



**Njeri v Commissioner of Customs & Border Control (Customs Tax Appeal E011 of 2021)  
[2024] KEHC 1642 (KLR) (Commercial and Tax) (23 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1642 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CUSTOMS TAX APPEAL E011 OF 2021  
FG MUGAMBI, J  
FEBRUARY 23, 2024**

**BETWEEN**

**NELSON NDEGWA NJERI ..... APPELLANT**

**AND**

**COMMISSIONER OF CUSTOMS & BORDER CONTROL ..... RESPONDENT**

*(Being an appeal from the Tax Appeal Tribunal in Tax Appeal No.361 of 2019)*

**JUDGMENT**

**Background**

1. The facts leading to this dispute are that the appellant imported goods which were described as pianos, used transformers and assorted furniture that were offloaded at the port of Mombasa and transported to the Inland Container Depot in Nairobi on 27<sup>th</sup> April 2019. The appellant paid Kshs.244,160/= as self-declared customs duties on 30<sup>th</sup> April 2019. The respondent then began a verification and clearing process of the shipment and eventually approved the declared values based on the transaction documents presented to them by the appellant. Consequently, the goods were cleared for release on 20<sup>th</sup> May 2019 and the release was done on 21<sup>st</sup> May 2019.
2. Vide a letter dated 27<sup>th</sup> May 2019, the appellant wrote to the respondent protesting the lengthy verification process which only ended up by confirming and verifying the appellant's self-declared values. After receiving no response to the aforementioned letter, the appellant appealed to the Tax Appeals Tribunal (hereinafter "the Tribunal") through a notice of appeal dated 24<sup>th</sup> July 2019.
3. The Tribunal considered the appeal and delivered a judgment on 22<sup>nd</sup> October 2021 in which it found that it lacked the jurisdiction to entertain the appeal and struck it out. This is what led to the present



appeal, filed before this Court vide a Memorandum of Appeal dated 4<sup>th</sup> November 2021 in which the appellant sought an order allowing the appeal and setting aside the Tribunal's ruling.

4. In opposition to the appeal the respondent filed a statement of facts dated 23<sup>rd</sup> December 2021 in which it contended that the appellant's submissions were not properly before the Tribunal hence it did not have a chance to consider them and that the appellant had not adduced evidence to show that the said submissions were filed online.
5. Without prejudice to the foregoing, the respondent averred that they were served with a document named the appellant's supplementary submissions on 22<sup>nd</sup> September 2020 which submissions would not have any effect on the ruling delivered by the Tribunal as they did not address the issue of jurisdiction of the Tribunal but only the losses they incurred as a result of the respondent's review.
6. The respondent averred that section 24 of the [Tax Appeals Tribunal \(Procedure\) Rules](#) only existed to supplement the provisions of the [Tax Appeals Tribunal Act](#) (TATA) and did not amend the substantive Act. Further the respondent argued that the Tribunal was correct in finding that there was no appealable decision capable of invoking its jurisdiction. As such, the respondent prayed to have the appeal dismissed with costs awarded to it. The appellant filed written submissions dated 17<sup>th</sup> April 2023 while the respondent filed submissions dated 18<sup>th</sup> April 2023.

### **Analysis**

7. I have carefully considered the pleadings, submissions, authorities and evidence presented by the parties. It is my view that the grounds of appeal contained in the Memorandum of Appeal dated 4<sup>th</sup> November 2021 mainly zero in around whether the Tribunal erred in finding that it had no jurisdiction to determine the appeal. In order to do so, I find it necessary to highlight the following relevant provisions of the law.
8. This dispute follows an engagement between the parties herein relating to a customs tax transaction, as governed by the [East African Community Customs Management Act](#) (EACCMA). Section 229(1) of the EACCMA provides that:

“A person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to Customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission.” (emphasis mine).
9. The starting point is that for a party to invoke the procedure of customs dispute resolution mechanism, there must be a decision made by the Commissioner or an omission by the Commissioner, against which the applicant may make an application to review. A decision is defined in the [Black's Law Dictionary](#) (8<sup>th</sup> edition) as a judicial or agency determination after consideration of the facts and the law. The first question to answer is whether there was therefore a decision made by the Commissioner in this case that the appellant disagreed with.
10. The notion of an 'appealable decision' is also found in the [Tax Procedures Act](#) (TPA), whose object is to harmonize and consolidate the procedural rules for the administration of tax laws in Kenya. These tax laws are defined under section 2 of the [Tax Appeals Tribunal Act](#) (TATA) to include the [EACCMA](#). This means that the provisions of [EACCMA](#) should also be read side by side with the [TPA](#).



11. Section 2 of the TPA provides for decisions that are appealable to the Tribunal. My understanding of this distinction is that there are specific types of disputes or matters over which the Tribunal does not have jurisdiction. This view is buttressed by the definition of an appealable decision as:
- “An objection decision and any other decision made under a tax law other than-
- (a) a tax decision; or
  - (b) a decision made in the course of making a tax decision;”
12. This means that an appealable decision typically refers to a decision made by the Kenya Revenue Authority (KRA) or its officers that a taxpayer disagrees with including decisions related to tax assessment, penalties and fines, refusal of tax credits and fines, adjustments of tax liabilities, and decisions on tax exemptions and incentives amongst others.
13. An objection decision is in turn defined under section 51(8) of the TPA as a decision made by the Commissioner allowing or disallowing an objection that has been raised by a tax payer.
14. It is worth noting that section 3 of the TATA establishes the Tribunal to hear appeals filed against any tax decision made by the Commissioner. The remedies that the Tribunal may grant after hearing such appeals are also provided under section 29(2) either:
- “(a) affirming the decision under review;
  - (b) varying the decision under review; or
  - (c) setting aside the decision under review and either—
    - (i) making a decision in substitution for the decision so set aside; or
    - (ii) referring the matter to the Commissioner for reconsideration in accordance with any directions or recommendations of the Tribunal.”
15. Turning to the matter at hand, the Court has considered the letter dated 27<sup>th</sup> May 2019 addressed to the respondent from the appellant, which the appellant states is what communicated his objection. The said letter is a complaint over delayed clearance by the respondent which led to extra expenses being incurred in the form of storage charges and container detention charges. The appellant claims compensation of the amount of Kshs. 184,778.02 under both headings.
16. Returning to the remedies under section 29(2) of the TATA, assessment of general or special damages is not within the purview of the Tribunal. Moreover, it is my observation that the appellant does not take issue with the assessment of tax due by the respondent. In fact, the respondent’s decision agreed with the self-assessment of the appellant. As such, no decision had emanated from the respondent.
17. Just like the Court found in Republic v Commissioner of Domestic Taxes ex Parte Fleur Investments Limited, [2020] eKLR, I would equally hold that
- “No decision was rendered within the meaning of this definition making it impracticable for the applicant to approach the Tribunal.”

Even as I say so, I am not convinced that the appellant is without a recourse in law, save that as stated by the Tribunal, that remedy cannot be rightfully sought before the Tax Appeals Tribunal. I therefore agree with the Tribunal’s finding that it lacked jurisdiction to hear and determine the matter. As such,



nothing more was left but to down its tools in accordance with the determination in *Owners of the Motor Vessel Lillian v Caltex Oil (Kenya) Ltd* [1989] KLR1.

18. On the issue of submissions, the appellant argued that the Tribunal failed to consider its submissions. However, the judgment of the Tribunal shows that the parties were directed to file submissions on the preliminary objection which touched on the jurisdiction of the tribunal but the appellant failed to do so.
19. I note that although the appellant claimed that they filed and served their submissions on 22<sup>nd</sup> September 2021, they did not provide evidence of this in the record of appeal.

#### **Determination**

20. The long and short of this is that the court finds that the instant appeal lacks merit and upholds the Tribunal's judgment dated 22<sup>nd</sup> October 2021. The costs of the appeal are awarded to the respondent.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY 2024.**

**F. MUGAMBI**

**JUDGE**

