make the records straight and noting that the respondent was not opposed to the application and the fact that the appellant was late by just three days, I hereby make an order allowing the notice of motion dated 18th July 2024. This appeal is deemed to have been filed time.

5. I have read the appellant's submissions dated 4th November 2024 and the respondent's statement of facts dated 14th October 2024. I note that the respondent did not file any submissions. The appellant raises only two issues in its submissions. The first is whether the tribunal erred by failing to appreciate that the decision dated 7th July 2023 was not an appealable decision as defined in section 2 of the *Tax Procedures Act*. The second issue is whether the tribunal erred by holding that the respondent's application for review dated 16th February 2022 was deemed allowed by operation of the law under Section 229(4) of the EACCMA.

6. The appellant submits that the decision contained in its letter dated 7th July 2023 which was in reply to an objection filed by the respondent through its advocates on 8-06-2023 was not an appealable decision. It has cited Section 2 of the *Tax Procedures Act* which defines an appealable decision to mean an objection decision and any other decision made under the tax law other than a tax decision or a decision made in the course of making a tax decision. This definition means that any decision which is

not a tax decision or made in the process of making a tax decision is appealable. Section 2 of the same Act defines a tax decision as;

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);

e. a decision under section 48 requiring repayment of a refund; or

f. a demand for a penalty or late payment interest;'

7. What I need to do to settle this issue is to decide whether the letter dated 7th July 2023 fits into any of the categories of the description of a tax decision as defined above. The said letter read in part;

> We acknowledge receipt of your letter of appeal referenced C/5938/22 dated 8th June 2023 wherein you applied for a review of our decision rendered in our demand letter to your client, M/S Ripple Mart Limited, and referenced HQ/PCA/RRI/119/22 dated 7th February, 2022.
>
> We wish to inform you that we already had issued the Commissioner's review on this issue vide letter Ref: HQ/PCA/RRI/91/22 dated 15th March 2022. (See a copy attached).
>
> From the foregoing, your application for review is unsuccessful and the demanded taxes amounting to Kshs 16,749,855.00 remain due and payable to the commissioner of Customs and Border Control immediately.'

8. I have struggled to fit the contents of the above letter in the above definition of a tax decision in vain. The appellant has not helped this court to do so since all that it has done in its submissions is to restate the statutory definition of a tax decision and appealable decision then give chronology of events leading to the issuing of its letter dated 7th July 2023. In my considered opinion, the decision in the said letter is not a tax decision. The letter in my view was a decision against the objection filed by the respondent's advocates vide their letter dated 8th June 2023 although the appellant seemed to apply ingenuity by making it appear that it was communicating its decision dated 15th March 2022. In its in own words at paragraph three, the letter states that 'your application for review is unsuccessful' which is to me an acknowledgment that the advocates' letter dated 8th June 2023 was an application for review and even if it were not, the fact remains that the decision therein was not a tax decision and therefore it was appealable. In view of this, it is my holding that the decision was appealable and the tribunal did not err in entertaining and hearing the appeal as it had the requisite jurisdiction.

9. The appellant has also faulted the tribunal for finding that the respondent's application for review stood allowed by operation of the law for failure by the appellant to communicate its decision dated 15th March 2022. It appears that there is no dispute that the appellant made its decision on the respondent's application for review on 15th March 2022. Pursuant to Section 229(4) of EACCMA, the appellant was bound to communicate its decision within thirty days from the date of the decision which means

that it should have been communicated by 13th April 2022. Subsections 4 and 5 of Section 229 of the Act provide that;

> 4. The Commissioner shall, within a period of not exceeding thirty days of the receipt of the application under subsection (2) and any further information the Commissioner may require from the person lodging the application, communicate his or her decision in writing to the person lodging the application stating the reasons for the decision.
>
> 5. Where the Commissioner has not communicated his or her decision to the person lodging the application for the review within time specified in subsection (4) the Commissioner shall be deemed to have made a decision to allow the application.'

10. To unlock this issue, all the court needs to do is to establish when the decision dated 15th February 2022 was communicated to the respondent. The appellant submits that the communication was sent to the respondent through the postal address of its advocates but it does not state when the same was done. The tribunal in its judgement in TAT appeal number 193 of 2023 mentions the decision which means that the decision was part of the record in that appeal. However, there is no indication when the said decision was filed in the said appeal. The judgement was delivered on 5th May 2023 more than a year after the decision was made which is obviously outside the thirty days statutory period. Even if I were to assume that filing of the decision in the said appeal amounted to service or communication of the same, I have no way of establishing whether it was filed within the thirty days period.

11. The tribunal stated in its judgement appealed herein that there was no evidence of the service or communication of the decision dated 15th March 2022. The appellant faults the tribunal on that finding averring that it amounted to shifting of burden of proof to the appellant. I understand this line of submissions to mean that the burden of proving service should have been on the respondent. I find that argument illogical and lacking legal basis. The respondent had denied that it was served with the decision and indeed, it was the appellant who wanted the court to believe that the decision was served in time. That burden of proof was on the appellant. That is my application of Section 109 of the *Evidence Act* in relation to this issue. The Section provides that;

> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.'

12. This court appreciates that in tax matters the burden of proof is placed upon the tax payer by Section 56(1) of the *Tax Procedures Act* and Section 30 of the *Tax Appeals Tribunal Act* but that is limited to proof that a tax decision is incorrect or should have been made differently. That strict liability does not extend to matters which are meant to be done by the appellant or the tax Authority. It does not mean that the tax payer is supposed to prove every issue even those in the personal or special knowledge of the tax Authority.

13. The appellant submits that there was no denial of postal address. The issue here is not whether the postal address was correct or not or whether it belonged to the respondent's advocates. The issue is when the decision was communicated to the respondent. Serving the decision and having the correct address in the letter communicating the decision are two different things. I have read the reasoning of the tribunal on why it doubted that the decision was served upon the respondent in time and I entirely agree with the same. On the basis of the above discussion, I see no error on the part of the tribunal and the second issue must fail.

14. The conclusion of the above is that, the appeal herein lacks merits and the same is dismissed with costs to the respondent.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF APRIL 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Otieno holding brie for Miss Nyakundi for the appellant and Miss Maina for the appellant.