Owino t/a Cherry Interior v Commissioner of Investigation and Enforcement (Customs Tax Appeal E040 of 2024) [2025] KEHC 11800 (KLR) (Commercial and Tax) (30 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11800 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CUSTOMS TAX APPEAL E040 OF 2024

CM KARIUKI, J

JULY 30, 2025

IN THE MATTER OF ARTICLE 47 (1) & (2) OF THE CONSTITUTION

AND

INVOKING SECTIONS 3, 4, 6, AND 12 OF THE FAIR ADMINISTRATIVE ACTION ACT, WHICH GOVERNS THE PROCEDURES FOR ADMINISTRATIVE ACTIONS,

AND

IN THE MATTER OF SECTIONS 10, 13 (8), 26, & 32 (1) OF THE TAX APPEALS TRIBUNAL ACT

AND

IN THE MATTER OF RULE 4 OF THE TAX APPEALS TRIBUNAL (APPEALS TO THE HIGH COURT) RULES

AND

IN THE MATTER OF SECTIONS 53, 56 (2), (3), 13 OF THE TAX PROCEDURES ACT

BETWEEN

SHIRLEY ADHIAMBO OWINO T/A CHERRY INTERIOR ..... APPELLANT

AND

COMMISSIONER OF INVESTIGATION AND ENFORCEMENT ..... RESPONDENT

(Being an appeal from the Judgment of the Tax Appeals Tribunal delivered on June 28, 2024, by the Panel comprising Mr. Eric Nyongesa Wafula (Chairperson), Ms. Eunice N. Ng'ang'a, Mr. Mutiso Makau, Mr. Elisha N. Njeru, and Mr. Abraham K. Kiprotich in Tax Appeals Tribunal)

JUDGMENT

Background

1. The Respondent undertook investigations targeting major timber importers following reports of systemic under-declaration of timber volumes and under-valuation based on the price per cubic metre in USD. As a result of these investigations, the Respondent issued a tax demand to the Appellant for a sum of KES 58,449,097, as communicated through a demand letter dated November 11, 2021.

2. The Appellant, through a letter dated March 15, 2023, objected to the said tax demand. Upon review of the objection, the Respondent issued an Objection Decision dated April 3, 2023, maintaining the tax assessment.

3. Aggrieved by the Objection Decision, the Appellant filed a Notice of Appeal on April 28, 2023, before the Tax Appeals Tribunal (TAT).

4. The Tribunal, in its comprehensive review, concluded that the Respondent did not introduce any new facts in its response. The comparative analysis between Uganda's ASYCUDA system and Kenya's Simba system, as well as the reference to international best practices, did not constitute new evidence. The Tribunal opined that had the Appellant adequately addressed the 65 customs entries it acknowledged, particularly the allegations of 'misdeclared quantities' and 'undeclared timber purchases,' the issues under contest would not have escalated or would have taken a different form.

5. The Tribunal further found that the Appellant failed to demonstrate that the Respondent had erroneously attributed 122 customs entries to it. As such, the Appellant did not discharge its burden of proof under the law. Consequently, the Tribunal held that the Respondent's tax demand of KES 58,443,097 was properly founded.

6. In conclusion, the Tribunal dismissed the appeal, upheld the Respondent's Objection Decision dated April 3, 2023, and directed that each party bear its costs.

7. The Respondent clarifies that the impugned tax demand encompasses customs duties, corporate income tax, and value-added tax (VAT). The Respondent contends that the tax assessment arose from 187 customs entries allegedly associated with the Appellant.

8. The Appellant challenges the Tribunal's judgment delivered on June 28, 2024, together with the underlying tax demand and the Objection Decision. The Appellant maintains that it is only responsible for 65 customs entries and asserts that the remaining 122 entries were the result of unauthorized use of its KRA Personal Identification Number (PIN) by unknown third parties.

Grounds of Appeal

9. The Appellant is dissatisfied with the whole of the Judgment and Orders of the Tax Appeals Tribunal delivered on June 28, 2024, in Tax Appeals Tribunal Case No. 229 of 2023 and appeals to this Honourable Court vide a Memorandum of Appeal dated October 25, 2024, on the following grounds, which include [specific grounds of appeal].

    1. The Tribunal erred in law in failing to render its judgment within a statutory period of ninety (90) days or a maximum of one hundred and twenty (120) days as required under the law since the judgment was rendered after a period of more than two hundred and fifty-seven (257) days after the out of Tribunal settlement collapsed on November 15, 2023.

2. The Tribunal meticulously adhered to legal procedures, ensuring that the failed arbitration constituted at least three members exclusive of the clerk, as per the statutory provisions that require that for any proceedings under the Tax Appeals Tribunal, there must be at least three members of the Tribunal exclusive of the panel clerk.

3. The Tribunal's unwavering commitment to fairness was evident in its decision-making process. It provided sufficient information as required under its guiding statutory provision through its demand notice dated November 11, 2021, ensuring that the Objection Decision did not entail new issues, more so not founded in law, therefore, translating to an unfair administrative process.

4. The Tribunal's error in law and fact was evident by failing to apply the statutory provision on volumetric measurements for goods (mahogany) with HS Code 4407.21 as provided for in the East Africa Community laws; instead, it proceeded to apply weight on wet wood, which is not under HS Code 4407.21.

5. The Tribunal erred in law by applying unknown research material that is contrary to the provisions of the East African Community laws that guide customs of mahogany under HS Code 4407.21 at the time the mahogany was getting to Kenya through the approved borders.

6. Pointing out the Tribunal's failure to comply with its guiding Statutory provision that requires disclosure to the Appellant of the investigation report resulting from alleged cross-border investigations between the Kenya Revenue Authority (KRA) and Uganda Revenue Authority (URA) over the alleged under-declaration of goods, which was heavily relied on by the Respondent and the Tribunal.

7. The Tribunal erred in law and fact by failing to appreciate that URA's Asycuda System uses a fundamentally different volumetric measurement model by offloading the timber from the truck for actual volume measurement. At the same time, KRA's Simba System will conduct outline measurements of the truck by the Respondent's officers to arrive at a particular figure.

8. The Tribunal erred in law and fact in failing to consider that an unknown person(s) or third party/ies was/were utilizing the Appellant's Kenya Revenue Authority Personal Identification Number (KRA PIN) to input transactions unknown to the Appellant's KRA despite the Respondent acknowledging there were such activities after the Appellant had raised the said complaint with them.

9. The Tribunal erred in law and fact in failing to consider that the Appellant had only a total of 65 undisputed and legal entries, while 122 entries were from unknown people who had unlawfully used the Appellant's KRA PIN.

10. The Tribunal erred in law and fact in failing to acknowledge the admission of the Respondent that a KRA PIN holder should receive notification should the KRA PIN holder's KRA PIN be used in a particular transaction, therefore making it easier for the KRA PIN holder, like the Appellant, to know when someone is using her KRA PIN.

11. The Tribunal erred in law and fact in failing to consider its statutory obligation to investigate misuse of KRA PIN, despite admitting that there were disputed entries already linked to the Appellant's KRA PIN, and the best the Respondent offered was that it would notify the Appellant of any future entries.

12. The Tribunal erred in law by failing to consider that the Respondent's system has an intentional design flaw, which results in third parties using the Appellant's KRA PIN. The

Respondent was not issuing notices to the Appellant that a transaction had been effected on the Appellant's KRA PIN.

The Response

10. In response to the appeal, the Respondent filed a Statement of Facts dated February 25, 2025, setting out its version of the facts, legal arguments, and opposition to the Appellant's grounds of appeal.

11. The Respondent explains that it conducted investigations targeting major timber importers following credible intelligence reports of widespread under-declaration and undervaluation of timber imports based on the unit price per cubic meter in USD. Arising from these investigations, a tax demand of KES 58,449,097 was issued to the Appellant vide a demand letter dated November 11, 2021.

12. Although the Appellant had not initially objected to the demand within the statutory time frame, the Respondent, vide a letter dated March 9, 2023, approved a late objection. The Appellant subsequently filed its objection on March 15, 2023, which was considered and dismissed by way of an Objection Decision dated April 3, 2023, thereby maintaining the tax demand. The Appellant then appealed to the Tax Appeals Tribunal, which, on June 28, 2024, upheld the Respondent's position and dismissed the appeal.

13. In defending the validity of the tax demand and the Tribunal's judgment, the Respondent asserts that the assessment was based on a detailed analysis of the Appellant's customs declarations for mahogany timber imported from the Democratic Republic of Congo (DRC) through the Malaba and Busia One Stop Border Posts (OSBPs). The Respondent states that the method employed involved mirror analysis —comparing the values, weights, and volumes declared on the Kenyan side via the KRA Simba system with those declared in Uganda using the URA ASYCUDA system.

14. The Respondent maintains that the correct Harmonized System (HS) Code for sawn raw timber is 4407, which prescribes cubic meters (m^3) as the standard unit of measurement for valuation. It acknowledges that some sellers use "board feet" as a measurement but argues that this discrepancy does not justify the Appellant's significantly undervalued declarations, which were inconsistent with prevailing international benchmarks.

15. Defending the methodology used, the Respondent reiterates that the mirror analysis revealed patterns of consistent under-declaration. The Appellant, in its submissions, had listed 187 customs entries, contending that only 65 were genuine and the remaining 122 were lodged fraudulently using its KRA PIN. The Respondent, however, asserts that all 187 entries bore the Appellant's name and PIN and were submitted through duly appointed customs agents. The Appellant argues that it failed to produce any complaints made to investigative authorities or credible evidence to support the allegation of identity theft or PIN misuse.

16. The Respondent maintains that the Appellant's objection was rightly rejected as she failed to provide a satisfactory response to the full tax assessment. It relies on Sections 121 and 122 of the East African Community Customs Management Act (EACCMA) in justifying the method used to determine customs values and assess tax liability.

17. In conclusion, the Respondent urges the High Court to: Dismiss the appeal in its entirety, Uphold the decision of the Tax Appeals Tribunal, and Award costs to the Respondent.

18. The Respondent also reserves the right to produce further oral or documentary evidence at the hearing of the appeal.

Directions of the Court.

19. The Court directed that the appeal be canvassed by way of written submissions, which were duly filed and exchanged by the parties.

The Appellant's Submissions.

20. The Appellant's first ground of complaint is that the Tax Appeals Tribunal violated Section 13(7) of the *Tax Appeals Tribunal Act*, which mandates delivery of a decision within ninety (90) days of the close of pleadings, extendable by no more than thirty (30) additional days. The Tribunal rendered its decision more than 257 days after the collapse of the attempted out-of-court settlement on November 15, 2023, thus breaching the statutory timeline. The Appellant submits that this delay rendered the Tribunal's decision a nullity in law. Furthermore, the Appellant contends that the Panel overseeing the failed arbitration was improperly constituted, in violation of Section 10(1) of the *Tax Appeals Tribunal Act*, which requires that any sitting of the Tribunal comprises not less than three members, exclusive of the panel clerk. To support this position, the Appellant cites: APA Insurance Co. v Vincent Nthuka [2018] KESC 5981 (KLR), Equity Group Holdings Ltd v Commissioner of Domestic Taxes [2021] KEHC 25 (KLR), Anaclet Kalia Musau v AG & Others [2015] KESC 532 (KLR), and Dutch Flower Group Ltd v Commissioner of Domestic Taxes [2024] KETAT 1625 (KLR).

21. The Appellant further submits that the Objection Decision dated April 3, 2023, introduced new grounds that were not contained in the original demand notice dated November 11, 2021, in contravention of Section 51(5) of the *Tax Procedures Act*. In particular, the Appellant challenges the Respondent's reliance on a mirror analysis between Uganda's ASYCUDA system and Kenya's SIMBA system, and on international best practices, which were never referenced in the initial demand. The Appellant argues that this offends the statutory principle that an Objection Decision must be confined to the grounds raised in the objection itself. The Appellant relies on the case of: Commissioner of Domestic Taxes v Bank of Africa Ltd [2023] KEHC.

22. A central plank of the appeal lies in the Appellant's challenge to the valuation methodology adopted by the Respondent. The Appellant contends that the use of mirror analysis and truck outline measurements is inappropriate and unreliable, especially in the context of timber imports under HS Code 4407.21, which, under the East African Community Customs Management Act (EACCMA) and the Common External Tariff (Legal Notice No. EAC/117/2022), requires volumetric measurement in cubic meters. The Appellant argues that Uganda's methodology—requiring the offloading and actual measurement of timber—is more accurate, while Kenya's approach of outline estimation leads to systematic overvaluation. The Appellant further submits that: The lack of uniformity in customs systems between Kenya and Uganda renders the mirror analysis legally and factually flawed; The absence of a benchmarking report or verifiable data source underlying the Respondent's uplifted values deprives the Appellant of procedural fairness; and The retrospective application of unannounced or undisclosed valuation methodologies violates the right to fair administrative action under Article 47 of the *Constitution*. The Appellant relies on the following authorities: Republic v Kenya Revenue Authority Ex parte Bata Shoe Company (Kenya) Ltd [2014] eKLR; Stanbic Bank Kenya Ltd v Kenya Revenue Authority [2009] KECA 427 (KLR); East African Community Customs Management Act (EACCMA) and Common External Tariff Legal Notice No. EAC/117/2022.

23. The Appellant maintains that her KRA PIN was fraudulently used in 122 of the 187 entries relied on by the Respondent. She avers that she notified the Respondent of this issue via email dated February 15, 2023, but no investigation or corrective action was taken. Instead, the Respondent

issued its Objection Decision without inquiring into the matter. The Appellant contends that, as the custodian of the SIMBA system, the Respondent bore a duty to flag irregular use of the PIN and notify her of transactions conducted under her name—particularly given its admission that KRA PIN holders are generally notified of transactions linked to their PINs. The Appellant submits that the Respondent's failure to investigate, while shifting the evidential burden to her, amounted to administrative abdication and a violation of the Appellant's rights under Article 47 of the *Constitution*. She urges the Court to deem her Objection Notice as allowed, on the basis that: The Tribunal's judgment was rendered out of time and is therefore void; The tax demand and objection decision were procedurally and substantively defective; The assessment relied on arbitrary and undisclosed valuation metrics; and The Appellant's legitimate expectations and right to due process were violated.

24. The Appellant prays that: The Judgment of the Tax Appeals Tribunal dated June 28, 2024, be set aside; The Tax Demand Notice dated November 11 2021 and the Objection Decision dated April 3 2023 be quashed; Its Objection Notice be deemed allowed and ascertained; and The Appellant be awarded costs of both the appeal and the Tribunal proceedings.

The Respondent's Submissions.

25. In response to the Appellant's contention regarding delay, the Respondent submits that the 90-day timeline under Section 13(7) of the *Tax Appeals Tribunal Act* is triggered from the close of the hearing, not from the date of filing. The Respondent further asserts that the Alternative Dispute Resolution (ADR) process, conducted under Section 55 of the *Tax Procedures Act*, suspended the running of time. Accordingly, upon the collapse of ADR on November 15, 2023, the Tribunal proceeded to render its judgment within 86 days, which was within the prescribed timeframe. The Respondent relies on the certified proceedings to demonstrate that the statutory deadlines were adhered to and that judgment was delivered on notice and in line with the Tribunal's internal schedule.

26. The Respondent denies the Appellant's assertion that new grounds were introduced in the Objection Decision dated April 3, 2023. It argues that references to international best practices and mirror analysis were already contained in the original demand letter dated November 11, 2021. Moreover, the Appellant itself raised the issue of mirror analysis in its Statement of Facts, thereby entitling the Respondent to respond. Thus, no prejudice arose, and Section 51(5) of the *Tax Procedures Act* was not violated.

27. Justifying the valuation methodology employed, the Respondent submits that mirror analysis —as endorsed by the World Customs Organization (WCO)—is a legitimate customs technique involving comparison of export data from one jurisdiction with import data from another to detect misstatements, fraud, or undervaluation. In this case, mirror analysis was undertaken by comparing declarations made to Uganda Revenue Authority (URA) under the ASYCUDA system against corresponding entries to Kenya Revenue Authority (KRA) under the SIMBA system. This analysis revealed inconsistencies in timber density and volume, with many declarations assigning a density of 1,000 kg/m^3, which is scientifically inaccurate. The Respondent relied on research by the World Agroforestry Centre, which established that mahogany has a density range of 790–820 kg/m^3, with an average of 805 kg/m^3, which was adopted in recalculating customs values. These calculations formed the basis for the revised tax assessment, comprising: KES 36,338,959 in customs duties, and KES 22,768,163 in corporate income tax, computed with a 25% mark-up based on typical industry margins, due to the Appellant's unreliable self-declarations. In support of this methodology, the Respondent relies on: Section 135(1) of the East African Community Customs Management Act (EACCMA), Section 236 of EACCMA, and Anne Wanjiku Kahwai v Kenya Revenue Authority [2019] eKLR

28. Addressing the Appellant's allegation of selective targeting, the Respondent contends that its review of only 20% of transactions where Uganda's values exceeded Kenya's was objectively justified and not discriminatory. The Respondent asserts that no evidence was presented to show unequal treatment of similarly situated taxpayers. It cites the decision in John Kabui Mwai & Others v Kenya National Examinations Council [2011] eKLR, where the Court applied the principle from Willis v United Kingdom, holding that discrimination arises only where there is differential treatment without objective justification.

29. The Respondent further submits that under Section 30 of the *Tax Appeals Tribunal Act*, the burden of proof lies squarely with the Appellant to demonstrate that the tax assessment is excessive, unlawful, or erroneous. The Appellant, it argues, failed to adduce credible documentary evidence to challenge the assessment or substantiate the alleged misuse of her KRA PIN. The Respondent points out that the disputed entries were lodged using the Appellant's registered customs agents, and no official reports or affidavits were filed to establish PIN fraud or identity theft. On the burden of proof and evidentiary standards, the Respondent cites: PZ Cussons East Africa Ltd v KRA [2013] eKLR, Pearson v Belcher (UK, TC Vol 38), Mulherin v Commissioner of Taxation [2013] FCAFC 115 (Australia), and CA McCourtie LON/92/191.

30. In conclusion, the Respondent submits that: Its assessment was lawful, well-founded in law, and based on scientific and comparative data; The Appellant failed to discharge the statutory burden of proving the assessment's excessive or erroneous; and no procedural or substantive fault lies with the Respondent. Accordingly, the Respondent prays that: The Appeal be dismissed with costs; and The Tribunal's Judgment dated June 28, 2024, be upheld and affirmed.

Analysis and Determination.

31. The Court has carefully considered the Record of Appeal, the parties' respective submissions, the cited authorities, and the applicable legal framework. From the material before it, the following key issues arise for determination:

32. Issues for Determination:

    a. Whether the Tribunal's judgment was rendered outside the statutory timelines and, if so, whether this vitiates the decision.

    b. Whether the Tribunal panel and the failed ADR process were improperly constituted.

    c. Whether the Respondent introduced new grounds in its Objection Decision contrary to Section 51(5) of the *Tax Procedures Act*.

    d. Whether the Respondent's use of mirror analysis and truck outline measurements was flawed or contrary to the law.

    e. Whether the Appellant discharged the burden of proof regarding alleged misuse of her KRA PIN and whether the Respondent violated fair administrative action under Article 47 of the *Constitution*; and

    f. Whether the Tribunal's decision should be upheld or set aside.

On the Statutory Timelines for Rendering Judgment

33. Section 13(7) of the *Tax Appeals Tribunal Act* requires the Tribunal to deliver a decision within 90 days of the close of the hearing, extendable by not more than 30 days. The Appellant asserts that the judgment was delivered 257 days after the ADR collapsed on November 15, 2023, rendering it invalid.

34. However, the Court agrees with the Respondent that the statutory period runs from the close of the hearing, not from the collapse of settlement talks. Furthermore, Section 55 of the *Tax Procedures Act* permits ADR proceedings, and the time taken during ADR does not count toward the hearing timeline. On the evidence, the judgment was rendered within 86 days post-ADR, which is within the statutory limits. This ground, therefore, fails.

2. On Composition of the Tribunal and ADR Panel

35. The Appellant contends that the ADR panel was improperly constituted in violation of Section 10(1) of the *Tax Appeals Tribunal Act*, which requires a quorum of three members, exclusive of the clerk. However, there is no evidence placed before this Court showing that the ADR process involved a less-than-quorate panel or that the Tribunal was improperly constituted during substantive proceedings. In the absence of concrete proof, the Court finds this claim unsubstantiated.

3. On Whether the Objection Decision Introduced New Grounds

36. Section 51(5) of the *Tax Procedures Act* restricts the Objection Decision to matters raised in the original tax demand. The Appellant contends that the reference to mirror analysis and international best practices was new and therefore unlawful. However, the Respondent has demonstrated that these concepts were referenced in the original demand, and the Appellant herself addressed them in her Statement of Facts. The Court finds that the Appellant was not taken by surprise, and no prejudice has been shown. This ground lacks merit.

4. On the Use of Mirror Analysis and Valuation Methodology

37. The Respondent relied on a mirror analysis comparing Uganda's URA ASYCUDA entries with Kenya's KRA SIMBA system. It adopted a scientifically supported timber density average of 805 kg/m^3 from the World Agroforestry Centre and found discrepancies in the Appellant's declarations.

38. While the Appellant contests this approach and prefers volumetric measurements used in Uganda, this Court finds that mirror analysis is a globally recognized methodology endorsed by the World Customs Organization (WCO). Moreover, Sections 121 and 135 of the EACCMA empower customs authorities to revalue goods when discrepancies or misstatements arise.

39. The Court is satisfied that the Respondent provided a rational basis for its valuation, grounded in comparative data, scientific evidence, and reasonable estimations. In the absence of rebuttal evidence from the Appellant, this ground cannot succeed.

5. On the Alleged Misuse of KRA PIN and Fair Administrative Action

40. The Appellant alleges that 122 of 187 entries were fraudulently lodged by unknown third parties using her KRA PIN, and that the Respondent failed to investigate or issue alerts as it ought to have. While this raises a serious allegation, the burden of proof lies with the Appellant under Section 30 of the *Tax Appeals Tribunal Act*.

41. The Appellant has not placed before this Court any formal complaint lodged with KRA, the police, or any regulatory agency. There is also no affidavit or credible documentary evidence demonstrating that her customs agents acted without authority. Mere assertions, without more, are insufficient to dislodge the statutory presumption of regularity in tax assessments.

42. The Court also finds that the Respondent's systems do not, at law, require real-time notification of PIN usage, and its failure to provide such alerts cannot, on its own, be deemed a violation of Article 47 of the *Constitution*. Thus, the Appellant has not established a breach of fair administrative action.

6. Final Disposition

43. Having considered the appeal in totality, the Court finds that:

i. The Tribunal acted within the statutory timelines.

ii. The Objection Decision was properly grounded in the original demand.

iii. The Respondent's valuation methodology was lawful and based on credible evidence.

iv. The Appellant failed to discharge the burden of proof regarding fraudulent use of her KRA PIN; and

v. No breach of Article 47 of the *Constitution* or administrative justice has been established.

Conclusion and Disposition

44.

i. For the foregoing reasons, this Court finds that the appeal is without merit and is hereby dismissed in its entirety.

ii. The Judgment of the Tax Appeals Tribunal dated June 28, 2024, is upheld.

iii. The Respondent shall have the costs of this appeal.

iv. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAIROBI THROUGH TEAMS APPLICATION, THIS 30TH DAY OF JULY, 2025

.....

CHARLES KARIUKI

JUDGE