



REPUBLIC OF KENYA



KENYA LAW

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Magot Freight Services Limited v Commissioner of Customs and Border Control (Customs Tax Appeal E002 of 2021) [2024] KEHC 11426 (KLR) (Commercial and Tax) (20 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11426 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CUSTOMS TAX APPEAL E002 OF 2021
MN MWANGI, J
SEPTEMBER 20, 2024

BETWEEN

MAGOT FREIGHT SERVICES LIMITED APPELLANT

AND

COMMISSIONER OF CUSTOMS AND BORDER CONTROL RESPONDENT

JUDGMENT

1. On 18th March, 2019, the National Targeting Centre flagged the appellant's goods for valuation with instructions to release point to verify 100% and refer the matter to valuation for value demonstration. The matter was then referred to valuation on 26th March, 2019. The appellant provided supporting documents, which included commercial invoices, packing lists, Bill of Lading and PVoC. After analysis, the declared values were deemed low compared to similar imports, leading to an uplift in declared unit values on 4th April, 2019. The appellant then requested to pay the uplifted values under protest on 5th April, 2019, which request was approved under Section 229(6) of the East Africa Community Customs Management Act, 2004 (EACCMA, 2004), and payment was made on the same day.
2. Subsequently, an offence was filed against the importer under Section 219 of the EACCMA, 2004, which was compounded and confirmed on 8th April, 2019 and 9th April, 2019, respectively. The appellant lodged an appeal with the respondent challenging the decision to uplift the declared unit values. The said appeal was received by the Customs Registry and by the valuation headquarters on 10th June, 2019, two (2) months after the appellant paid the additional taxes. On 18th June, 2019, the respondent informed the appellant that the appeal was time-barred and therefore invalid according to Section 229(1) of EACCMA, 2004.



3. Dissatisfied with the respondent's decision, the appellant filed an appeal with the Tax Appeals Tribunal (Tribunal) through a Notice of Appeal dated 7th June, 2019. Thereafter, the appellant filed a Memorandum of Appeal and Statement of Facts both dated 20th June, 2019. The appellant contended that the respondent violated Section 122(2) of EACCMA, 2004, it failed to adhere to the six methods of valuing imported goods, specifically by failing to prioritize the transaction value method. The appellant herein argued that the respondent's additional assessment of Kshs.489,656.00 was excessive and erroneous. Upon consideration of the pleadings filed and rival submissions by Counsel for the parties, the Tribunal framed only one issue for determination; whether the appellant's representative had the requisite locus standi before the Tribunal.
4. In its judgment, the Tribunal took judicial notice of the fact that the appellant's representative, Christine Makungu Mukangi, had multiple appeals before the Tribunal, and in all the said appeals, the respondent raised a Preliminary Objection arguing that the said person could not conduct the appeals by virtue of the provisions of Section 25(1) of the [Tax Appeals Tribunal Act](#), 2013. The Tribunal aligned itself with the findings of a separately constituted panel of the Tribunal in Misc. App. No. 12 of 2019 El-Amigos Auto v Commissioner of Investigations & Enforcement regarding the appellant's representative's registration status as a Tax Agent. In the said decision, the Tribunal held that Ms Mukangi was not a registered Tax Agent, and struck out the appeal. The Tribunal then granted the appellant leave to file and serve a fresh appeal either on its own or through a Registered Tax Agent within fourteen (14) days.
5. Dissatisfied with the Tribunal's decision, the appellant lodged an appeal against it in this Court vide a Memorandum of Appeal dated 15th June, 2021 raising the following grounds of appeal –
 - i. That the Honourable Tax Tribunal erred in both law and fact by finding and holding that the applicant's representative one Christine Makungu Mukangi/Magot Freight Services Ltd was not a registered Tax Agent without considering and appreciating that as Customs Agents they co-own the goods with the importers pursuant to the provisions of Section 147 of the East Africa Community Customs Management Act (EACCMA) 2004;
 - ii. That the Honourable Tax Tribunal erred in both law and fact by finding and holding that the applicant's representative one Christine Makungu Mukangi/Magot Freight Services Ltd was not a Registered Tax Agent pursuant to Section 25(1) of the [Tax Appeals Tribunal Act](#);
 - iii. That the Honourable Tax Appeals Tribunal erred in law and fact by striking out TAT Application. No. 276 of 2019 based on its avoidance of acknowledgment of Customs Agent License No. CAL/0652/20 dated 2nd April, 2020 as proof of the appellant's representative being a recognized Tax Agent as per the Tax Appeal Tribunal Act, 2013 Section 25(1);
 - iv. That the Honourable Tax Appeals Tribunal erred in law and fact by purposely ignoring and/or avoiding to consider the Power of Attorney dated 1st September, 2020 issued by the appellant authorizing Christine Makungu Mukangi/Magot Freight Services Ltd to represent it as provided for under Order 9 Rule 2(a) of the [Civil Procedure Act](#);
 - v. That the Honourable Tax Tribunal erred in both law and fact by ignoring the East Africa Community Customs Management Act (EACCMA) 2004, in Sections 145, 146 &147 and Customs Regulations 149 and 150(b);
 - vi. That the Honourable Tax Appeals Tribunal erred in law and fact by basing their ruling on another ruling made on 1st April, 2021 in Misc. Application [No. 12/2019](#) El-Amigos Auto vs.



Commissioner of Investigation & Enforcement without considering the written submissions and the merits of the case;

- vii. That the Honourable Tribunal erred in law and fact by failing to consider the appellant's application on its merits; and
 - viii. That the Honourable Tribunal erred in law and fact by failing to analyze the facts of the case and the applicable law in view of the submissions and highlights filed by both parties.
6. The appellant filed further grounds of appeal dated 9th October, 2021, raising the following issues –
- i. That this Honourable Court gives interpretation and finding whether the Customs Agent is legally allowed to represent their clients (importers) in the Tribunal;
 - ii. That this Honourable Court to give interpretation and finding whether a Custom Agent being a co-owner of the goods with the importer pursuant to Section 147 of the East Africa Community Customs Management Act (EACCMA) 2004 can represent the importer in the Tribunal; and
 - iii. That this Honourable Court to give interpretation and finding whether Section 25 of the [Tax Appeals Tribunal Act](#), No. 40 of 2013, as read with Section 147 of the East Africa Community Customs Management Act (EACCMA) 2004, and Tax Agent Regulation 3 of the [Tax Procedures Act](#) are in contradiction to each other and are discriminatory to the Customs Agent contrary to Article 27(6) of [the Constitution](#) of Kenya 2010.
7. The appellant's prayer is for this Court to allow the appeal with costs, set aside the Tax Appeals Tribunal ruling and orders, and make appropriate orders.
8. The appeal herein was canvassed by way of written submissions which were highlighted on 13th February, 2024. The appellant's submissions were filed by the law firm of Mkan & Company Advocates on 20th March, 2023, whereas the respondent's submissions were filed on 6th December, 2023 by Victor Andambi Chabala Advocate.
9. Mr. Mkan, learned Counsel for the appellant cited the provisions of Section 25 of the [Tax Appeals Tribunal Act](#) and Section 147 of the EACCMA, 2004 and submitted that the said provisions do not bar a Customs Agent from representing an importer as its Agent, and as a co-owner of the imported goods. He relied on the decision in Republic v Kenya Revenue Authority Ex-parte Africa Boot Company Limited [2012] eKLR, and Republic v Commissioner General Kenya Revenue Authority and Gama Villa Limited Ex-parte Mount Kenya Bottlers Limited [2016] eKLR. He submitted that Section 147 of EACCMA, 2004 mandates Customs Agents to co-own imported goods and take full responsibility for them, akin to the owner. Counsel asserted that Customs Agents should be able to represent importers in proceedings before the Tax Appeals Tribunal, even if they are not registered Tax Agents, because co-ownership places them in the same legal position as the importer under Section 25 of the [Tax Appeals Tribunal Act](#).
10. Counsel relied on the case of the Law Society of Kenya v Attorney General & another [2019] eKLR and the Court of Appeal case of Centre for Rights Education and Awareness & another v John Harun Mwau & 5 others [2012] eKLR, and argued that Customs Agents, who are considered co-owners of goods and held accountable for any issues arising from their agency, are being discriminated against if they cannot represent the owners in Tribunal proceedings. He contended that above position violates Article 27 of [the Constitution](#) of Kenya, 2010. He submitted that Section 25 of the [Tax Appeals Tribunal Act](#), when read with Section 147 of the EACCMA, 2004 and the Tax Agent Regulations 3 of the [Tax Procedures Act](#), are contradictory and discriminatory.



11. Mr. Chabala, learned Counsel for the respondent cited the provisions of Section 145(1) of the of the EACCMA, 2004, the CONFIAD Pan-European Network Steering Committee for the Modernization of the Community Customs Code at page 33 of its explanatory memorandum definition of a Customs Agent, and the World Customs Organization definition of a Customs Agent found under the glossary of International Customs Terms. He submitted that a Customs Agent performs representation activities in the customs field for operators involved in international transactions or operations involving the movement of goods to or from other countries. He explained that their primary responsibility is to help their clients to comply with customs rules and regulations in an efficient and cost-effective way.
12. Counsel cited to the provisions of Section 25(1) of the [Tax Appeals Tribunal Act](#) and stated that the appellant's representative is not the proper person to appear on behalf of the appellant at the Tax Appeals Tribunal since she is a Customs Agent and not a Tax Agent. To buttress his submissions, he relied on the decision made in Misc. App. No. 12 of 2019 El-Amigos Auto v Commissioner of Investigations & Enforcement.

Analysis And Determination

13. Pursuant to the provisions of Section 56(2) of the [Tax Procedures Act](#), an Appeal to the High Court from the decision of the Tax Appeals Tribunal or to the Court of Appeal shall be on a question of law only. For this reason, this Court is not permitted to substitute the Tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts.
14. I have considered the Memorandum of Appeal, the further grounds of Appeal and the Record of Appeal filed by the appellant. I have also considered the statement of facts filed by the respondent together with the written submissions by Counsel for the parties. The issue that arises for determination is whether a Customs Agent can act as a Tax Agent in the Tax Appeals Tribunal.
15. The Tribunal in its ruling delivered on 4th June, 2021 found that pursuant to the provisions of Section 25 of the [Tax Appeals Tribunal Act](#), the appellant's representative by the name Christine Makungu Mukangi, had no locus standi to represent the appellant in the proceedings before it, and struck out the appellant's appeal. Section 25 of the [Tax Appeals Tribunal Act](#) provides as follows -
 1. For the hearing of proceedings before the Tribunal, the appellant may appear in person or be represented by a tax agent or by an advocate of the High Court of Kenya.
16. It is not disputed that Ms. Christine Makungu Mukangi is not a Tax Agent. Counsel for the appellant however submitted that since she is a Customs Agent licensed under Section 145 of the EACCMA, 2004, she has every right to represent the appellant in proceedings before the Tax Appeals Tribunal pursuant to the provisions of Sections 146 & 147 of the EACCMA, 2004, which provide as follows –

Section 146

 1. Where under the provisions of the Customs laws the owner of any goods is required or authorised to perform any act then such act, unless the contrary appears, may be performed on his or her behalf by authorized agent.
 2. A person shall not be the duly authorised agent or any owner unless-
 - a. such person is exclusively in the employment of the owner; or



- b. such person is a Customs agent duly licensed as such in accordance with this Act, and, in either case, such person is authorised in writing by the owner, either generally or in relation to any particular act, to perform the act on behalf of the owner.
3. The proper officer may require from any person purporting to be the duly authorised agent of any owner the production of his or her written authority and in default of the production of such authority the proper officer may refuse to recognize such person as a duly authorized agent.

Section 147

A duly authorised agent who performs any act on behalf of the owner of any goods shall, for the purposes of this Act, be deemed to be the owner of such goods, and shall, accordingly, be personally liable for the payment of any duties to which the goods are liable and for the performance of all acts in respect of the goods which the owner is required to perform under this Act:

Provided that nothing herein contained shall relieve the owner of such goods from such liability.

17. It is trite law that Tax Statutes should be interpreted strictly, with no room for implication or intendment. Further, if there is any ambiguity in Tax law, the same ought to be interpreted in the Taxpayer's favour. The said position was upheld by the Court in the case of Republic v Commissioner of Domestic Taxes Large Tax Payer's Office Ex-Parte Barclays Bank of Kenya Ltd [2012] eKLR, where it was held that -

“The approach to this case is that stated in the oft cited case of Cape Brandy Syndicate v Inland Revenue Commissioners [1920] 1 KB as applied in T.M. Bell v Commissioner of Income Tax [1960] EALR 224 where Roland J. stated, “ ...in a taxing Act, one has to look at what is clearly said. There is no room for intendment as to a tax. Nothing is to be read in, nothing to be implied. One can only look fairly at the language used... If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be”. (Emphasis added).

18. In regard to what happens when there is ambiguity in Tax Statutes, the Court of Appeal in the case of Commissioner of Domestic Taxes (Large Taxpayers Office) v Barclays Bank of Kenya Ltd [2020] eKLR, held the following-

“There is no doubt in our minds that the decisions in Adamson v Attorney General [1933] AC 247, Cape Brandy Syndicate v. Inland Revenue Commissioners [1920] 1 KB 64, T. M. Bell v. Commissioner of Income Tax [1960] EA 224, Republic v. Commissioner of Income Tax ex parte SDV Transami [2005] eKLR and the first judgment represent a correct statement of the law, namely strict construction of tax legislation, so that the tax demand must fall within the terms of the statute without ambiguity. If there's any ambiguity in the legislation, it is not to be rectified by considerations of intendment, but by amending the legislation. However, determination of whether there is clarity or ambiguity in the legislation or whether a tax demand is precise and within the terms of the legislation, is not an abstract or pedantic exercise. It must be based on the evidence and the circumstances



of each case. We agree with the majority of this Court in Stanbic Bank Ltd v. Kenya Revenue Authority [2009] eKLR that meaning of words should not be strained so as to find ambiguity.” (Emphasis added).

19. On perusal of Sections 146 & 147 of the EACCMA, 2004, it is clear that the said provisions apply only to matters falling under the said Act. This is because Section 146 (1) reads “Where under the provisions of the Customs laws ...” and Section 147 reads “A duly authorised agent who performs any act on behalf of the owner of any goods shall, for the purposes of this Act.....”. In light of the decisions I have referred to on how Tax Statutes are meant to be interpreted, and the above provisions of the law, it is my finding that a Customs Agent is only deemed as a co-owner of the imported goods, authorized to perform all acts in respect of the imported goods which the owner is required to perform, in respect to the EACCMA, 2004. Therefore, the appellant’s representative Christine Makungu Mukangi, cannot rely on the provisions of Sections 145, 146 & 147 of the EACCMA, 2004, to purport to represent the appellant in proceedings before the Tax Appeals Tribunal.
20. Section 25 of the *Tax Appeals Tribunal Act* on the other hand provides that the only persons qualified to appear on behalf of a Tax Payer in proceedings before the Tax Appeals Tribunal in instances where the Taxpayer opts not to appear in person are a Tax Agent and an Advocate. The provisions of Sections 145, 146 & 147 of the EACCMA, 2004 and Section 25 of the *Tax Appeals Tribunal Act* are not ambiguous. To the contrary, Section 25 of the *Tax Appeals Tribunal Act* is very clear as to who is qualified to appear before the Tax Appeals Tribunal. Therefore, since Ms. Christine Makungu Mukangi was not the owner of the imported goods, neither is she an Advocate nor a Tax Agent. I as such agree with the Tax Appeals Tribunal that she had no locus standi to file an appeal and appear before the Tax Appeals Tribunal on behalf of the appellant.
21. For the reasons given in the judgment, I find that the appeal herein is devoid of merits. It is hereby dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF SEPTEMBER, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Mkan for the appellant

Ms Chepsiror h/b for Mr. Chabala for the respondent

Ms B. Wokabi - Court Assistant.

