



**EL-Amigos Enterprises Limited v Commissioner of Investigations
and Enforcement (Customs Tax Appeal E008 of 2023)
[2024] KEHC 10177 (KLR) (Commercial and Tax) (6 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10177 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CUSTOMS TAX APPEAL E008 OF 2023**

**A MABEYA, J
AUGUST 6, 2024**

BETWEEN

EL-AMIGOS ENTERPRISES LIMITED APPELLANT

AND

**COMMISSIONER OF INVESTIGATIONS AND
ENFORCEMENT RESPONDENT**

JUDGMENT

1. This is an appeal against the decision of the Tax Appeals Tribunal (“the Tribunal”) delivered on 10/3/2023. The appellant made an import of a consignment of container STC assorted used motor vehicle and motor cycle spare parts from Japan through a bill of lading dated 14/12/2018.
2. The goods were then entered through the Customs Simba System and an import entry was generated. On 14/3/2019, the respondent impounded the appellant’s consignment and issued a notice of goods deposited in customs warehouse no 202358. He then informed the appellant that there had been a miscalculation of the goods and vide a letter dated 13/3/2019, he requested the appellant to provide additional information.
3. The appellant demanded the release of the goods but the respondent declined. The appellant preferred an appeal to the Tribunal. In its decision of 10/3/2023, the Tribunal dismissed the appeal on the grounds that the appeal was incompetent for it breached the doctrine of exhaustion. Being aggrieved by that decision, the appellant lodged the present appeal vide a memorandum of appeal dated 21/3/2023.
4. The grounds upon which the appeal was founded can be summarized into 3 as follows: -



- a. That the Tribunal erred in law and fact for not recognizing that the goods had been examined taxed and released by the Commissioner of Customs.
 - b. That the Tribunal erred in fact and in law in failing to recognize that the actions of the Commissioner for investigations and enforcement were ultra vires and contrary to Article 47(4)(1), 4(3)(a)(b) of *the Constitution* and section 5(3) of the EACCMA, 2004 and section 60(1)(2) and (5) of the *Tax Procedures Act* (“the TPA”).
 - c. That the Tribunal erred in failing to consider the appellant’s reasons for the appeal.
5. In opposition, the respondent filed a Statement of Facts dated 24/4/2023. He contended that he impounded the appellant’s goods because the appellant had imported used motor cycles and mis-declared them as motor cycle parts. That the Notice of Goods Deposited in Customs Warehouse had described the goods as 15 assembled motor bikes from Japan. That during offloading of the goods, it was established that there was a mis-classification contrary to section 203 of the East African Community Customs Management Act (EACCMA).
 6. The respondent further contended that the appellant had packed the goods with an intention of deceiving the respondent. That the goods had only been deposited in order for the appellant to provide further information. That the appellant had not provided information showing that it had lodged any notice of objection.
 7. This appeal was canvassed by way of written submissions. The appellant submitted that the Commissioner of Customs verified the goods and was satisfied that the appellant had complied with the doctrine of procedural propriety and released the goods. That since the Commissioner of Customs did not raise any offence there was no need to invoke section 203 of EACCMA.
 8. That there was no appealable decision created by the Commissioner of Customs during the clearance process to warrant the application of the doctrine of exhaustion. That the respondent had no authorization under the EACCMA, 2004 to follow goods released by the Commissioner of Customs to their destination and supervise offloading.
 9. That the respondent acted ultra vires by raiding and closing the appellant’s shop without informing the appellant. That the seizure of the appellant’s goods was unlawful and un-procedural for there was no warrant issued, the consignment had already been released and there was no evidence that the Commissioner of Customs and border control had been questioned. That the doctrine of exhaustion was not applicable under section 229 of EACCMA, 2004 since the appellant had exhausted the doctrine of procedural propriety.
 10. On his part, the respondent submitted that the appellant’s appeal before the Tribunal was lodged before the appellant had exhausted the laid internal remedies provided for under section 229 of the EACCMA. That Kenya being a signatory of the World Custom Organization, it relies on the Harmonized Community Description and Coding System.
 11. That the classification of goods is based on the components of the product and in accordance with the terms of the sub-headings. That the miscalculation was confirmed during the offloading whereby it was noted that the goods had been misclassified and they ought to have been declared as motorbikes. That the appellant failed to provide additional information as requested and therefore the tariff classification did not change.
 12. I have carefully considered the record and the submissions by Learned Counsel. The appellant’s gravamen is that the respondent raided its premises and impounded its goods despite having been cleared by the Commissioner of Customs. That the respondent’s actions were ultra vires since it



- contravened the EACCMA. The appellant therefore faulted the Tribunal for failing to recognize that the goods had already passed the inspection by the Commissioner of Customs.
13. On his part, the respondent's contention was that the goods had been misclassified as motor cycle parts yet they were used motor cycles. According to the respondent, the appellant had contravened section 202(a) of the EACCMA as it had packed the goods in a manner to deceive the respondent.
 14. The Tribunal struck out the appeal on the basis that the same was incompetent as it offended the doctrine of exhaustion. As a result, the Tribunal did not consider the merit of the appeal.
 15. The EACCMA was enacted for the management and administration of customs and related matters. Kenya having ratified the same, those operating within Kenya are bound by its provisions while importing products.
 16. Section 229(1) EACCMA 2004 provides as follows: -

“A person directly affected by the decision or omission of the commissioner or any other officer on matters for review of relating to customs shall within thirty days of the date of the commissioner's decision or omission lodge an application for review of that decision or omission.”
 17. The Tribunal struck out the appeal on the ground that the appellant had failed to exhaust the review process provided above before lodging an appeal at the Tribunal.
 18. In Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR, the court stated as follows: -

“The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution* and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:

“This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:

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.”
 19. In Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR, the Court of Appeal stated: -

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same should be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews. ... The exhaustion



doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”

20. In the present case, section 229(1) EACCMA 2004 makes it mandatory for any party aggrieved by the decision of the Commissioner lodge an application for review and thereafter appeal to the Tribunal once the review is not favourable. The appellant did not attempt to review the decision of the Commissioner. It failed this crucial step before lodging its appeal at the Tribunal.
21. In this regard, I find that the Tribunal did not err in striking out the appeal as being incompetent. The Tribunal did not have the jurisdiction to adjudicate the dispute before it as the laid down process in the Act had not been exhausted.
22. The upshot is that, I find no error on the part of the Tribunal to warrant interference with its decision of 10/3/2023. The appeal lacks merit and is dismissed with costs.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF AUGUST, 2024.

A. MABEYA, FCI Arb

JUDGE

