



**Kenya Revenue Authority v Omondi & another (Income Tax Appeal E094 of 2022)  
[2023] KEHC 3554 (KLR) (Commercial and Tax) (17 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3554 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E094 OF 2022  
JWW MONG'ARE, J  
APRIL 17, 2023**

**BETWEEN**

**KENYA REVENUE AUTHORITY ..... APPELLANT**

**AND**

**ARTHUR JOHN OMONDI ..... 1<sup>ST</sup> RESPONDENT**

**SUSAN JOLELYN OMONDI ..... 2<sup>ND</sup> RESPONDENT**

*(Appeal from the Judgement & Orders of the Tax  
Appeals Tribunal No. 105 of 2017 dated 30th July 2020)*

**JUDGMENT**

1. By a Memorandum of Appeal dated and filed before this court on 21<sup>st</sup> day of September 2020 the Appellant has challenged the decision of the Tax Appeal Tribunal in TAT No. 105 of 2015 delivered on 30<sup>th</sup> July 2020. The Appellant has filed the following grounds of appeal;
  - i. That the Honourable Tribunal erred in law by failing to consider the express provisions of the guidelines for importation of duty free vehicles by Kenyan residents returning from countries that operate left hand drive vehicles established under section 247 (b) of the *East Africa Community Customs Management Act, 2014*.
  - ii. The Honourable Tribunal erred in law and fact by concluding that the vehicles imported by the Respondents were similar with the previously owned ones in regards to make, engine rating and year of manufacturer.
  - iii. That the Honourable court erred in law and fact by ignoring all material facts placed before it and based its judgment on extraneous and irrelevant facts without due regard to the balance of the scales of justice.



2. The Appeal is opposed and the Respondents have filed their Statement of Facts dated 11<sup>th</sup> March 2021. The facts giving rise to this appeal are that both Respondents are Kenyan citizens who prior to 2017 worked and resided in the United States. Upon attaining their retirement age, and as they returned back to Kenya, they sold their left-hand drive vehicles and imported right-hand drive vehicles back to Kenya in line with the “Guidelines (Revised) for importation of Duty-Free Vehicles by Kenyans residents returning from Countries that Operate Left-Hand Drive vehicle (The Guidelines)”.
3. At the port of entry, the Appellant inspected the vehicles and assessed duty and charged both non-custom and customs levies which included import duty, excise duty, VAT imports and non-custom charges assessed at Kshs.1,220,201/- for the 1<sup>st</sup> respondent’s replacement vehicle and Kshs.598,181/- for the 2<sup>nd</sup> respondent’s replacement vehicle. To secure the release of the two vehicles, the Respondents made the payments under protest and moved to the Tax Appeals Tribunal (The Tribunal) to challenge the payment of the same. The Tribunal found in favour of the Respondents and made the following findings and orders;
  - i. That the Appellants (Respondents) are eligible for/ entitled to exemption from payment of duty.
  - ii. The Appellants (Respondents) complied with the guidelines outlined in the importation of duty-free motor vehicles by Kenyan residents returning from countries that operate left-hand drive motor vehicles in accordance with section 247(b) of the *East Africa Community Customs Management Act, 2014*(EACCMA).

Accordingly, the tribunal then made the following final orders;

    1. That the Appellant do refund the customs duties paid by the Respondents in respect of the importation of the replacement vehicles.
    2. Each party to bear its own costs.
4. Arising from the above decision of the Tribunal, the Appellant has filed the current appeal challenging the same.

#### **Appellant’s Case:-**

5. In their submissions, the Appellant stated that the Tribunal erred in law in its finding that the Respondents complied with the *EACCMA* in its criteria for importing duty free vehicle and that the Respondents did not qualify for tax exemption. The Appellant’s argument was that the vehicles imported by the Respondents, upon verification at the port of entry, were found to be not in conformity with the guidelines for replacement of left-hand drive vehicles for returning residents.
6. The Appellant further stated that one of the requirements is that the replacement vehicle must be of similar category with the previously owned left-hand vehicle with regard to make, engine rating and year of manufacturer. Further, the Appellant argues that the criteria for determining similarity includes among other criteria existence similar trade mark, quality and reputation.
7. The Appellant further argued that the vehicles imported by the Respondents failed to meet the similarity test and therefore did not meet the requirements of the law. The Appellant submitted that the guidelines are put in place to enable returning residents from Left-Hand drive enjoy the same privilege as their counterparts in the Right-Hand drive and do not gain undue advantage from the same provisions by upgrading their vehicles to superior ones. That the Respondents imported different vehicles from the ones they owned in the United States and hence the Tribunal was wrong to order a



refund of the import taxes charged and collected by the Appellant. The Appellant urged the court to set aside the decision of the Tribunal and allow the Appeal.

### **The Respondents Case:-**

8. The Respondents opposed this Appeal and maintained that the decision by the Tribunal was a correct interpretation of the law. The Respondents maintain that they provided adequate proof to confirm indeed they were returning residents and entitled to the benefit of importing right-hand drive vehicles in place of the left-hand drive models that they had used while residing in the United States.
9. The 1<sup>st</sup> respondent stated that while in the States he owned and drove a Toyota Runner Sport UT, Year of Manufacture 2001, Rating 3500 cc (Left Hand Drive) VIN: JT3HN86R51904868 which he replaced with A Toyota Lexus, year of Manufacturer 2013, Rating 2700, VIN;AG10-2442288.
10. The 2<sup>nd</sup> Respondent stated that while residing in the United States owned and drove a Toyota Lexus IS 300; Year of manufacturer 2001. Rating 3000 cc(left Hand drive), VIN JTHBD 182510021225 which she replaced with a Toyota Hilux, year of manufacturer 2009, rating 2982 CC, VIN;AHTFZ29G509035269.
11. At the port of entry, both vehicles were subjected to customs duties, contrary to the guidelines governing the importation of right-hand drive vehicles by returning residents from countries where left-hand drive vehicles are driven.
12. Having been forced to pay the assessed duty in order to secure the release of the vehicles from the Port to avoid further accumulation of port charges, the Respondents argue that the Tribunal's decision was correct and urge this court to dismiss the appeal as filed and uphold the decision of the Tribunal.

### **Analysis and Determination: -**

13. Having read the Memorandum of Appeal and the supporting documents including the Respondents statement of facts, I have identified one issue for determination to wit;

“Whether the Tribunal erred in finding that the Respondents complied with the guidelines outlined in the importation of duty-free motor vehicles by Kenyan residents returning from countries that operate left-hand drive motor vehicles in accordance with section 247(b) of the *East Africa Community Customs Management Act, 2014* and in ordering a refund of the import duty so paid by the Respondents”.
14. The guidelines for importation of right hand drive vehicles by returning residents from countries where left Hand drive vehicles are used provide that:-
  - i. “The replacement vehicle must comply with KEBS requirements of Legal Notice No. 78 of 15<sup>th</sup> July 2005 and KS1515;2000 Kenya Standard Code of Practice for inspection of Road Vehicles. In particular, the replacement vehicle;
    1. Must be less than 8 years old from the year of first registration;
    2. Will be subject to roadworthiness inspection by KEB’s appointed inspection agent in the country of export.”
15. The Appellant is vested with power to make exemptions of the customs duty of vehicles imported by returning residents in compliance with the guidelines under section 247 of the *East Africa Community Customs Management Act (EACCMA)* which provides as follows;-



- a. “Notwithstanding anything contained in this Act, the in special cases, notices, etc. Re-exportation, destruction and abandonment. Commissioner may, in order to meet the exigencies of any special case—
    - a. ....
    - b. permit the entry of any goods, and the report or clearance of any aircraft or vessel or vehicle, in such form and manner, and by such person, as the Commissioner may either generally or in particular case direct”.
16. It is a settled fact that the Respondents met the criteria for returning residents and therefore were entitled to import duty free vehicles for use when they return to settle in Kenya. The issue of contention between the Appellant and Respondents is whether the vehicles they imported were similar to the Left-Hand Drive Vehicles that they replaced. The 4th Schedule in *EACCOMA* has defined similar goods for purposes of Determination of value of imported goods liable to ad valorem import duty interpretation as follows;
17. In this Schedule— “customs value of imported goods” means the value of goods for the purposes of levying ad valorem duties of customs on imported goods;
- i. “Identical goods” means goods which are same in all respects, including physical characteristics, quality and reputation. Minor differences in appearance shall not preclude goods otherwise conforming to the definition from being regarded as identical;
  - ii. “Similar goods” means goods which, although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable. The quality of the goods, their reputation and the existence of a trademark are among the factors to be considered in determining whether goods are similar.
  - iii. “identical goods” and “similar goods” do not include, as the case may be, goods which incorporate or reflect engineering, development, artwork, design work, and plans and sketches for which no adjustment has been made under subparagraph (1) (b) (iv) or paragraph 9 because such elements were undertaken in the Partner States; “produced” includes grown, manufactured and mined.
  - iv. (2) For the purposes of this Schedule—
    - a. Goods shall not be regarded as “identical goods” or “similar goods” unless they were produced in the same country as the goods being valued;
18. I have considered the decision of the Tribunal in this matter and I note that the same took into account the law and the regulations in arriving at its findings that the Respondent met the criteria for returning residents and indeed did import vehicles similar to the ones they were replacing and I find no reason to interfere with it.
19. The upshot of the above finding is that the appeal before me lacks merit and is therefore dismissed with costs to the Respondents. As ordered by the Tribunal, the Respondents are entitled to a refund of the customs duties paid in respect of the importation of the replacement vehicles. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17<sup>TH</sup> DAY OF APRIL 2023.**

.....  
**J. W. W. MONGARE**



**JUDGE**

**IN THE PRESENCE OF:-**

**Ms. Naeku for the Appellant.**

**Mr. Waweru holding Brief for Mr. Githinji for the Respondent.**

**Sylvia- Court Assistant.**

