Commissioner of Customs and Border Control v East African Seed Company Limited (Income Tax Appeal E115 of 2020) [2023] KEHC 18813 (KLR) (19 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18813 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

INCOME TAX APPEAL E115 OF 2020

JWW MONG'ARE, J

JUNE 19, 2023

BETWEEN

COMMISSIONER OF CUSTOMS AND BORDER CONTROL ..... APPELLANT

AND

THE EAST AFRICAN SEED COMPANY LIMITED ..... RESPONDENT

(Being an Appeal from the judgement of the Tax Appeals Tribunal dated 4/9/2020 in Nairobi Tax Appeal No.116 of 2016)

JUDGMENT

1. The Appellant is a principal officer appointed under the *Kenya Revenue Authority Act* Cap 469 of the Laws of Kenya while the Respondent is a private limited liability company incorporated in Kenya and its principal activity is processing, wholesaling and retailing of seeds for sowing and not for consumption.

2. The Appellant conducted a post clearance audit of the Respondent's operations covering the period 2010 to 2015 culminating in a provisional demand notice vide a letter dated 29/4/2015. The Respondent opposed the assessment and the Appellant revised it on more than one occasion.

3. In the end the Appellant confirmed the revised post clearance audit of Ksh.29,842,011/- vide a letter dated 29/7/2016. Aggrieved by that demand, the Respondent filed an appeal before the Tax Appeals Tribunal (the tribunal)

4. On 4/9/2020 the tribunal delivered its judgement on the dispute between the parties herein. The tribunal found inter alia that the proper classification for water melon seeds for sowing was HS Code 1209.91 of the East African Community-Common External Tariff ("The EAC-CET") version 2007 and set aside the Appellant's assessment in respect of water melon seeds for sowing.

5. The Appellant being dissatisfied with the judgement of the tribunal in respect of water melon seeds for sowing filed the present appeal on the following grounds:

> " 1. The Tribunal erred in law and in fact in failing to consider that the amendment contained in the 2012 CET version removed any ambiguity in classification of water melon seeds under Tariff 1207.70.00.
>
> 2. The Tribunal erred in law and in fact by setting aside the entire assessments on classification of the water melon seeds for the periods after July 2012."

6. In opposition to the appeal, the Respondent filed its statement of facts dated 7/6/2021.

7. The Respondent contended that the Appellant relied on a provision of the law that was not existent in the East African Community-Common External Tariff ("The EAC-CET") version 2007 to assess the tax due and payable by the Respondent and that the tribunal rightfully found that since the HS Code relied upon by the Appellant at the time of assessment for the water melon seeds for sowing was non-existent in the EAC-CET Version 2007, the same could not be upheld as the correct HS Code in the matter and the Appellant's assertion was dismissed.

8. It was contended that the provisions of HS Code 12.07 have not specifically provided for water melon seeds for sowing and the Respondent erred in relying on tariff code 12.07.99.00 under the heading "other" which is ambiguous and wide in scope; that the Appellant's proposed tariff code 12.07.99.00 lacked specificity contrary to general jurisprudence on interpretation of customs laws and in the face of the glaring obscurity the tribunal was correct in disregarding the Appellant's arguments and upholding the Respondent's position.

9. The Respondent averred that the tribunal was rightfully guided by Chapter 12 Note 3 of the General Interpretative Rules which provides that under heading 12.09 beet seeds, grass and other herbage seeds, seeds of ornamental flowers, vegetable seeds, seeds of forest trees, seeds of fruit seeds, seeds of vetches (other than those of the species Vicia Foba) or of lupines are to be regarded as seeds of a kind used for sowing and that the tribunal was accurate in its decision to dismiss the HS Code relied on by the Appellant in the instant appeal being heading 12.07 and affirming the H.S Code relied on by the Respondent being heading 12.09 as the same was grounded on sound and accurate legal practice as well as the rules and jurisprudence applicable to customs laws.

10. It was the Respondent's case that the Appellant voluntarily and on its own motion wrote to the Respondent with regard to the assessment conducted past June 2012 and more specifically under the EAC-CET Version 2012. That by the said correspondence, the Appellant, on receipt of advice from its customs experts, dropped its assessment of the Respondent's water melon seeds for sowing as declared past June, 2012 and confirmed that the claim is neither substantive, credible or viable. Therefore, the Appellant's claim in its memorandum of appeal alleging error in fact and in law on the part of the tribunal in its action of setting aside the entire assessments on classification of watermelon seeds for the period after 2012 amounts to flagrant hypocrisy and an attempt by the Appellant to have its cake and eat it too. The tribunal rightfully rejected this assertion and dismissed the same.

11. Based on the above grounds, the Respondent prayed for an order to have this appeal dismissed and the tribunal's judgement upheld.

12. I have considered and analysed the record of appeal, the opposition to it and submissions filed by both parties. The first ground of appeal and issue for determination is whether the tribunal erred in law and in fact in failing to consider that the amendment contained in the 2012 CET version removed any ambiguity in classification of water melon seeds under Tariff 1207.70.00.

13. The Appellant submitted that it agreed with the tribunal with regard to the ambiguity on classification of water melon seeds for sowing as provided in the EAC CET version 2007 and that the ambiguity must be interpreted in favour of the Respondent. However, the Appellant submitted that the ambiguity was removed by the EAC CET Version 2012 which clearly specified that water melon seeds fell under Tariff 1207.70.00.

14. The Respondent vehemently opposed this assertion by stating that the Appellant did not at any point before the tribunal claim any relief under the EAC CET Version 2012 and therefore the tribunal could not make a determination on the same. That the Appellant had the opportunity to amend its pleadings before the tribunal and claim under H.S Code 1207.70.00 of the EAC CET Version 2012 but failed and/or refused to do so and that before the tribunal the Appellant sought to affirm that H.S Code 1207.99.00 of the EAC-CET Version 2007 was the correct classification code for watermelon seeds for sowing. Therefore, the Appellant cannot and should not be allowed by the court to purport that it can now claim under H.S Code 1207.70.00 of the EAC-CET Version 2012.

15. While looking at the pleadings before the tribunal, I note that the Appellant did not claim under H.S Code 1207.70.00 of the EAC-CET Version 2012. Its entire appeal before the tribunal was founded on H.S Code 1207.99.00 of the EAC-CET Version 2007.

16. The Appellant is thus barred from claiming the same before this court if it did not do so before the tribunal. Parties are bound by their pleadings; this was held in the Court of Appeal case of *David Sironga Ole Tukai v Francis Arap Muge & 2 others* [2014] eKLR where it was stated:

> " In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense."

17. I find that the tribunal did not err in law and in fact in failing to consider that the amendment contained in the 2012 CET version removed any ambiguity in classification of water melon seeds under Tariff 1207.70.00 as this was an issue that was not pleaded before it.

18. The second ground of appeal/issue for determination is whether the tribunal erred in law and in fact by setting aside the entire assessment on classification of the water melon seeds for the periods after July 2012.

19. The Appellant submitted that the audit period of the Respondent's affairs was between 2010 and 2014 when both CET 2007 and 2012 were in force; that although the tribunal found that the CET 2007 was ambiguous and it could not be enforced against the Respondent, it was unjustified for the tribunal to set aside the entire assessment even for the periods after July 2012 when the CET was very clear on the classification of watermelon seeds.

20. The Respondent on its part reiterated that the Appellant only relied on EAC-CET Version 2007 in its classification of water melon seeds for sowing and for computation of tax payable and did not at any point rely on the EAC-CET Version 2012.

21. Having found that the Appellant failed to plead under the EAC-CET Version 2012, I am of the view that the tribunal did not err in setting aside the classification of water melon seeds for sowing for the period after July 2012.

22. Having found no merit in the Appellant's grounds of appeal before this court, I dismiss the appeal and uphold the tribunal's judgement of 4/9/2020.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF JUNE 2023

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J.W.W. MONG'ARE

JUDGE

In the Presence of

1. Mr. Kagiri for the Advocate/Client.

2. Mr. Sijenje for Client/Respondent.

3. Sylvia- Court Assistant.