Mart v Commissioner of Customs & Border Control (Customs Tax Appeal E028 of 2023) [2024] KEHC 4816 (KLR) (8 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4816 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CUSTOMS TAX APPEAL E028 OF 2023

DAS MAJANJA, J

MAY 8, 2024

BETWEEN

ROSHINA TIMBER MART .... APPELLANT

AND

COMMISSIONER OF CUSTOMS & BORDER CONTROL .... RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 14th July 2023 in Tax Appeal No.593 of 2022)

JUDGMENT

Introduction and Background

1. On 14.07.2023 the Tax Appeals Tribunal ("the Tribunal") delivered a judgment where it struck out the Appellant's appeal after finding that the same was premature as the Appellant had not exhausted all avenues for redress before filing the appeal before the Tribunal. Thus, the Tribunal did not determine the merits of the appeal that was before it. The Appellant is dissatisfied with this decision and now appeals the against the same to the court through its Memorandum of Appeal dated 28.07.2023. The Respondent ("the Commissioner") has opposed the appeal through its Statement of Facts dated 14.12.2023. The appeal has been canvassed by way of written submissions which are on record.

2. In order to fully contextualize and appreciate the appeal, I will highlight the chronological background of the dispute. The Appellant is a partnership company based in Mombasa that engages in construction activities. It imported five consignments including ceramic tiles, water closet suites, bathroom cabinets and gypsum ceilings whose entries were dated 03.03.2018, 05.05.2018, 08.09.2018 and two consignments dated 01.10.2018.

3. The Appellant declared the consignments under the Simba system and paid for the amounts as per the system however, the Commissioner's Document Processing Centre sent a notification to a verification officer asking the officer to verify the contents and quantity of the imported items as

the Commissioner claimed that the value of the items declared by the Appellant was lower than the transaction value for similar items. The Appellant then proceeded to the Commissioner's Valuation and Tariff department where it was informed that the verification had revealed that the Appellant had understated the quantity of the imported. Consequently, the imports attracted uplifts and after several correspondences between the parties, the Commissioner on various dates gave decisions whereby it indicated that because of the understated quantities, extra taxes were assessed as due and payable. With respect to the import entry dated 03.03.2018 of ceramic tiles, the Appellant was advised by the Commissioner through its letter of 27.03.2018 that it had the benefit of appealing these decisions under section 229 of the East African Community Customs Management Act, 2004 (hereinafter "EACCMA") with the Commissioner. With respect to the consignments dated 08.09.2018 and 01.10.2018, the Commissioner advised the Appellant through its letter dated 19.10.2018 that it could pursue an appeal with the Tribunal or Alternative Disputes Resolutions.

4. The Appellant, in various letters paid the uplifted duty under protest while evincing its intention to appeal the Commissioner's decisions and on 08.06.2022, it appealed to the Tribunal which then held that the appeal was not properly before it as the Appellant had bypassed the provisions of section 229 of the EACCMA hence this appeal.

Analysis and Determination

5. In determining this appeal, I am cognizant that this court is exercising appellate jurisdiction that is circumscribed by section 56(2) of the *Tax Procedures Act* (Chapter 469B of the Laws of Kenya) ("the TPA") which provides that "An appeal to the High Court or to the Court of Appeal shall be on a question of law only". 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 (See *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR).

6. It is for the above reasons that I decline to determine the factual issues raised by the Appellant in its memorandum of appeal and submissions as the same were never determined by the Tribunal. As this court is exercising appellate jurisdiction and if at all I find that the Tribunal was wrong in determining the Appellant's appeal preliminarily, then the proper relief in these circumstances would be to refer the matter back to the Tribunal for resolution on its merits (See *Commissioner Investigations and Enforcement v Eastern Consulting Management Limited (Income Tax Appeal E132 of 2021)* [2022] KEHC 12202 (KLR) (Commercial and Tax) (23 August 2022) (Ruling) and Commissioner for Investigations and Enforcement v Menengai Oils Limited [2021] eKLR).

7. Therefore, this court will only determine whether the Tribunal was correct in finding that the appeal before it was premature as the Appellant had not first sought a review of the Commissioner's decision with the Commissioner. It is common ground that under section 229(1) of the EACCMA, "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 for that decision or omission" and that as per section 229(4), the Commissioner is to render a decision on the same within 30 days. Section 230 then goes to provide that a party dissatisfied with a decision rendered by the Commissioner above can appeal to the Tribunal within 45 days of the decision. The use of the word "shall" under section 229(1) above connotes the mandatory nature of the proceeding meaning that a party cannot by pass the application for review if it is dissatisfied with a decision of the Commissioner.

8. Likewise, with respect to tax disputes, section 51(1) & (2) of the TPA provides as follows as regards the dispute resolution process:

> (1) A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.
>
> (2) A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.

9. Section 52 of the TPA in addition provides as follows as regards appealable decisions to the Tax Appeals Tribunal:

> (1) A person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the *Tax Appeals Tribunal Act*, 2013 (No. 40 of 2013).
>
> (2) A notice of appeal to the Tribunal relating to an assessment shall be valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice."

10. As stated in the introductory part, the parties corresponded on the issue of the Commissioner uplifting the declared values and raising additional assessments. The Commissioner, in its submissions before the Tribunal cited the decision of the court in *Republic v KRA and 2 Others Ex-parte Hi-Fi E.A. Ltd*; Miscellaneous Civil Application No. 534 of 2007 where it was held as follows in respect of an application for review under section 229(1) of the EACCMA:

> ...For an application [application for review under section 229] to take effect it must satisfy the description of a counter offer as understood in the law of contract or constitute a clear and complete answer to the assessment in a manner that can bind KRA. An inquiry for information, meeting or discussion cannot in my view constitute the "application " contemplated by the section. The making of pleas and inquiries leaves assessments unaffected and effectual

11. The Tribunal noted that in as much as the Appellant protested the additional assessments and continued holding of its consignments, it only evinced its intention to appeal under section 229(1) but never followed through with this intention. Going through the said correspondences I agree with the Tribunal and the Commissioner that in its letter of 28.03.2018, the Appellant only gave notice that it would pursue section 229 of the EACCMA to recover its "money, Loss of business, Demurrage & Storage charges and associated costs" but that there is no evidence that it ever followed through with the actual application. The Appellant also stated in its letter of 16.10.2018 that it would be pursuing an appeal to the Tribunal and Alternative Disputes Resolution for determination of its refund that it stated it had paid under duress. I note that the Commissioner, in its letter dated 19.10.2018 advised the Appellant that it could pursue an appeal with the Tribunal or Alternative Disputes Resolutions. This was in respect of the impugned consignments dated 08.09.2018 and 01.10.2018. The Commissioner made reference to the Appellant's earlier letter dated 16.10.2018 above.

12. While I agree with the Tribunal and the Commissioner that the Appellant never followed through with filing an application for review under section 229 of the EACCMA for the consignment entry dated

03.03.2018, I cannot ignore the Commissioner's advice on the consignment entries dated 08.09.2018 and 01.10.2018 where it advised the Appellant to pursue remedies of appeal "with the Tax Appeals Tribunal or Alternative Disputes Resolution under Part XX Appeals -230". In my view, this advice by the Commissioner was based on the fact that it construed the Appellant's protestations in respect of these consignments as an application for review and that its letter of 19.10.2018 was its decision thereof and thus appealable to the Tribunal as an "appealable decision". The Commissioner was thus estopped from claiming that the appeal was premature when it had advised the Appellant to appeal to the Tribunal. This position is similar to what the court held in *Commissioner of Customs and Border Control v Auto Industries Limited* [2022] KEHC 15974 (KLR) where it was stated as follows:

> I find and hold that by advising the respondent to appeal to the tribunal if at all it was dissatisfied, the commissioner was estopped from claiming that the appeal was time barred once it continued engaging the respondent and rendered another decision on the application for review. I agree with the tribunal that this letter of December 10, 2020 is what constituted an appealable decision, which meant that the appeal was thus rightly before the tribunal...

13. I therefore find and hold that the Commissioner's letter dated 19.10.2018 in respect of the consignment entries dated 08.09.2018 and 01.10.2018 was an appealable decision that was rightly before the Tribunal and the Tribunal ought to have determined its merits. However, I find that the Appellant did not properly appeal the decisions in respect of the consignment entries dated 03.03.2018 and 05.05.2018 in line with section 229(1) of the EACCMA and the appeal before the Tribunal on these consignments was premature.

Disposition

14. The Appellant's appeal partly succeeds. The matter is referred back to the Tribunal for determination on the merits of the Appellant's consignment entries dated 08.09.2018 and 01.10.2018. The Tribunal's decision dated 14.07.2023 is set aside and varied to this extent. There shall be no order as to costs.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED and DELIVERED at NAIROBI this 8th day of MAY 2024.

A. MABEYA

JUDGE

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