**Exome Life Sciences Kenya Limited v Commissioner of Customs & Boarder Control (Tax Appeal E180 of 2024) [2025] KEHC 10030 (KLR) (Commercial and Tax) (11 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10030 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**COMMERCIAL AND TAX**

**TAX APPEAL E180 OF 2024**

**RC RUTTO, J**

**JULY 11, 2025**

**BETWEEN**

**EXOME LIFE SCIENCES KENYA LIMITED ..... APPELLANT**

**AND**

**COMMISSIONER OF CUSTOMS & BOARDER CONTROL ..... RESPONDENT**

***(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi delivered on 24/5/2024 in TAT Appeal No. E608 of 2023)***

## JUDGMENT

1. The appellant is a limited liability company incorporated in Kenya and is in the business of manufacturing and importation of products for application in agriculture.

2. The respondent is a principal officer of the Kenya Revenue Authority (KRA) appointed under Section 13 of the *Kenya Revenue Authority Act* and is charged with administering and enforcing various tax statutes.

3. The appellant imported products under several entries. The appellant classified the products under 2022 EAC/CET HS Code 3101 under which the products were not chargeable for VAT.

4. Upon verification, the respondent disagreed with the classification and issued tariff rulings on 19/7/2023, 31/7/2023 and 16/8/2023 where the products were reclassified as 'miscellaneous chemical products' under Chapter 38 of the EAC/CET, under HS Code 3824.99.90 and value added tax (VAT) amounting to Kshs.5,177,517.00/= was charged.

5. The appellant being dissatisfied with the respondent's finding, lodged an appeal at the Tax Appeals Tribunal *vide* memorandum of appeal dated 21/9/2023 challenging that finding and seeking refund for VAT payment of Kshs.5,177,517/= and demurrage charges of Kshs.853,997/=.

6. The appellant's case was that the classification was erroneous. The respondent however maintained that the imported products fell under the categories of bio-stimulants, plant growth promoters/ enhancers and soil decontaminants, all of which were not covered by HS Code 3101.00.00. The respondent further argued that despite issuing the tariff rulings, the appellant did not request a review of the rulings in accordance with Section 229 of the *East African Community Customs Management Act* (herein EACCMA).

7. In its judgment delivered on 24th May 2024, the Tribunal found that the appellant had failed to comply with the procedural requirements set out under Sections 229 and 230 of the *East African Community Customs Management Act* (EACCMA). Specifically, the Tribunal held that the appellant had not exhausted the internal dispute resolution mechanisms provided under Section 229 of the Act. Consequently, the Tribunal concluded that the appeal was not properly before it and proceeded to strike it out.

8. Aggrieved by that decision, the appellant filed this appeal vide a memorandum of appeal. The appeal is based on 19 grounds that are summarized as, that: -

    i. The Tribunal erred in determining the appeal based entirely upon an un-pleaded issue;

    ii. The Tribunal erred in finding that the appellant had failed to exhaust the internal remedy provided under section 229 of the *EACCMA*;

    iii. The Tribunal erred in failing to consider the merits of the appellant Appeal and in failing to grant the orders sought by the appellant;

    iv. Who bears the costs of this appeal.

9. The respondent filed its statement of facts dated 27/8/2024. The respondent maintained that section 229 of the *EACCMA* provided that a person who was dissatisfied with a decision of the Commissioner concerning a tariff classification is required to request a review of that decision. If after review the person was still dissatisfied, he was entitled to escalate the matter to the Tax Tribunal under section 230 of the *EACCMA*. That the appealed decision was the review decision by the respondent and not the initial reclassification ruling.

10. According to the respondent, the internal mechanism was a mandatory precondition before invoking section 230 of the *EACCMA* and was designed to give the respondent an opportunity to reconsider the decision before the matter was escalated. That the appellant failed to exhaust the internal mechanisms thus the tribunal correctly found that the appeal was premature. The respondent added that the specific procedures and remedies under the *EACCMA* for customs-related matters were distinct and took precedence over those under the *Tax Procedures Act* (TPA) and the *Tax Appeals Tribunal Act* (TATA).

11. The respondent also contended that the tribunal did not err in refraining from addressing the substantive issues regarding classification of products and it correctly determined that the appeal was procedurally premature due to the appellant's failure to exhaust the internal remedies under Section 229 of the *EACCMA*. That the tribunal thus lacked jurisdiction to determine the appeal on merit.

12. Throughout its response, the respondent maintained that the tribunal correctly enforced the doctrine of exhaustion and correctly found that the appeal was incompetent as the procedure under section 229 of the *EACCMA* was not adhered to making the appeal before it incompetent. The respondent contended that the tribunal's decision was legally sound and procedurally correct and this court was urged to uphold that decision.

13. The appeal was heard by way of submissions.

**Appellant's Submissions**

14. The appellant's submissions were dated 15th November 2024. The appellant submitted that the Tribunal wrongfully reclassified its products as "Miscellanoeus Chemical Products" under Chapter 38 of the East African Community Common External Tariff under HS/Tariff Code 3824.99.90 instead of the correct classification under Chapter 31 of the EACCET under HS/Tariff Code 3101.00.00, adopted by the appellant in its importation documents. That the respondent failed to be guided by the Tribunal decision in Tax Appeal Tribunal Appeal Number 222 of 2022 and High Court Income Tax Appeal Number E020 of 2023.

15. It submitted that vide its letter dated 13th June 2023, it requested the respondent to review its decision on reclassification of the products but the respondent vide letters dated 19th July 2023, 31st July 2023 and 16th August 2023 upheld its own decision and proceeded to reclassify the products.

16. The appellant submitted that the alleged failure to request a review under section 229 of the *EACCMA* was never pleaded by the respondent and as such, the court had no power or jurisdiction to decide an issue not raised before it. That the respondent raised this issue for the first time in its further written submissions and this irregularly sneaked. To buttress this, reference was made to the case of *Nairobi City Council v Thabiti Enterprises Ltd* [1997] eKLR.

17. It was submitted that the Tribunal holding that the appellant did not exhaust the provisions of section 229 of the *EACCMA* was an erroneous finding of fact. That in a letter dated 13th June 2023 the appellant effectively asked the respondent to review its decision contained in the respondent letter Ref. KRA/C&BC/BIA/THQ/550/11/2021 dated 29th November 2021. That it was in response to this request for review that the respondent issued his decision which were subject of the appeal before the Tribunal.

18. It was further submitted that the subject of appeal before the Tribunal were not decisions to which section 229 of the *EACCMA* applied as they related to the aappellant's liability to VAT and not any custom duties or taxes. That the decision was an appealable decision to which section 52(1) of the *Tax Procedures Act* applies and against which the appellant has a clear and express right to file an appeal to the Tribunal.

19. The appellant faulted the Tribunal for failing to consider and make a determination on the merits of the appeal. It urged the Court to find that the respondent erred in classifying all products as Miscellaneous Chemical Products under Chapter 38 of the EAC CET under HS/Tariff Code 3824.99.90

20. As to whether the VAT is chargeable on the product and whether the appellant should be reimbursed demurrage charges and penalties paid for the VAT, it was submitted that classification under Chapter 31 is exempt from VAT hence the respondent had no obligation to ask for VAT from the appellant. That it paid kshs.5,177,517 in respect to VAT wrongly imposed when its goods were wrongly re-classified and kshs.853,997 as demurrage charges imposed on its goods.

21. On costs, it urged that it would be unjust for it to bear any portion of the costs of the suit in the circumstance of this case. It prayed that the appeal be allowed as prayed in the amended Memorandum of Appeal with costs.

**Respondent's Submissions**

22. The respondent's submissions and supplementary submissions were dated 4th and 22nd November 2024 respectively. The respondent set out the primary issue for determination as whether the Tribunal decision to strike out the appeal was correct and whether the same was grounded in the statutory framework governing disputes.

23. It submitted that pursuant to section 229 of the *EACCMA*, the appellant failed to exhaust internal review mechanisms as required by law before lodging an appeal with the Tax Appeal Tribunal. To buttress this, reference was made to the case *Republic v Kenya Revenue Authority, Commissioner of Customs Services Ex Parte Europa Health Limited* (2014) eKLR where it was held that section 229(1) of the *EACCMA* clearly mandates a person aggrieved with the decision of the commissioner or any other person on a matter relating to the customs to lodge an application for review within 30 days of the decision. It urged that the appellant's appeal was premature and the Tribunal acted correctly by striking it out since the doctrine of exhaustion prevents premature recourse of the courts. Numerous decisions were relied upon to support this assertion.

24. It was urged that by disregarding the statutory review mechanism, the appellant invalidates its own appeal. That the Tribunal correctly confined itself to the customs framework under *EACCMA* which specifically governs tariff classification disputes since the *Tax Appeals Tribunal Act* and the *Tax Procedures Act* address general tax administration matters but not customs classification disputes which are governed by *EACCMA*.

25. They urged that the Tribunal was right in refraining from addressing the substantive issues in the appeal since it lacked the jurisdiction to delve into the merits of the classification dispute or any other substantive matters.

26. They urged the Court to dismiss the appeal for it is without merit based on a failure to comply with the statutory framework governing customs disputes.

**Analysis and Determination**

27. This Court has considered the submissions, pleadings and record before it. From the record, the Court notes that the appellant filed the present Appeal against the Tribunal's Judgment of 24/5/2024 in Tax Appeals Tribunal Case No. E608 of 2023. The appellant was aggrieved by the Tribunal's decision to strike out its appeal on the basis that it breached the doctrine of exhaustion as it did not adhere to the dispute resolution mechanism processes laid out in section 229 of the *EACCMA*. All that this Court is to determine was whether the Tribunal's decision was correct in law or not.

28. The relevant provision is Section 229 of the *EACCMA* which reads: -

> " 229 (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".

29. Section 230 (1) of the *EACCMA* then provides: -

> " A person dissatisfied with the decision of the Commissioner under Section 229 may appeal to the Tax Appeals Tribunal established in accordance with section 231."

30. The Appeal shall be lodged within forty-five days after being served with the decision, and a copy of the appeal served on the Commissioner.

31. It is trite that tax laws are to be construed within their exact meaning and there are no in-betweens. In *Mount Kenya Bottlers Ltd & 3 others v Attorney General & 3 Others* NRB CA Civil Appeal No. 164 of 2013 [2019] eKLR, the Court of Appeal observed, thus: -

> "when it comes to interpretation of tax legislation, the statute must be looked at using slightly different lenses. With regard to tax legislation, the language imposing the tax must receive a strict construction. Judge Rowlett in his decision in *Cape Brandy Syndicate v I.R. Commissioners* [1921] 1KB (cited by the appellants), expressed the common law position in this area when he stated '... in a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used".

32. To this Court's understanding, the concise meaning of the foregoing provisions is that an Appeal to the Tax Tribunal emanating from decisions or omissions of the Commissioner on matters relating to Customs should be founded on a decision of the Commissioner upon application and review as provided under Section 229 of *EACCMA*. Neither the *TPA* nor the *TAT Act* provide alternative remedies, and therefore the remedy set out under Section 229 of *EACCMA*, ought to be exhausted before a party can lodge its Appeal under Section 230 of *EACCMA*. Indeed, the Court in *Republic v Kenya Revenue Authority Commissioner of Custom Services Ex-Parte Europa Healthcare Limited* [2014] eKLR held that: -

> "Section 229(1) of the *EACCMA* clearly mandates a person aggrieved with the decision of the Commissioner or any other person on a matter relating to the customs to lodge an application for review in writing within thirty days of the decision or omission."

33. It then follows that an appeal to the Tax Tribunal can only emanate from: (a) a ruling on reclassification of a product, and (b); a review decision of that ruling from the Commissioner upon application by a dissatisfied person. It then follows that the remedy ought to be exhausted before a party can file an appeal under section 230 of the *EACCMA*.

34. In the instant case, the appellant filed an appeal with the Tax Appeals Tribunal challenging the reclassification rulings that altered the classification of its products, thereby subjecting them to VAT. The appellant contends that the erroneous reclassification constitutes an appealable decision by the respondent, and that it had an express right to appeal to the Tribunal under Section 52(1) of the *Tax Procedures Act*.

35. I do not agree with the appellant's submission above. The reclassification in question pertains to imported goods and therefore falls within the realm of customs matters. Such matters are governed by the *East African Community Customs Management Act* (EACCMA), which provides the legal framework for the administration and management of customs affairs. This matter was well settled in *SBI International Holdings Ag Kenya v Commissioner, Customs and Border Control, of Kenya Revenue Authority*, where the Court stated thus:

> "69. It is clear that section 229 of the East African Community Customs Management Act 2004 is not worded in the same manner as section 51 of the *Tax Procedures Act* No. 29 of 2015. While the latter only deals with decisions, the former deals with both decisions and omissions. As submitted by the Respondent, The East African Community Customs Management Act

2004 provides for both the substantive and procedural law hence ousting any necessity of applying the *Tax Procedures Act* to matters customs."

36. I concur with the Tribunal's finding that the reclassification rulings were not the type of appealable decisions contemplated under Section 230 of the *EACCMA*. The appellant should have first sought a review of the tariff classification rulings by the Commissioner in accordance with Section 229 of the *EACCMA*. If dissatisfied with the outcome of that review, the appellant could then have lodged an appeal under Section 230 of the *EACCMA*.

37. It also follows that there was no basis of filing an appeal before the Tax Tribunal, as an appeal to the Tribunal could only be in relation to a decision of the respondent and none was made. The appellant failed to make an application for review of the tax demand as per Section 229(1) of the *EACCMA* to enable the respondent deliver a decision. The Tribunal's jurisdiction could not have been properly invoked in those circumstances. In *Krystalline Salt Ltd v KRA* [2019] eKLR the Court held that:

> "Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures. The relevant procedure here is the process of opposing an assessment by the Commissioner."

38. There was no room for the appellant to deviate from a well laid down procedure and the same ought to have been strictly adhered to.

39. In the circumstances, this Court is satisfied that the appellant did not exhaust the internal remedies provided for under Section 229 of *EACCMA*, thus lodged its Appeal to the Tribunal prematurely.

40. The upshot is that the Tribunal's findings were merited and ought to be upheld. Consequently, the instant appeal is found to be without merit and is hereby dismissed.

41. Each party will bear its own costs.

42. Orders accordingly

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 11TH DAY OF JULY, 2025.**

**RHODA RUTTO**

**JUDGE**

In the presence of;

.....Appellant

.....Respondent