Commissioner of Customs and Border Control v Hygrotech East Africa Limited (Income Tax Appeal E013 of 2024) [2025] KEHC 12590 (KLR) (Commercial and Tax) (16 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12590 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E013 OF 2024

H NAMISI, J

SEPTEMBER 16, 2025

BETWEEN

THE COMMISSIONER OF CUSTOMS AND BORDER CONTROL ..... APPLICANT

AND

HYGROTECH EAST AFRICA LIMITED ..... RESPONDENT

(Being an appeal arising from the judgement of the Tax Appeals Tribunal dated 2 February 2024 in Tax Appeals Tribunal No. E1376 of 2022)

JUDGMENT

1. The Appellant is a principal officer appointed under section 13 of the *Kenya Revenue Authority Act*.

2. The Respondent is a limited liability company duly incorporated in Kenya under the provisions of the *Companies Act*. The Appellant is engaged in the business of sale of agricultural inputs, vegetable seeds, foliar range and the provision of related agricultural services such as technical advisory, research and development of various plant chemicals and nutritional products.

3. Between 2017 and 2022, the Respondent imported several consignments of a product known as "DK-20", which the Respondent classified as a biofertilizer under the Harmonised System (HS) Tariff Code 3101.00.00 of the East African Community Common External Tariff (EAC CET). This classification attracts 0% rate of VAT under the VAT Act, 2013.

4. Pursuant to its statutory powers under sections 235 and 236 of the East African Community Customs Management Act, 2004 (EACCMA) the Appellant conducted a post-clearance audit of the Respondent's imports for the said period. The audit culminated in a demand notice dated

5 August 2022, wherein the Appellant held the view that DK-20 had been misclassified. The Appellant contended that the product was not a fertilizer but an organic plant growth stimulant, and ought to have been classified under HS Code 3808.93.90, which attracts VAT at the standard rate. Consequently, the Appellant demanded payment of Kshs 4,367,057.88.

5. Aggrieved by this decision, the Respondent lodged an application for review as provided under section 229 of EACCMA. On 26 September 2022, the Appellant reviewed its decision. While conceding that HS Code 3808.93.90 was not appropriate, the Appellant asserted that the correct classification was HS Code 3824.99.90. The sum demanded remained unchanged.

6. Dissatisfied with the outcome of the review, the Respondent lodged an appeal to the Tax Appeals Tribunal. The Respondent produced a letter from the manufacturer of the DK-20, Agrimax Pte Ltd, describing the product as a biofertilizer produced through the fermentation of native soil bacteria. The Respondent also produced a letter from Kenya Plant Health Inspectorate Service (KEPHIS) confirming the product as an organic fertiliser, a Certificate of Analysis detailing its composition and the expert testimony of Dr. Kwa Sire Hwa, the manufacturer's Chief Scientist and General Manager.

7. On its part, the Appellant maintained its position that DK-20 was a plant growth regulator or bio-stimulant, properly classifiable under Chapter 38 of the EAC CET. In cross examination, the Appellant's expert witness admitted that no independent laboratory analysis had been conducted to controvert the evidence adduced by the Respondent.

8. In its judgement, the Tribunal found that the Respondent had successfully discharged its burden of proof by providing sufficient and uncontroverted evidence that DK-20 is a biofertilizer whose composition and use align with the description of goods under HS Code 3101.00.00. In allowing the appeal, the Tribunal found that the Appellant's reclassification was unsubstantiated and arbitrary since the Appellant had failed to conduct any independent laboratory tests.

9. Aggrieved by the judgement and order of the Tribunal, the Appellant lodged this appeal on the following grounds:

    i. The Tax Appeal Tribunal erred in fact and in law by misconstruing the composition, nature and use of the DK-20 in dispute hence confirming the wrong classification of the import product;

    ii. The Tax Appeals Tribunal erred in fact and in law in classifying DK-20 under tariff code 3101.00.00 instead of Tariff code 3824.99.90 contrary to the Common External Tariff that governs classification;

    iii. The Tax Appeals Tribunal erred in fact and law in finding that the Appellant should have undertaken testing to ascertain the nature and composition of the product whereas the nature and composition of the product was not in dispute. Therefore, a lab analysis was not sufficient to resolve the classification issue;

    iv. The Tax Appeal Tribunal erred in fact and in law by misconstruing the relevant provisions of the East African Community Common External Tariff as applicable to the subject import products;

    v. The Honourable Tribunal erred in fact and law by misconstruing the relevant provisions of the General Rules of Interpretation for the interpretation of the Harmonised System;

    vi. The Tribunal erred in law and fact by failing to consider the mandate of KEPHIS (Kenya Plant Health Inspectorate Service) under the KEPHIS Act (No.12 of 2012) being assessing,

reviewing, testing and licensing of produce and agricultural input including fertilizers for use in Kenya;

vii. The Learned Tribunal erred in fact and law by failing to appreciate that only the Appellant has the mandate to classify or reclassify imports under the provisions of the law in Kenya;

viii. The Tax Appeals Tribunal erred in law by applying the classification by KEPHIS over the applicable provisions of the law thereby arriving at an erroneous decision;

ix. The Tax Appeals Tribunal misconstrued the Respondent's submissions and averments thereby arriving at the erroneous conclusion that the imported goods constituted fertilizers as per the East African Community Common External Tariff;

x. The Tax Appeals Tribunal erred in law and fact by failing to apply itself to the limitive element of Chapter 31 of the East African Community Common External Tariff.

10. The appeal was canvassed by way of written submissions.

11. The Appellant submitted that DK-20 is not a fertilizer in the sense contemplated by Chapter 31 of the EAC CET. Instead, it is a plant growth stimulant or bio-stimulant, a product which improves the soil or assists in plant growth rather than directly fertilizing it with essential nutrients. The Appellant relied on the World Customs Organization Explanatory Notes to Chapter 31, which expressly exclude micronutrient preparations which are applied to assist in seed germination and plant growth, but not as essential constituents. The Notes direct that such products should be classified under heading 38.24.

12. The Appellant asserted its exclusive statutory mandate to classify goods for customs purposes. It argued that the Tribunal committed a grave error of law by abdicating this function and giving undue, if not determinative, weight to the opinion of KEPHIS. The Appellant cited the case of Republic v Commissioner of Customs ex parte Mulchand Ramji & Sons Ltd [2010] eKLR where the Court affirmed that it is the duty of the Commissioner to determine the applicable codes for goods guided by the Harmonizes System. The Appellant contended that the role of KEPHIS is limited to assuring the quality of agricultural inputs for safety and environmental purposes, not for tariff classification.

13. Further, the Appellant submitted that the burden of proof in tax disputes lies squarely on the taxpayer to prove that the Commissioner's decision is incorrect, a principle that is codified in section 56 of the *Tax Procedures Act* and section 30 of the *Tax Appeals Tribunal Act*. The Appellant relied on the case of Mbuthia Macharia v Annah Mutua Ndwiga & another, [2017] eKLR in arguing that the Tribunal erred by shifting the burden to the Appellant by faulting it for not conducting its own laboratory tests.

14. The Appellant argued that the Tribunal's finding that it ought to have conducted its own tests was misplaced. The Appellant's stance was that the physical and chemical composition of the product was not in dispute; the real issue was the legal interpretation and application of the tariff nomenclature to those agreed facts. Therefore, a laboratory test was not necessary to resolve what was purely a question of legal classification.

15. On its part, the Respondent raised a preliminary objection as to the competence of the appeal. The Respondent submitted that section 56(2) of the *Tax Procedures Act* is clear; an appeal from the Tribunal to the High Court shall be on a question of law only. The Respondent argued that the appeal, in substance and form, challenges the Tribunal's findings on the characteristics, composition and nature of DK-20, which are quintessentially questions of fact. The Respondent relied on the case of Commissioner of Domestic Taxes v Sketchers Limited (Tax Appeal E011 of 2023) [2024] KEHC 5569.

16. In its alternative argument, the Respondent submitted that the Tribunal's decision was sound in law and well founded on the evidence. It argued that the Respondent successfully discharged

the evidentiary burden before the Tribunal by adducing compelling and cohesive evidence, which overwhelmingly established that DK-20 is a biofertilizer properly classified under HS Code 3101.00.00.

17. Regarding the role of KEPHIS, the Respondent submitted that the Tribunal did not hold that KEPHIS is the classifying authority. Rather, it correctly held that KEPHIS, as the statutory body with the technical expertise to analyse agricultural inputs, provides an expert certification which is a critical piece of evidence that informs the proper tariff classification. It was, therefore, unreasonable and an error in law for the Appellant to ignore such expert evidence from a fellow state agency without any cogent basis.

Analysis & Determination

18. Having keenly read the Record of Appeal, Supplementary Record of Appeal, Statement of Facts and the respective submissions, the issues that lend themselves for determination herein are:

    i. Whether this appeal is competent and properly before this Court;

    ii. Whether the Tribunal erred in classifying the product DK-20 under HS Tariff Code 3101.00.00 instead of 3824.99.90.

19. Before delving into the merits of the appeal, the Court must first satisfy itself that it is properly seized of the matter. The question of jurisdiction is so fundamental that it must be determined from the onset.

20. The jurisdiction of this Court in tax appeals from the Tribunal is expressly provided by section 56(2) of the *Tax Procedures Act* which states that an appeal to the High Court or to the Court of Appeal shall be on a question of law only. This provision is couched in mandatory terms.

21. The distinction between a question of law and a question of fact is, however, not always a straightforward one. In Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others [2014] KECA 707 (KLR), the Court of Appeal observed that there is an inherent danger that legal ingenuity may attempt to dress up and camouflage purely factual issues with the borrowed garb of legalness. The Court in that case, adopting the reasoning in the English case of BRACEGIRDLE v OXLEY (2) [1947] 1 ALL E.R. 126 at p 130, provided a useful distinction between primary facts and the conclusions drawn from them. Primary facts are those observed by witnesses and proved by testimony. The determination of the primary facts is always a question of fact. A conclusion drawn from those primary facts may be a conclusion of fact or one of law, thus appealable, if it is a conclusion that no reasonable tribunal, properly directing itself on the law, could have reached based on the primary facts before it.

22. Applying this test to the present case, the Court must examine the substance of the Appellant's grounds of appeal. The first ground alleges that the Tribunal erred in fact and law in misconstruing the composition, nature and use of DK-20. Composition, nature and use are primary facts, determinable through scientific analysis and expert evidence. The Tribunal heard evidence on these very facts from Dr. Kaw Siew Hwa and considered the documentary evidence from the manufacturer and KEPHIS, before making its finding of fact that DK-20 is an organic biofertilizer.

23. On the second ground of appeal, determination of a customs tariff classification involves a two-step process. First, the ascertainment of the facts (the nature, composition and the characteristics of the goods in question). Second, the application of the law (the terms of the tariff headings and the General Interpretation Rules) to those facts. The first step is a question of fact, while the second is a question of law. In this instance, the Tribunal made a finding of fact on the nature of the product. The Appellant has not demonstrated that the finding was perverse or that it was a conclusion that no reasonable

tribunal could have reached. Instead, the Appellant seeks to invite this Court to re-weigh the evidence and arrive at a different factual conclusion. This Court has no jurisdiction to do so.

24. Some of the Appellant's grounds seem to contradict others. Whereas in the first ground, the Appellant faults the Tribunal for misconstruing the composition and nature of the product, in the third ground the Appellant faults the Tribunal for finding that the Appellant should have undertaken testing to ascertain the nature and composition of the product yet the nature and composition of the product were not in dispute.

25. Similarly, grounds six and eight are contradictory. In ground 6, the Appellant acknowledges that the mandate of KEPHIS under the *Kenya Plant Health Inspectorate Service Act* includes assessing and testing of produce and agricultural inputs including fertilizers for use in Kenya. Interestingly, in ground 8, the Appellant faults the Tribunal for applying the classification by KEPHIS. The Appellant cannot have it both ways.

26. In Commissioner of Domestic Taxes v Sketchers Limited [2024] KEHC 5569 (KLR), the Court held that an appeal limited to matters of law does not permit the appellate court to substitute the Tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts.

27. In John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others [2018] eKLR, stated as follows:

> "(38)The interpretation or construction of *the Constitution*, statute or regulations made thereunder or their application to the sets of facts established by the trial Court. As far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the trial court."

28. For the foregoing reasons, this Court finds that this appeal, in substance, raises questions of fact and not of law. The Respondent's Preliminary Objection is, therefore, upheld. The appeal is incompetent and must be struck out with costs to the Respondent.

DATED AND DELIVERED AT NAIROBI THIS 16 DAY OF SEPTEMBER 2025.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Appellant: Ms. Kamau h/b Mwongera

Respondent: Ms. Nderitu h/b Waruiru for the Respondent

Court Assistant: Lucy Mwangi