Sunpower International Limited v Commisssioner of Customs and Border Control (Income Tax Appeal E245 of 2024) [2025] KEHC 12274 (KLR) (Commercial and Tax) (29 August 2025) (Judgment)

Neutral citation: [2025] KEHC 12274 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E245 OF 2024

PJO OTIENO, J

AUGUST 29, 2025

BETWEEN

SUNPOWER INTERNATIONAL LIMITED ..... APPELLANT

AND

COMMISSSIONER OF CUSTOMS AND BORDER CONTROL .. RESPONDENT

JUDGMENT

1. The Appellant is a private limited liability company established under the provisions of the *Companies Act*, whose core business involves the importation, distribution, and installation of solar energy systems and related accessories.

2. The Respondent is a public officer engaged by the Kenya Revenue Authority (hereinafter referred to as "KRA"), a statutory body established pursuant to the provisions of the *Kenya Revenue Authority Act*, Chapter 469 of the Laws of Kenya as the designated agent of the Government of Kenya mandated with the responsibility of assessing, collecting, and accounting for all revenue on behalf of the national government. In discharge of her statutory mandate, the Respondent undertakes revenue related functions including the imposition of taxes and levies on goods and services, regulation of imports and exports, and enforcement of import duty and Value Added Tax (VAT) compliance.

Background of the Appeal

3. The origin of the dispute is the reclassification by the respondent of the goods imported by the Respondent following a post-clearance audit. When the dispute reached the appeal before the Tribunal, the respondent raised a procedural objection against the proceedings alleging that the appeal was filed out of time. This appeal will thus interrogate the merits of the resistance to the reclassification as well as the propriety of the proceedings on account of timelines

4. The Respondent undertook a post-clearance desk audit of the Appellant's importation records covering the period between August 2021 and August 2022. Upon examination, the Respondent observed that the Appellant had imported aqua hot storage tanks which were declared under Harmonized Tariff Codes 8404.10.00 and 8419.90.00. These tariff codes attract zero-rated import duty and Value Added Tax (VAT). However, the Respondent formed the view that the appropriate classification for the said goods was Tariff Code 8516.10.00, which imposes an import duty at the rate of 25% and VAT at 16%.

5. Arising from this reclassification, the Respondent issued a tax demand notice dated 24th February 2023 requiring the Appellant to remit the resulting additional taxes. In response, the Appellant, acting through its tax representative, submitted a request for review via correspondence dated 7th June 2023. The Respondent, however, declined the said application on 20th June 2023, citing the Appellant's failure to adhere to the statutory timelines and upholding its earlier decision regarding the reclassification and consequent tax liability.

6. The second issue pertained a procedural objection raised in the course of the appeal proceedings before the Tribunal by the Respondent who asserted that, in accordance with Section 13 of the *Tax Appeals Tribunal Act*, the Appellant was obligated to lodge a Notice of Appeal within thirty (30) days of the impugned decision, and thereafter file the substantive Memorandum of Appeal within fourteen (14) days of lodging the notice. The Respondent contended that the Notice of Appeal was required to be filed by 19th July 2023, a deadline which the Appellant failed to meet.

7. Upon consideration of the parties' submissions and the pleadings on record, the Tribunal delivered its judgment on 23rd August 2024, dismissed the appeal in its entirety and upheld the Respondent's decision both on procedural and substantive grounds.

The Appeal

8. Aggrieved by the Tribunal's judgment, the Appellant filed a Memorandum of Appeal dated 23rd September 2024 seeking the following reliefs:

    i. A declaration that the Appellant's objection was lodged within time and in conformity with the applicable legal provisions.

    ii. An order setting aside the Tribunal's judgment dated 23rd August 2024 together with all consequential orders arising therefrom.

    iii. A declaration that the decision of the Tribunal was rendered in contravention of the doctrine of res judicata.

    iv. An award of costs against the Respondent.

9. The grounds upon which the appeal is premised are as follows;

    a. That the Honourable Tribunal erred in law by finding that the assessment dated 24th February, 2023 was not the same as an already decided matter between the parties in E179 of 2022 and which was determined on 12th May, 2023.

    b. That the Honourable Tribunal erred in law and fact in failing to determine that the Respondent could not legally demand the same principal tax against the same Taxpayer over the same subject matter.

c. That the Honourable Tribunal erred in law and fact by holding that the Appellant was served with an alleged assessment dated 24th February, 2023 without any evidence being adduced,

d. That the Honourable Tribunal erred in law and fact by making a conclusion that there was no contention that an alleged demand dated 24th April, 2023 was issued to the Appellant contrary to the pleadings and correspondences between the parties.

e. That the Honourable Tribunal erred in law and fact by issuing a decision at variance with its previous decisions in Tax Appeal No. E179 of 2022 which was between the same parties and over the same subject matter contrary to the principle of res judicata.

f. That the Honourable Tribunal erred in law and fact by failing to find that the Respondent cannot legally impose the same on the same goods more than once.

g. That the Honourable Tribunal erred in law by failing to find that at the time of importation of the Aqua Water Tanks, which are solar heating tanks, the Appellant correctly classified the dual water hearing system under tariff code no. 8419.19.00 and that the Respondent's classification of the same under tariff code 8516.19.00 was in error.

h. That the Honourable Tribunal erred in law by failing to determine that Aqua hot water storage solar heating panel did not fall among those equipment classified under chapter 85 of the East Africa Community Common External Tariff 2017 version.

i. That the Honourable Tribunal erred in law and fact by ignoring the binding decisions of the superior courts that were cited by the Appellant.

j. That the Honourable Tribunal erred in law in making a decision at variance with the objection decision.

Appellant's Case

10. The Appellant's case is predicated upon its Statement of Facts dated 3rd August 2023 which traces the genesis of the present dispute from a tax demand notice issued by the Respondent on 24th February 2023 in the sum of KES 4,505,320.00, purportedly pursuant to Sections 235 and 236 of the East African Community Customs Management Act (EACCMA), 2004. The Appellant challenges the validity of the said demand notice on the grounds that it was never duly or effectively served.

11. Subsequently, on 27th April 2023, the Respondent contacted the Appellant via telephone, inquiring whether the said tax demand had been received. This was followed by an email communication dispatched on the same date, seeking a formal response to the contents of the demand.

12. The Appellant avers that during the said telephone conversation, it duly informed the Respondent of an existing matter before the Tax Appeals Tribunal, specifically, Tax Appeal No. E179 of 2022, which involved analogous issues pertaining to tariff classification. The Appellant was, at the material time, under the mistaken impression that the present tax demand related to the earlier proceeding.

13. Acting on this bona fide yet mistaken belief, the Appellant, through its duly appointed tax representative, addressed a letter to the Respondent on 7th June 2023, referencing the Tribunal's judgment delivered on 12th May 2023 and asserting that no outstanding tax liability remained. The Appellant concedes that this representation was erroneous, attributing the same to an oversight by its tax agent. That concession by itself disposes a substantial number of the grounds of appeal mounted on the basis of res judicata.

14. On 20th June 2023, the Respondent rendered a decision rejecting the Appellant's application for review, asserting that the impugned demand notice was distinct from the matter adjudicated in Tax Appeal No. E179 of 2022, and confirming that the present assessment remained due and payable.

15. The Respondent further contended that the Appellant had erroneously applied HS Codes 8404.10.00 and 8419.90.00 in respect of the subject goods, and that the correct classification should have been HS Code 8516.10.00. The Appellant contests this assertion, maintaining that the imported products are solar water heating systems devoid of any electrical components, and thus not amenable to classification under 8516.10.00. On that basis the appellant prays that the decision of the respondent as upheld by the respondent be set aside by the appeal being allowed with costs .

Respondent's Response

16. In its Statement of Facts dated 25th October 2023, the Respondent reiterated that the Appellant's application for review was time-barred under the applicable statutory framework and was lawfully rejected. It clarified that the tax demand under contest related to aqua hot water tanks, as distinguished from the dual solar water heaters that formed the subject matter of Tax Appeal No. E179 of 2022.

17. The Respondent maintained that the Appellant's grounds of appeal were legally untenable and arose from a fundamental misunderstanding of the factual and legal basis of the impugned decision.

18. Citing Section 236 of the EACCMA, the Respondent contended that it is vested with authority to undertake post-clearance audits, reclassify goods, and raise corresponding tax demands. It affirmed that its decision to dismiss the Appellant's review application was procedurally regular and substantively sound.

19. The Respondent asserted that the imported tanks were equipped with electrical immersion heating elements and were accordingly classifiable under HS Code 8516.10.00. It emphasized that such appliances utilize thermosiphon technology and electric heating when solar power is inadequate.

20. In support of this classification, the Respondent invoked the General Interpretative Rules (GIR) of the East African Community Common External Tariff (EAC CET), noting that Heading 8419 pertains to industrial processing equipment, whereas Heading 8516 encompasses electro-thermic domestic appliances, including electric storage water heaters.

21. The Respondent thus maintained that since the tanks can be imported as standalone items and may contain integrated electrical heating elements, they do not fall under Chapter 84 but are more appropriately classified under Heading 8516.

Submissions

22. The court directed that the appeal be canvassed by way of written submissions which directions were duly honoured by the parties. In its submissions, the appellant identifies five issues for determination by the Court and faults the decision of the tribunal on those five fronts. Firstly, the Appellant argues that the review application dated 7th June 2023 was lodged within the statutory timeline by relying on Section 229(1) and (2) of the EACCMA. To the appellant, time begins to run only upon lawful and effective service of the tax decision or demand. The Appellant maintains that it was not furnished with any evidence of such service and reiterates that it did not receive the demand notice.

23. The Appellant emphasizes the legal imperative of proper service as a prerequisite for procedural fairness under Article 47 and Article 50 of *the Constitution*. It relies on the decision in Mwangi &

another v GKM (Civil Appeal E133 of 2023), which underscores the centrality of effective service in administrative justice.

24. On the second front, the Appellant challenges the coherence of the Tribunal's ruling with the Respondent's review decision dated 20th June 2023. It contends that the rejection letter did not raise the issue of time bar as the reason for refusal, and that the Tribunal's reliance on timeliness as a ground of determination was procedurally irregular having not been in contention.

25. The third challenge is related with the first in that the Appellant contends that the Tribunal erred in law and fact in finding that the demand notice dated 24th February 2023 was served. It asserts that no admissible evidence of such service was tendered, and that a follow up telephone call does not satisfy the legal threshold for service.

26. On the fourth front, the Appellant contends that the Respondent acted ultra vires in retrospectively reclassifying the subject goods and issuing additional tax assessments in the absence of fraud, misrepresentation, or material non-disclosure. In support, it cites Sections 16 and 24 of the EACCMA, which govern customs verification and inspection procedures at the point of entry.

27. The Appellant also relies on a classification issued by the Kenya Bureau of Standards (KEBS), which identifies the subject goods as solar water tanks. In the absence of authoritative expert evidence to the contrary, the Appellant submits that the Respondent's unilateral reclassification is unfounded and untenable.

28. The last and fifth challenge is that the retrospective tax demand could give rise to liability to third parties under its contractual arrangements, particularly in relation to Value Added Tax (VAT), which would ultimately be borne by consumers. This, it argues, violates the consumer protection provisions of Article 46 of *the Constitution* and the principles of legitimate expectation.

29. The Appellant places further reliance on the decision in Republic v Kenya Revenue Authority ex parte Beta Healthcare International Ltd (2017) eKLR, which affirms the principles of procedural fairness and legitimate expectation in the administration of tax laws.

30. In response to the appellants position, the Respondent argues that the Appellant misunderstood the subject matter of the impugned demand and mistakenly linked it to a previously determined matter. It maintains that this misapprehension does not constitute reasonable cause for delay in seeking a review.

31. The Respondent asserts that its decision dated 20th June 2023 was based solely on the Appellant's failure to comply with statutory timelines, and not on the merits of the tariff classification. It relies onthe decision in Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR cited in the case of Daphne Parry vs. Murray Alexander Carson [1963] EA 546 to emphasize the necessity of adhering to procedural deadlines. In the decision, the court held;

> " If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant."

32. In conclusion, the Respondent submits that the instant appeal is devoid of merit, and prays that the same be dismissed with costs.

Issues Analysis and Determination

33. The court upon due consideration of the Memorandum of Appeal, the Statement of Facts, the Judgment of the tribunal and the submissions filed identifies the sole issue for determination to be whether the decision of the tribunal was merited or erroneous and calling out to be set aside. That must be the issue for determination because, the appeal to the tribunal was against the decision on review which was on both merit and question of timeliness. It is thus incorrect for the Respondent to insist that its decision was only on failure of the appellant to seek review within the stipulated timelines.

34. The court takes the view, having read the records availed, that it was both the competence of the commissioner's decision as well as its merits that arose in the decision of the tribunal now subjected to this appeal.

35. However, even with that appreciation, the mandate of the court in this matter must remain confined to matters of law only.[1] The court also reminds itself that being appellate, it must give deference to the master and trier of facts on the analysis of the facts/evidence and conclusions thereof. This flows from the firm position of the law that an appellate court must be slow to reverse the trier of facts on factual conclusions but would be most justified to interfere where the conclusions reached are not derivable from the facts availed or where the conclusions point to a perversion of the evidence. In own words, the Court of Appeal, many years ago, in agreeing with and applying the position of the English law said; in M'irungu vs. R [1983] KLR 455,

> " ...where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law...unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law

36. In this appeal, the appellant is reminded that the court has no jurisdiction to determine its 2nd, 3rd, 4th, 5th and 6th grounds of appeal in so far as it is invited to consider alleged errors of facts. The court takes guidance from Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others [2018] KECA 677 (KLR) where the court of appeal warned that raising factual grounds in an appeal limited to matter of law only invite jurisdictional objections and such grounds only invite dismissal.

37. Additionally, grounds 1,2, 5 and 6 must be deemed abandoned after it was conceded that there was a confusion by the tax agent about the subject demand and a previously decided dispute. It is thus clear that the dispute is whether the appellant was served, if the review application was made within the statutory timelines and if the reclassification was legally undertaken.

38. On service, while the Appellant asserts that it was not served with the Respondent's demand notice dated 24th February 2023, the Respondent states that the notice was emailed to the Appellant. Contrary to that assertion, the appellant in paragraph 4 of its Statement of Facts, admits to having been contacted by the Respondent regarding the demand notice and concedes that it mistakenly believed the notice pertained to a different matter. This acknowledgment amounts to constructive knowledge of the demand, which in turn satisfies the threshold of service for the purposes of tax proceedings.

39. The Court takes the view that where a party has demonstrable knowledge of an assessment or demand, mere denial of formal service cannot vitiate proceedings, particularly in the absence of prejudice. The

1 Section 56(2) *Tax procedures Act*

Appellant's subsequent reliance on the Tribunal's decision in TAT No. 179 of 2022 to justify inaction does not amount to reasonable cause.

40. In coming to this conclusion, the court is persuaded by the decision in Equity Group Holdings Limited v Commissioner of Domestic Taxes [2021] KEHC 25 (KLR), where the court stressed that statutory timelines in tax disputes are mandatory and not mere procedural technicalities. They are binding and must be complied with as a matter of law. The court held;

> "A statutory edict is not procedural technicality. It's a law which must be complied with. Parliament in its wisdom expressly and in mandatory perms provided the consequences of failing to render a decision with 60 days."

41. Moreover, whether or not there was service is first and foremost a question of facts which must be left to the determination of the master.

42. On the timeliness of the application for review, Section 229(1) of the EACCMA, gives a party aggrieved by a decision of the Commissioner to file a request for review within thirty (30) days of such decision or notice. In this matter, the Appellant became aware of the demand notice on 27th April 2023 through a telephone call from the Respondent. It did not file the review application until 7th June 2023, well outside the statutory window. The court remains f the learning that where a statute creates timelines for taking any action, none is entitled to ignore such dictate and where one chooses not to comply, it must bear the consequences of such none compliance. The rationale is that the law must be obeyed in its command so that lawlessness is not rewarded.

43. The court thus finds that the Tribunal correctly upheld the statutory timelines under Section 229(1) in upholding the commissioner's decline to entertain the review filed outside the prescribed window.

44. The upshot of the foregoing discussions and conclusion is that the court finds no error of law in the decision by the tribunal and therefore upholds the decision with the consequence that the appeal lacks merit and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29ND DAY OF AUGUST, 2025

PATRICK J O OTIENO

JUDGE