Frigoken Limited v Commissioner of Customs and Border Control (Customs Tax Appeal E007 of 2024) [2025] KEHC 9365 (KLR) (Commercial and Tax) (30 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9365 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CUSTOMS TAX APPEAL E007 OF 2024

A MABEYA, J

JUNE 30, 2025

BETWEEN

FRIGOKEN LIMITED ..... APPELLANT

AND

COMMISSIONER OF CUSTOMS AND BORDER CONTROL .... RESPONDENT

JUDGMENT

1. This is an appeal against the judgment dated 20th December 2023 by the Tax Appeals Tribunal (Tribunal) in TAT No. E077 of 2023; Frigoken Limited v Commissioner of Customs and Border Control. In the judgment, the TAT upheld the respondent's review decision dated 25th January 2023 on the importation of goods under the EAC Duty Remission Scheme.

Grounds of appeal

2. The memorandum of appeal dated 15th February 2024 raises the following grounds: -

    1. That the Honourable Tribunal erred in law and misdirected itself in upholding the Respondent's review decision, dated 25th January 2023, confirming additional tax of Kshs. 10,388,275 levied on the Applicant's importation.

    2. That the Honourable Tribunal erred in law and fact by ignoring the policy rationale, the law and practical operation of the Duty Remission Scheme.

    3. That the Honourable Tribunal erred in law and fact by ignoring evidence that the Applicant has used the imported metal caps and steel cans to manufacture goods for exports and that none of the metal caps and steel cans were used to manufacture goods for domestic markets.

4. That the Honourable Tribunal erred in law and fact by failing to consider that the fact that the Respondent did not suffer any tax loss to warrant imposition of duties on the Appellant.

5. That the Honourable Tribunal erred in law and in fact in holding that the Appellant failed to demonstrate that they applied for an extension of the Gazette Notice No. EAC/ 180/2018 dated 6th December 2018 under the East African Community Duty Remission Scheme.

6. That the Honourable Tribunal erred in law and in fact in basing its decision of the Appellant's failure to demonstrate that they had applied for an extension of the Gazette Notice No. EAC/ 180/2018, contrary to Section 79 of the *Evidence Act*.

7. That the Honourable Tribunal erred in law and in fact goods by failing to consider that the goods were cleared through customs on 11th December 2019 and 27th December 2019 respectively, the delay is neither inordinate nor inexcusable and thereby the "balance of justice" should tilt in favour of the Applicant.

8. That the Honourable Tribunal erred in law and in fact by failing to establish that the Appellant was listed as manufacturer in "Legal Notice No. EAC/7/2020" dated 10th January 2020.

9. That the Honourable Tribunal erred in law and in fact by not recognising that there were delays by the Council in publishing Legal Notice No. EAC/7/2020 and that is unfair to pass on costs of the adverse consequences of the delay to the Applicant.

10. The Tribunal erred in law and fact in not examining all the material and evidence presented before it.

Background

3. The appellant is a limited liability company that engages in the business of exporting flowers. It is a beneficiary of the Duty Remission Scheme (DRS), an incentive granted to manufacturers in the East African Community (EAC) that import inputs and raw materials for manufacturing goods destined for exports and for producing affordable essential goods for the domestic market.

4. In 2022, the respondent issued the appellant with a notice to issue a post-clearance audit on importation of metal caps and steel cans of tariff code 8309.90.90 and 7310.90.90 for the period September 2017 to September 2022. It subsequently carried out a post-clearance audit and issued the appellant with findings through a letter dated 9th November 2022. The respondent established that the appellant continued to import the goods beyond 5th December 2019, the expiry date of Legal Notice No. 16 of 6th December 2018 (“2018 Notice”), without seeking approval.

5. The appellant responded via letter dated 15th November 2022. In reply, the respondent issued a demand notice dated 15th December 2022 for Kshs. 155,088,042 comprised of import duty of Kshs. 133,803,904 and VAT of Kshs. 21,204,738.

6. The appellant issued a letter of objection dated 22nd December 2022. With respect to the demand notice for Kshs. 495,575, it indicated that the shipment was airlifted on 6th December 2019 as it could not get an earlier flight due to flight space constraints. With respect to demand notices for Kshs. 728,683 and Kshs. 9,164,817, it indicated that the goods were shipped long before the expiry of the subject Legal Notice.

7. In response, the respondent issued a review decision dated 25th January 2023, partially allowing the review application, but upholding the demand for Kshs. 10,388,275 because the appellant had not provided sufficient reasons for its actions

8. The appellant was aggrieved by the review decision and filed an appeal before the Tribunal challenging the method applied in the determination of the value of its imported goods and the availability of lab records.

9. The Tribunal found that the appellant had not sufficiently demonstrated that it imported goods during the subsistence of the Legal Notice. It also found that the respondent's decision to raise short-levied tax on goods under the Duty Remission Scheme was justified. It therefore dismissed the appeal and upheld the respondent's review decision dated 25th January 2023.

Appellant's case

10. The appellant filed initial and supplementary written submissions dated 15th April 2024 and 26th June 2024.

11. The appellant submitted that it imported goods before the expiry of the 2018 Notice on 5th December 2019. It also submitted that the importation of goods is not a single event. It is a series of processes that involves several activities such as contracting and loading of goods into a vessel for transportation. All these processes, except the clearance of goods at the port, took place before the expiry of the 2018 Notice.

12. The appellant urged that the appeal be allowed; that the decision of the Tribunal made on the 20th December 2023 be set aside; that the additional assessment be set aside; and that the costs of and incidental to the appeal and those of the appeal to the Tribunal be awarded to the appellant.

13. The appellant relied on:-

    1. Civil Appeal No. 24 of 2018; Kenya Revenue Authority, Commissioner Customs Services & Julius Musyoki v Darasa Investments Limited

    2. Civil Appeal No. 24 of 2018; Kenya Revenue Authority, Commissioner Customs Services & Julius Musyoki v Darasa Investments Limited [2018] eKLR, Communications Commission of Kenya & 5 others v Royal Media Services & 5 Others and

    3. Petition No. 20 of 2020 (E021 of 2020) Kenya Revenue Authority v Export Trading Company Limited.

Response

14. In opposition to the appeal, the respondent filed a statement of facts dated 14th March 2024, together with annexures. The respondent filed written submissions dated 24th April 2024.

15. The respondent submitted that the appellant continued to import beyond the legal notice timeline without any leave or extension, as admitted in grounds 5, 6 and 7 of the memorandum of appeal. It contended that the appellant did not present any application of extension of time for importation before the Tribunal or before this court.

16. The respondent urged that the appeal be dismissed; that the Tribunal's judgment dated 17th March 2023 be upheld, and that the costs of the appeal be awarded to it.

17. The respondent relied on:-

    1. Esther Nugari Gachomo v Equity Bank Limited [2019] eKLR

    2. Republic v Commissioner of Domestic Taxes Exparte Sony Holdings Limited [2019] eKLR

3. Republic v Commissioner General Kenya Revenue Authority Ex-Parte Mount Kenya Bottlers Ltd & another [2016] eKLR Nairobi High Court Miscellaneous Civil Application 170 of 2010

Analysis and Determination

Duty of court

18. This court's mandate in such an appeal is prescribed under Section 56 of the *Tax Procedures Act* (herein after TPA), which provides that: -

    1. In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.

    2. An appeal to the High Court or to the Court of Appeal shall be on a question of law only.

    3. In an appeal by a taxpayer to the Tribunal, High Court or Court of Appeal in relation to an appealable decision, the taxpayer shall rely on the grounds stated in the objection to which the decision relates unless the Tribunal or Court allows the person to add new grounds."

19. The import of subsection 56(2) of the TPA is that the court will only engage with matters of fact for background and context and to determine whether the conclusions of the Tribunal are based on evidence on record and law. Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others NYR CA Civil Appeal No 48 of 2013 [2013] eKLR

20. The appellant submitted that it imported goods before the expiry of the 2018 Notice on 5th December 2019. The appellant asserted that the control numbers were applied for on 30th September 2019 and approved on 4th October 2019 and another one was applied for on 2nd December 2019 and issued on 3rd December 2019, before 5th December 2019. It also asserted that the control documents were valid for twelve months.

21. The appellant contended that the importation of goods included the contracting and loading of the goods for shipment. It argued that all the importation processes, except the clearance of goods at the port, took place before the expiry of the 2018 Notice. It relied on Kenya Revenue Authority & 2 others v Darasa Investments Limited [2018] KECA 358 (KLR) to argue that the respondent ought to have considered whether the goods were shipped before the expiry of the 2018 Notice.

22. The respondent submitted that the control documents issued by the National Treasury facilitate the importation of goods under the Scheme, but do not change the importation period of goods as specified in the East Africa Community Gazette Notice.

Distinguishing a case

23. In Kenya Revenue Authority, Commissioner Customs Services & Julius Musyoki v Darasa Investments Limited, [Supra], the Court of Appeal observed that: -

    52. As the 2nd appellant found that the respondent had not established that the consignment had been shipped within the exemption period the issue of legitimate expectation could not arise.

    ...

    The promise made to the general public was that they had to import sugar and provide proof that the consignment of sugar was loaded in a vessel for a port in Kenya within the dates of 12th

May, to 31st August, 2017. In the event that the 2nd appellant found the respondent did not provide clear evidence of the time of loading, it follows there was no legitimate expectation.

53. Finally, there was no evidence that the appellants subjected the respondent to differential treatment or discrimination by allowing the consignment of sugar belonging to the other 13 companies who were subject to the amended Gazette Notice to be cleared duty free without complying with the condition attendant thereto. This is for the simple reason that there was no evidence to show that the documents presented by the other 13 importers had the same inconsistencies as those presented by the respondent."

24. In the above case, the court considered the exemption notice required as a condition that the consignment of sugar was loaded in a vessel for a port in Kenya within the specified date. Hence, the above case is distinguishable from the present scenario, where no condition in the 2018 Notice specified that the goods had to be shipped before expiry of the exemption period.

25. Section 2 of the EACCMA provides that "import" means to bring of cause to be brought into the Partner States from a foreign country;

26. Therefore, the appellant's contention that the respondent ought to have considered whether the goods were shipped before the expiry of the 2018 Notice fails.

Of import notice

27. In the impugned judgment, the Tribunal noted that:-

39. The Appellant averred that all the shipments were declared from the Port of Importation after 5th December 2019, on the expiry of the Legal Notice that granted the remission, and that the instrument utilized to monitor the utilization of the quantities under a particular Gazette Notice for the Duty Remission Scheme on 20th November 2020, which in part reads, as follows:-

"The Duty Remission Committee wishes to clarify that importation of raw materials/ inputs under the Duty Remission Scheme shall be done within twelve months from the date of publication of the East Africa Community Gazette Notice."

47. Having said that, the appellant has not demonstrated having done anything to seek for the Gazette Notice No. EAC 2021 (sic) which lapsed on 5th December 2019 to be extended for a further period of 12 months and therefore valid for importation under the Duty Remission Scheme. By dint of such failure by the appellant, the respondent is entitled to charge the goods to tax in accordance with the Regulations which provide for full taxation. The mistake of the Appellant cannot be transferred to the Respondent. The Appellant ought to have realized its mistakes and taken the necessary steps to make amendments as opposed to terming it an administrative error on the part of the National Treasury."

28. The appellant faulted the Tribunal for basing its decision on its failure to demonstrate that it had applied for an extension of the 2018 Notice, contrary to Section 79 of the *Evidence Act*.

29. On the other hand, the respondent submitted that the appellant continued to import beyond the legal notice timeline without any leave or extension, as admitted in grounds 5, 6 and 7 of the memorandum of appeal.

30. The appellant countered that it applied for extension on 8th October 2019 and that the Council published Legal Notice No. EAC/7/2020 ("2020 Notice") to replace the 2018 Notice.

31. However, the respondent contended that the appellant did not present any application for extension of time for importation before the Tribunal or before this court.

32. The appellant retorted that its inclusion in the 2020 Notice was sufficient evidence of its application for extension.

33. From my study of the record, there was indeed no evidence of the appellant's application for extension on 8th October 2019. However, the 2020 Notice does include the appellant's name.

34. The appellant argued that the 36-day hiatus between the 2018 Notice and the 2020 Notice was a violation of its right to fair administrative action. It asserted that it had a legitimate expectation that the application for inclusion in the DRS would be accepted and that the decision would be made expeditiously. It argued that it was unfair for the respondent to punish it for the few days' delay that was caused by challenges facing the sellers of the goods.

35. The respondent submitted that the claim for legitimate expectation must fail. This is because there was no representation made to the appellant to the effect that Import VAT will not be charged on their imports or to the effect that they would be exempted from the provisions of 235 and 236 of the EACCMA. The said sections read with Sections 135, 234 and WTO TFA Article 7 paragraph 5 on PCA give the respondent powers to call for documents and to conduct a post clearance audit on the import and export operations of a taxpayer within five years from the date of importation or exportation.

Post clearance audit

36. Section 135 of the EACCMA provides that:-

    1. Where any duty has been short levied or erroneously refunded, then the person who should have paid the amount short levied or to whom the refund has erroneously been made shall, on demand by the proper officer, pay the amount short levied or repay the amount erroneously refunded, as the case may be; and any such amount may be recovered as if it were duty to which the goods in relation to which the amount was short levied or erroneously refunded, as the case may be, were liable."

37. Section 234 of the EACCMA provides that an owner of goods shall keep every document required or authorised for five years.

38. Sections 235 and 236 of the EACCMA provide that:-

    1. The proper officer may, within five years of the date of importation, exportation or transfer or manufacture of any goods, require the owner of the goods or any person who is in possession of any documents relating to the goods–

        a. to produce all books, records and documents relating in any way to the goods; and

        b. to answer any question in relation to the goods; and

        c. to make declaration with respect to the weight, number, measure, strength, value, cost, selling price, origin, destination or place of transhipment of the goods, as the proper officer may deem fit.

        236. The Commissioner shall have the powers to— Inspection or audit.

a. verify the accuracy of the entry of goods or documents through examination of books, records, computer stored information, business systems and all relevant customs documents, commercial documents and other data related to the goods;

b. question any person involved directly or indirectly in the business, or any person in the possession of documents and data relevant to the goods or entry;

c. inspect the premises of the owner of the goods or any other place of the person directly or indirectly involved in the operations; and

d. examine the goods where possible for the goods to be produced."

39. In Republic v Commissioner General Kenya Revenue Authority Ex-Parte Mount Kenya Bottlers Ltd & another [2016] KEHC 5170 (KLR), Odunga J (as he then was), interpreted the above provisions, as follows:-

> " 58. In my view, the Customs Officer is supposed to verify the accuracy of the entries made by the clearing agent within the shortest time possible in order to facilitate the release of the goods and mitigate the accrual of demurrage and customs warehouse rent hence the reason for conferment of the powers under section 235 and 236 of the EACCMA to conduct Post Clearance Audits to verify the accuracy of the entries after the goods have been released from Customs control. Therefore the mere fact that goods have been released to the importer does not preclude the Respondent from carrying out post clearance audit to verify the accuracy of the declarations made at the time of the clearance of the goods and where the said audit disclose that as there was an undervaluation of import values by the Applicant Company's agents for customs purposes hence resulting in gross underpayment of duties on the Applicant Company's imports, the importer will be liable to make good the difference. The general rule was propounded in Mombasa Civil Appeal No. 157 of 2007 between Commissioner Customs and Others vs. Amit Ashok Doshi & Two Others where the Court cited Tarmal Industries Ltd vs. Commissioner of Customs and Excise [1968] EA 471..."

40. Thus, the post clearance audit conducted in 2022 on the appellant was lawful and within the statutory timelines.

41. Nonetheless, in exercising its statutory powers under Section 235 and 236 of the EACCMA, the respondent shall ensure that such exercise of power is fair and just to the person against whom the power is being exercised. Odunga J (as he then was) Ex-Parte Mount Kenya Bottlers Ltd (supra)

Legitimate expectation

42. In Halsbury's Laws Of England, 4th Edition, Vol. 1 (1) at page 151, paragraph 81, the principle of legitimate expectation is explained as follows: -

> " A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by authority, including an implied representation, or from consistent past practice".

43. The 2018 Notice reads thus: -

> " In Exercise of the powers conferred upon the Council of Ministers by Section 140 of the East African Community Customs Management Act, 2004, the Council of Ministers has

approved the following manufacturers to import specified quantities of raw materials for manufacture of goods for export at a duty rate of 0% under the Duty Remission Scheme.

Approved Kenya Manufacturers And Quantities Of Raw Materials For Export At A Duty Rate Of 0% Under The Duty Remission Scheme For Twelve Months"

44. The above Notice stipulated that the exemption on the imports would apply for 12 months from 6th December 2018, when the notice was issued and end on 5th December 2019. Therefore, there was no promise of exemption after the expiry of the 2018 Notice and before the 2020 Notice was issued. The 2020 notice does not apply retrospectively. It is couched similarly to the 2018 Notice, and is forward-looking; the exemption from duty applies 12 months from the date of the issue on 10th January 2020.

45. As captured by the Tribunal, the Duty Remission Committee gave a clarification on 20th November 2020 that any imports after expiry of the Notice would be subject to applicable taxes, duties and charges, including penalties.

46. Consequently, the claim for legitimate expectation fails. Similarly, the appellant's contention that the 36-day hiatus between the 2018 Notice and the 2020 Notice was a violation of its right to fair administrative action does not hold sway. Further, the claim that the Tribunal erred by ignoring the policy rationale, the law and the practical operation of the Duty Remission Scheme fails.

Disposition

47. The upshot is that the appeal is dismissed for want of merit with no orders as to costs. The judgment of the Tribunal dated 20th December 2023 is upheld.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT ONLINE APPLICATION THIS 30TH DAY OF JUNE, 2025

F. GIKONYO M

JUDGE

In the presence of: -

Ms. Lonah for Bosire for Plaintiff

Lemaiyan for Respondent

CA Kinyua