

CASES DIGEST

ISSUE 1 | October 2020

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**Decisions on
KRA cases**



**KENYA REVENUE
AUTHORITY**

Tulipe Ushuru, Tujitegemee!



**A publication of the
Kenya Revenue Authority**

Vision

A Globally Trusted Revenue Agency Facilitating Tax and Customs Compliance

Mission

Building Trust through Facilitation so as to foster Compliance with Tax and Customs Legislation

Values

Trustworthy, Ethical, Competent, Helpful

Forward

Kenya Revenue Authority is the Government Agency established through the Kenya Revenue Authority Act, Chapter 469 of the Laws of Kenya with the role of collecting revenue and enforcing tax laws. We are pleased to publish the inaugural edition of the Kenya Revenue Authority (KRA) Cases Digest. This is the first ever edition of the series of cases digests involving the Authority that has ever been published.

A number of decisions on various issues have been delivered by courts and Tribunals since the establishment of the Kenya Revenue Authority in the year 1995. Some of these decisions have been uploaded on the National Council for Law Reporting website and library. This digest documents judicial jurisprudence in Cases involving the Authority activities and operations.

This case digest is relevant to legal practitioners, scholars, the Authority's staff and all persons interested in the Authority's operations. We trust that this is the beginning of a journey that will continue where judicial decisions emanating from various dispute resolution bodies setting precedence will be published on a quarterly basis.

The case digest highlights salient principles of law as clarified by the courts and tribunals. The courts cases cited in this and subsequent digests will serve as quick guides and reference to court and tribunal decisions that apply to a tax administration.

I wish to thank the editorial and design teams for the concerted efforts made towards the publication of this inaugural edition of the Kenya Revenue Authority cases digest.

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Executive Summary

This volume constitutes cases focusing on the legal liability of agents when acting under instructions of their principals during clearance of import and export goods. It highlights precedent setting cases on liability of agents over the years culminating to the decisions made by the Court of Appeal on the subject. Some of the principles on law relating to agents and principles as set out by the courts have stood out as firm footprints in the law since decisions were made in these cases and will guide similar cases in the future. In *Nairobi Civil Appeal No 139 of 2015: Republic (Appellant), Kenya Revenue Authority & Jaspa Logistics Exparte Redington Kenya Limited* the Court of Appeal held that mere granting of authority to an institution to issue licences cannot make the licensee synonymous with the licensor. Both the Licensor and the Licensee have legal obligations specified in the law that they must meet when executing their roles.

The court in the *Redington* case cited emphasized that section 147 of the East African Community Customs Management Act, (EACCMA, 2004) sought to ensure that the Authority has an option for recovery of tax as liability attaches equally between the agent and the owner of the goods. The importers of goods who appoint customs clearing and forwarding agents are liable for the fraudulent actions of the agents. Therefore when a customs agent engages in fraudulent activities, the importer cannot ask the Authority for compensation. The importer has to bear the loss with fortitude and find a way of recovering the money misappropriated from the customs agent. A prudent taxpayer will always monitor the activities of its agent so as to ensure compliance with the law. If an importer chooses to engage an agent, then the law prescribes the kind of agent to be chosen.

In *Nairobi Civil Appeal No: No. 116 of 2013: Republic (Appellant) and Kenya Revenue Authority Exparte Alltex Epz Limited*; the Court held that the common law doctrine that a principal is not liable for the actions of its agent does not apply where there are clear provisions of the law. A court of law cannot ignore the provisions of a statute and supplant them with principles of common law. The substance of common law and doctrines of equity apply only in so far as the Constitution or a statute does not apply.

Further, the Court of Appeal in *Nairobi Civil Appeal No 148 of 2013: Total Kenya Limited v Kenya Revenue Authority [2018]* held that it is perfectly right for the Authority to proceed against the Importer or the agent in the absence of bad faith and illegality in its decision. Where fraud is established against a taxpayer or his agent, demand for the payment of the duty from a taxpayer is not limited to a period of five years.

November 2020



Table of Contents

Liability of agents

- 1** R Versus Kenya Revenue Authority Ex-parte African Boot Company Limited (2012)
- 3** Versus Kenya Revenue Authority & Jaspa Logistics Ex-parte Redington Kenya Ltd (2015)
- 6** R Versus Kenya Revenue Authority Ex-parte Alltex EPZ Ltd (2013) (Civil Appeal)
- 9** R Versus Commissioner General, KRA & Anor Ex-parte Mount Kenya Bottlers Ltd (2016)
- 11** R Versus Commissioner of Customs Services & Anor Ex-parte SDV Transami Ltd (2012)
- 16** Total Kenya Limited Versus Kenya Revenue Authority (Civil Appeal)

A. The law of agency and liability of agents

1. NAIROBI HIGH COURT MISCELLANEOUS JUDICIAL REVIEW CIVIL APPLICATION NO. 54 OF 2010: REPUBLIC

V KENYA REVENUE AUTHORITY EX-PARTE AFRICAN BOOT COMPANY LIMITED (2012)

Judge: Weldon K. Korir

Date of Judgment: 23rd February ,2012.

Key words and Issues: Liability for fraudulent activities of customs clearing agent, fake receipts, whose agent is a Customs Clearing agent?

Q Implications

The importers of goods who appoint customs clearing and forwarding agents are liable for the fraudulent actions of the agents. The statutory role of the Kenya Revenue Authority is to license customs Clearing agents and the Authority is not liable for the fraud committed by the agent.

Q Background

African Boot Company Ltd (the applicant) contracted Hellmann Worldwide Logistics Limited (hereinafter simply referred to as Hellmann) to handle all the sourcing, clearing and forwarding of its goods imported to Kenya. The applicant paid Hellmann for the services and custom duties due to the Kenya Revenue Authority (the respondent). In order to clear goods through customs, Hellmann would use Cargo Rollers Limited as clearing agents. In 2009 the applicant learned that Hellmann had not been remitting to the Respondent the sum due to it amounting to Kshs 6,902,658/=. The respondent demanded for the payment of the duties and upon failure, issued agency notices to the Applicant's bankers to collect the unpaid duties.

The Applicant filed a judicial review application contesting the demand and sought for an order of certiorari directed at the respondent to quash the decision requiring the applicant's bankers to pay to the respondent the sum due and denied owing any taxes.

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The statutory role of the Kenya Revenue Authority is to license customs Clearing agents and the Authority is not liable for the fraud committed by the agent.

◀◀ The Applicant claimed that Hellmann are the respondent's agents, it is not under any legal obligation to pay a single cent of the amount claimed and that if the said money did not reach the respondent Authority then it failed to do so because of fraudulent collusion between the Authority's employees and Hellmann.

The Authority opposed the application stating that the goods were cleared by the Applicant's customs clearing agent without payment of duties, since the receipts produced were found to be fake. The applicant argued that since the respondent is the body which licensed Hellmann as a clearing agent, then the said clearing agent is an agent of the respondent. The Respondent stated that Hellmann being the Applicants agent it would not be liable for its fraudulent activities.

🔍 Issues for determination

- a) Whose agent was Hellman Logistics Ltd as the Customs Clearing agent?
- b) Who bears the responsibility of the fraudulent activities of a customs Clearing agent?

🔍 Decision of the Court

The Commissioner of Customs only licenses customs agents under the East African Community Customs Management Act 2004. The agents however act on behalf of the importers of goods. The person who appoints the agent to carry out a particular transaction is the importer. That means the customs agent becomes the agent of the importer and not the Commissioner of Customs.

Just like the Law Society of Kenya licenses advocates to practice law, the Kenya Revenue Authority through the Commissioner of Customs, licenses customs agents to clear goods and baggage which have been imported into the country. If a lawyer becomes rogue and misappropriate the client's money, the client cannot turn to LSK for compensation.

When a customs agent engages in fraudulent activities, the importer cannot ask the respondent for compensation. The importer has to bear the loss with fortitude and find a way of recovering the money misappropriated from the customs agent. A prudent taxpayer will always monitor the activities of its agent so as to ensure compliance with the law. The only civil duty a taxpayer can do is to report the agent so that the license can be revoked by the respondent.

The judicial review application is dismissed.

[Read the full judgment here](#)

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*If a lawyer becomes
rogue and misappropriate
the client's money, the
client cannot turn to LSK
for compensation.*

2. NAIROBI CIVIL APPEAL NO. 139 OF 2015: REPUBLIC (APPELLANT), KENYA REVENUE AUTHORITY & JASPA LOGISTICS EXPARTE REDINGTON KENYA LTD (An Appeal from the Judgment of the High Court of Kenya at Nairobi delivered on 13th day of June, 2014 In High Court Judicial Review Miscellaneous Application No. 200 of 2011)

Judge: Odunga J.

Date of judgment: 13th June 2014

Key issues and words: liability of customs agents for omissions, judicial review orders, East African Community Customs Management Act, 2004, Section 145, 146, 147 and 148.

○ Implications of the judgment

The case gives interpretation of the provisions of section 145-148 of East African Community Customs Management Act, 2004 (EACCMA, 2004) and provides that they do not make the Authority liable for the omissions of the customs agents licenced by it. Mere granting of authority to an institution to issue licences cannot make the licensee synonymous with the licensor. Section 147 sought to ensure that the Authority has an option for recovery of tax as liability attaches equally between the agent and the owner of the goods

○ Background

The Appellant, Redington Ltd, is a Kenyan Company engaged in business of importation and distribution of electronic goods in Kenya. It engaged the services of the 2nd Respondent Jaspa Logistics, a customs agent licenced by the 1st Respondent (KRA). On 23rd May 2011 the Authority served a notice on the appellant for payment of unpaid taxes worth Kshs. 13,212,122. KRA went ahead to impound a consignment of Redington's goods in July. Redington then objected and asserted that it had released the money to Jaspa Logistics for clearance of goods, while KRA asserted that the declaration made for clearance of the goods were false and fraudulent as no taxes had been paid.

“

Mere granting of authority to an institution to issue licences cannot make the licensee synonymous with the licensor.

Redington moved to court seeking for orders of Certiorari to quash the demand for payment made by KRA; prohibition to stop KRA from issuing any agency notices to its bankers or proceeding with any other enforcement action in purported recovery of the money from it and an order of mandamus to compel KRA to investigate the activities of the agent and prefer criminal charges against it.

○ Background



The Appellant, Redington Ltd, is a Kenyan Company engaged in business of importation and distribution of electronic goods in Kenya. It engaged the services of the 2nd Respondent Jaspa Logistics, a customs agent licenced by the 1st Respondent (KRA). On 23rd May 2011 the Authority served a notice on the appellant for payment of unpaid taxes worth Kshs. 13,212,122. KRA went ahead to impound a consignment of Redington's goods in July. Redington then objected and asserted that it had released the money to Jaspa Logistics for clearance of goods, while KRA asserted that the declaration made for clearance of the goods were false and fraudulent as no taxes had been paid.

Redington moved to court seeking for orders of Certiorari to quash the demand for payment made by KRA; prohibition to stop KRA from issuing any agency notices to its bankers or proceeding with any other enforcement action in purported recovery of the money from it and an order of mandamus to compel KRA to investigate the activities of the agent and prefer criminal charges against it.

“

Redington moved to court seeking for orders of Certiorari to quash the demand for payment made by KRA;

Issues for Determination

- a) Whether KRA acted within the law in line with section 145, 147 and 148 of the act.
- b) Whether judicial review orders are appropriate in the circumstances of the case.

Determination

The provisions of section 145-148 of EACMMA do not make KRA liable for the omissions of the customs agent licenced by them. Further, the court was of the opinion that the mere granting of authority to an institution to issue licences cannot make the licensee synonymous with the licensor.

The court further stated that section 147 of the EACCMA, 2004 sought to ensure that KRA has an option for recovery of tax as liability attaches equally between the agent and the owner of the goods. KRA was within the law in pursuing payment of the taxes from appellant by application of Section 147, 148 of EACCMA, 2004. Accordingly, the court declined to grant the order of certiorari.

The court was of the view that there is no compulsion for an importer to engage an agent to clear goods and pay the requisite taxes. But if an importer chooses to engage an agent, then the law prescribes the kind of agent to be chosen and declares that the agent acts on behalf of the importer.

The court also held that it was not established that the Authority was a duty bearer in the investigation and prosecution of crimes, therefore, the court declined to grant an order of mandamus.

The court also emphasized that a judicial review forum was not the right forum for ventilation of tax disputes and as such the order of prohibition could not be granted. Accordingly, the court dismissed the Appeal for lack of merit with costs to the Respondents.

The judicial review application is dismissed.

[Read the full judgment here](#)

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The court also emphasized that a judicial review forum was not the right forum for ventilation of tax disputes and as such the order of prohibition could not be granted.

3. NAIROBI CIVIL APPEAL NO: NO. 116 OF 2013: REPUBLIC (APPELLANT) AND KENYA REVENUE

AUTHORITY EXPARTE ALLTEX EPZ LIMITED (Appeal from the judgment and decree of the High Court at Nairobi, (Majanja, J.) dated 5th October 2012 in High Court Miscellaneous Application No. 709 OF 2008)

Coram: Makhandia, M'noti & Murgor, JJ.A

Date of Judgment: 29th September 2017

Key issues and words: Authorised agent, Common law doctrine of principal and agent, the law of agency, EPZ Enterprise, Section 147, Section 148 of the East African Community Customs Management Act 2004, The Law Reform Act

○ Implications

An owner or importer of goods is liable for the fraudulent actions of its lawfully authorized agent. Such an owner is liable to pay duty on goods fraudulently imported duty free by its employees on the strength of its security bond.

The common law doctrine that a principal is not liable for the actions of its agent does not apply where there are clear provisions of the law. A court of law cannot ignore the provisions of a statute and supplant them with principles of common law. The substance of common law and doctrines of equity apply only in so far as the Constitution or a statute does not apply.





Q Background

The appellant was registered as an export processing zone operator under the Export Processing Zones Act and under the East African Community Custom Management Act (the Act) under which it held a license to manufacture goods at its EPZ premises, under a customs security bond.

The security bond, required by regulation 147 of the East Africa Customs Management Regulations, 2006 (the regulations) enabled the appellant to import duty free, goods and raw materials for production of garments for export at its EPZ business. Due to exemption of the EPZ enterprise from duty and taxes, a fairly rigid regime of checks and accountability is put in place under the Act and the regulations made thereunder. Goods imported under the security bond arrangement must be strictly used in the EPZ and the operator is under an obligation to account for all goods imported under its license. Breach of the conditions of the bond, such as importation of goods that are not meant for the EPZ business, failure to satisfactorily account for all imported goods, or diversion of manufactured products from the export to the local

market, results in the operator having to pay taxes and duties on those goods, together with interest and penalties.

The Appellant's employee, authorized to clear goods on its behalf, in collusion with others breached the security bond conditions by importing personal goods on the strength of the security bond of the Appellant. The Respondent demanded for payment of duties, taxes, interest and penalties amounting to Kshs 6,561,303 for the unaccounted goods which the appellant contested in the High Court and lost. The Appellant then appealed to the Court of Appeal.

Q Issues for determinations

- a) Whether an employer as the principal is liable for the fraudulent actions of its duly authorized employee who fraudulently imports goods using the employer's identity
- b) Whether the common law doctrine that the principle is not liable for

○ Determination by the Court of Appeal

A court of law cannot ignore the provisions of a statute and supplant them with principles of common law. Under section 3(1) (c) of the Judicature Act the substance of common law and doctrines of equity apply only in so far as the Constitution or a statute does not apply.

Under section 146 of the EACCMA, 2004, where the owner of goods is required or authorised under the customs laws to perform any act, his authorised agent may perform such act on his behalf. The agent declared and represented on behalf of the appellant that the goods in question belonged to the appellant and by virtue of that declaration and representation, the goods were exempted from duty.

While the agent is deemed to be the owner of goods in respect of which he has made declarations and is personally liable for payment of duties due thereon, the proviso to section 147 of the EACCMA, 2004 is express enough that the fact that the agent is liable does not relieve the owner of the goods from liability.

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A court of law cannot ignore the provisions of a statute and supplant them with principles of common law.

Under Section 147 of the EACCMA, 2004, the owner of goods who has authorised an agent to act for him is liable for the acts and declarations of the agent and may even be prosecuted for any offences committed by the agent, though he cannot be imprisoned unless it is proved that he consented to the commission of the offence. Appeal dismissed for lack of merit.



[Read the full judgment here](#)

Judge: G.V. Odunga

Date of judgment: 23rd May 2016

Key issues and words: East African Community Customs Management Act force of law in Kenya, Fraudulent actions of Customs Clearing agent, agency notice, post clearance audit, discretion, fair administrative action, public exercise of power.

○ Implications

An imported of goods is liable for the fraudulent actions of its duly appointed licensed Customs Clearing agent by virtue of Section 147 and 148 of the East African Community Customs. The East African Community Customs Management Act, 2004 is a legally enforceable statute of the Community recognised and applicable in Kenya.

○ Background

The Applicant, a bottler of carbonated drinks of various brands under the Coca Cola Company franchise, engages in the importation of raw materials, among them, concentrates, for the manufacture of the afore stated products. The Applicant engaged Gamma Villa Limited, a customs clearing agent who collected, cleared and forwarded various consignments of concentrates to the Applicant. Gama Villa Ltd informed the Applicant through various invoices, that it had paid all taxes due from the Applicant for the said period, on the basis of which the Applicant paid, in re-imbursement of Kshs 52,060,600/=.

“

The East African Community Customs Management Act, 2004 is a legally enforceable statute of the Community recognised and applicable in Kenya.

On or about the 30th of November, 2009, having been duly informed by Gamma Villa Ltd that all duties due had been settled and upon receipt of the actual goods, the Applicant received a demand for unpaid taxes on the basis that the documents submitted by the Applicant had major discrepancies. The Applicant objected to the demand and the Respondent issued two separate agency notices to the Applicant's Bankers.

The Applicant alleged that the EACCMA 2004 is not an Act of the Kenyan Parliament pursuant to the provisions of section 9 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya hence its provisions have not been properly brought into force in the Republic of Kenya.

Issues for determination

- a) Whether an importer of goods is liable for the fraudulent actions of its customs clearing agent.
- b) Whether the Respondent is entitled to carry out post clearance audit to verify accuracy of customs entries after goods have been released from customs control.
- c) Whether the East African Community Customs Management Act 2004 has the force of law in Kenya.

Determination by the Court

A clearing agent is an agent of the importer and this is not in doubt. The Importer of goods who engages a customs clearing agent is liable for the fraudulent actions of the agent.

Sections 235 and 236 of the EACCMA, 2004 confers powers to the officer to conduct Post Clearance Audits to verify the accuracy of the entries after the goods have been released from Customs control. Where an importer fails to pay the taxes, or part thereof he cannot be heard to say that he is not liable for the shortfall due to illegal actions perpetrated by the agent since the liability of the agent does not preclude him from meeting his own obligations to pay taxes. Under the said sections both the owner of the goods and its agent are liable under the EACCMA 2004.

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The EACCMA is one of the Acts of the East African Community established by the Treaty for the Establishment of the East African Community.

The EACCMA is one of the Acts of the East African Community established by the Treaty for the Establishment of the East African Community. According to EACCMA, its date of commencement was the date appointed by the Council. It is therefore clear that as opposed to those Acts to which section 9(1) of Cap 2 apply, the date of the coming into operation of EACCMA was the date appointed by the Council. It follows that section 9(1) of Cap 2 was inapplicable to the EACCMA and therefore the objection raised with respect to the operationalisation of the Act before Gazettement has no legal validity.

[Read the full judgment here](#)

Judge: M. Warsame

Date delivered: 28th March 2012

Sections of the law: Sections 130, 131, 135, 146, 147, 148, 229, 236 of the East African Community Customs Management Act (EACCMA, 2004), Order 53 rule 3 of the Civil Procedure Rules made under the Civil Procedure Act, Cap 21 Laws of Kenya

Key words and terms: Application for review, short levied taxes, tariff classification, authorised Customs agent, legitimate expectation.

Implications

The application for review of the decision of the Commissioner under Section 229 of the EACCMA, 2004 should be made within the statutory timelines of 30 days from the date of the Commissioner's decision. It is not within the jurisdiction and powers of the Commissioner of Customs (Respondent) to entertain an appeal outside the time allowed. It is not within the powers of the respondent to decide who is liable to pay the taxes. The respondent is allowed to make a choice or election in terms of sections 147 and 148 of the EACCMA, 2004. A decision cannot be said to have been made in error simply because the Respondent demands taxes due and payable from the agent and importer.

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The demand for short-levied taxes is a statutory duty bestowed upon the Respondent which must be exercised without interference.

An order of prohibition cannot issue to prohibit the Commissioner of Customs from demanding taxes acknowledged to be outstanding and due. An order of prohibition can only issue to prevent a contemplated decision and not one which has already been made. An order of prohibition is powerless against a decision which has already been made before such an order is granted. It means that an order of prohibition operates as to the future to prevent unlawful act on the part of public bodies or authorities. The demand for short-levied taxes is a statutory duty bestowed upon the Respondent which must be exercised without interference.



The Respondent (Commissioner of Customs) by a letter dated 6th May 2010 addressed to the applicant (SDV Transami Limited) and copied to the Interested Party (Energy Investment Limited), stated that the aluminium conductors are classified under tariff 7614 and not 7605 as done by the applicant. The respondent called upon the applicant to pay the sum of Kshs.103,419,275/48 being the under-declared taxes and issued a decision to the Applicant on 30th December 2010 seeking to recover tax amounting to Kshs.123,968,690.94.

The Interested Party engaged the applicant to deal with the logistics and clearing of the entire consignment to be delivered to Kenya Power and Lighting Company, which was importing the goods. It was in line with duties that the applicant opened import declaration forms and advised the Interested Party on the import duty payable. The applicant cleared various goods belonging to Interested Party and paid certain import duties which it declared was payable in accordance with the correct tariffs. Later the respondent carried out an investigation which disclosed that the applicant declared the wrong tariff, the result of which is that more taxes was said to be due and payable to Kenya Revenue Authority.

The Applicant lodged an application on 4th January 2011 with the Respondent to review her decision dated 30th December 2010 in accordance with Section 229 (1) and Section 229(2) of the EACCMA, 2004. It is mandatory requirement under Section 229(4) for the Respondent to communicate her decision in respect of an application to review brought under sections 229(1) and (2) within a period of 30 days. Section 229(5) clearly states that where the Respondent fails to communicate her decision within the stated period, then the Respondent will be deemed to have allowed the Application for review.

The Applicant filed a judicial review application pursuant to Order 53 rule 3 of the Civil Procedure Rules seeking orders of certiorari to quash the decision of the Respondent dated 1st April 2011 and the demand dated 30th December 2010 and an order of prohibition to prohibit the Commissioner of Customs Services from demanding the tax claimed in her decision and an order for payment of costs by the respondent.

It was alleged by the Applicant that the Respondent failed to communicate her decision in respect of the Applicant's Application for review within the 30 day time period stipulated in the Act and therefore by virtue of the provisions of Section 229(5) of the EACCMA, 2004, was is deemed to have allowed the Application for review and that the Respondent had no jurisdiction to claim the tax, penalties and interest claimed in her decision dated 1st April 2011 as she is deemed to have allowed the Applicant's application for review in which the Applicant had stated that it was not liable for the payment of the tax.

Issues for determination

- a) Whether the respondent has breached section 229 of the East African Community Customs Management Act 2004 as alleged by the applicant.
- b) Whether the respondent has acted unreasonably and in excess of its jurisdiction in demanding for taxes through letters dated 16th November 2010 and 1st April 2011 and whether the same has been done in accordance with section 135(1) and (2) of EACCMA.
- c) Whether the respondent violated the legal principle of legitimate expectation and whether it has acted unreasonably and without consistency in demanding for payment from both the applicant and the Interested Party under section 147 and 148 of EACCMA.

Determination

The Kenya Revenue Authority is duty bound by law to investigate all claims and information received from any source to the effect that any party has evaded the lawful payment of taxes. Investigations were carried out to establish whether the applicant had used the correct tariff in clearing aluminum conductors/cables belonging to the Interested Party. The outcome of the investigations revealed that the applicant had used a wrong tariff classification to clear goods belonging to the Interested Party. The applicant agreed and acknowledged a wrong tariff was used resulting in underpayment of taxes.

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The applicant agreed and acknowledged a wrong tariff was used resulting in underpayment of taxes.

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Section 236 of the EACCMA, 2004 empowers the Respondent to carry out field audit.

Where any obligation has been incurred for the payment of any duty, such obligation shall be deemed to be an obligation to pay all duties which are or may become payable or recoverable under the provisions of the East African Community Customs Management Act. Under section 146(1) of the EACCMA, 2004 where the owner of any goods is required or authorized to perform any act then such act unless the contrary appears may be performed on his or her behalf by an authorized agent. The agent recognized be an employee of a customs agent duty licensed as such in accordance with the law.

Section 147 and 148 can be interpreted to mean that the respondent is empowered to hold the agent liable for the payment of any Duty to which the goods are liable and for the performance of all acts in respect of the goods which the owner is required to perform. An owner of any goods who authorizes an agent to act for him shall be liable for the acts and declaration of such duty by authorized agent. Consequently, the respondent was perfectly right in making a demand against the applicant and interested party as it did in the letter dated 30th December 2010.

Section 236 of the EACCMA, 2004 empowers the Respondent to carry out field audit. Any short collection/levy discovered is payable as prescribed under section 135 of the EACCMA, 2004. The applicant was seeking to apportion liability between the importer and itself. The respondent has no jurisdiction to determine who should shoulder all responsibilities or the greatest liability. The letter dated 4th January 2011 was not a review within the meaning of section 229 as alleged by the applicant. The respondent had statutory duty, authority, jurisdiction and/or powers to make such a demand under section 147 and 148 of the EACCMA, 2004.



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There was no evidence to show that in demanding taxes from the applicant and Interested Party, it acted capriciously and in violation of the law.

The applicant was required to lodge an appeal within the stipulated or specified period under section 229 of the EACCMA, 2004. It was not open or available to the applicant to lodge an appeal 5 months after the decision was made. It was not within the jurisdiction and powers of the respondent to entertain an appeal outside the time allowed. There was no valid appeal lodged by applicant under section 229 and the respondent cannot be condemned for violating the law when there is no basis to do so. It cannot be said that the respondent made a decision or an omission relating to custom matters by demanding short levied taxes from the agent and the importer jointly and severally. The respondent is allowed to make a choice or election in terms of sections 147 and 148 of the EACCMA, 2004.

There was no evidence to show that in demanding taxes from the applicant and Interested Party, it acted capriciously and in violation of the law. The respondent treated the applicant and Interested Party in a dignified manner by asking them to sort out the payment due between themselves. It is perfectly right for the respondent to proceed against the respondent or the Interested Party in the absence of bad faith and illegality in its decision. The applicant was not condemned unheard.

Certiorari cannot issue to quash the letters dated 30th December 2010 and 1st April 2011 and there is no bad faith or ulterior motives or unreasonableness that was committed by the respondent in addressing the two letters to the applicant and the Interested Party. An order of prohibition cannot issue to prohibit the Commissioner of Customs from demanding taxes which is acknowledged to be outstanding and due by the applicant and the Interested party. It is not the business of the court to apportion liability between the applicant and the Interested Party. It is also not the business of the court to review the merits of the decision by the respondent. There is no single evidence to show that the process followed by the respondent is contrary to the principle of legitimate expectation and natural justice. The applicant and the Interested Party participated in the decision making process and gave valuable inputs and their side of the story before the final decision was made. The respondent demanded the short levied taxes legally and in accordance with section 135(1) of the East African Community Customs Management Act. It is a statutory duty bestowed upon the respondent that must be exercised without interference in the absence of any violation, omission or acts committed by the respondent.

[Read the full judgment here](#)

6. Nairobi Civil Appeal No 148 of 2013: Total Kenya Limited v Kenya Revenue Authority [2018] eKLR (Being an appeal from the Judgment and Orders of the High Court of Kenya at Nairobi (D. S. Majanja, J.) dated 8th May, 2012 in High Court JR. No. 449 of 2001)

Coram: Waki, Nambuye & Makhandia, JJ.A

Date Delivered: 12th October 2018

Key words: Fraud, natural justice,

Sections of the law: sections 163 and 225A (1) of the Customs and Excise Act “the Act”, Section 145, 146, 146, 148 of the East African Community Customs Management Act 2004

Implications

Where fraud is established against a taxpayer or his agent, demand for the payment of the duty from taxpayer is not limited to a period of five years. An investigating body is under duty to act fairly. Where an opportunity to be heard is accorded to the appellant the appellant cannot turn around and claim not to have been heard and cite denial of natural justice in the process. The requirements of natural justice depends on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth. The investigating body is however, the master of its procedure. It can do everything in writing.

Though an importer is deemed to have knowledge of fraud by its agent, it would be onerous, unfair and wholly unjustified to condemn an importer to pay grossly huge and colossal sum which translates to 100% increment in further penalties and interest on that basis when the principle sum demanded has been settled and acknowledged.

Background

Total Kenya Limited “the appellant” lodged an appeal against the judgment and decree of the High Court (Majanja J.) dated 8th May 2012 following judicial review proceedings initiated by the appellant. The appellant sought to quash by way of an order of certiorari, a decision made and communicated by the Commissioner of Customs and Excise, Kenya Revenue Authority “the respondent” demanding for payment from the appellant Kshs 23,407,724/= as unpaid duty and compound interest of Kshs 18,436,990/=.

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The investigating body is however, the master of its procedure. It can do everything in writing.

The duty demanded was in respect of a consignment of 21 cases of prime burners imported by the appellant and was made pursuant to sections 163 and 225A (1) of the Customs and Excise Act. The appellant also sought an order of Prohibition to prohibit the respondent from attaching, intervening, confiscating, disposing or in any other manner interfering in its affairs or conduct of business and costs of the case. The appellant had engaged its clearing and forwarding agent, Veritas Agencies Limited “the agent” with duties to clear its imported goods by paying the necessary duties and taxes and thereafter raising its invoice with the appellant for settlement. The appellant alleged that the demand for the duty was time barred by virtue of section 158(1) of the Customs and Excise Act having taken 6 years since clearance.

The respondent maintained that the appellant was liable to pay the duty pursuant to the provisions of section 166 of the Customs and Excise Act which stipulated that the appellant was liable for the acts of its agent and that pursuant to section 158(1) of the Act, the respondent was mandated to recover or levy duty even after five years where there had been fraud such as was the case here.

Q Issues for determination

1. Whether the respondent will demand for duties five years after the incident;
2. Whether an importer is liable for the fraudulent actions of its clearing and forwarding agent.

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The appellant alleged that the demand for the duty was time barred by virtue of section 158(1) of the Customs and Excise Act having taken 6 years since clearance.

Q Determination

Section 165 of the Customs and Excise Act does not exonerate the appellant from the acts of the agent as it was at all material times the owner of the goods and hence the attachment of liability for the acts of its agent. It is trite that allegations of fraud, being of a serious nature so as to even attract penal consequences must be specifically pleaded and the particulars thereof given. The standard of proof required has been said to be higher than that in ordinary civil cases, namely proof upon a balance of probabilities; but such proof is certainly not beyond reasonable doubt as in criminal cases.

The appellant did not controvert any of the assertions of fraud alleged against it by the respondent in the replying affidavit. The judge cannot therefore be faulted for finding that fraud had been proved. Interestingly the appellant did not bother to enjoin in the proceedings its agent who was in a better position to counter, if at all, the allegations of fraud attributed to it as the appellant by the respondent. It was not enough for the appellant to merely proclaim that “...once a principal pays the duty to its agent, it has no way of knowing if such duty ends up with the respondent”.

The person liable to pay the duty is the appellant as the principal, since fraud had been established allowing he respondent to levy duty beyond the five-year stipulated period. Liability of a principal under sections 165 and 166 of the Customs and Excise Act extends to liability arising out of fraud of an agent as set out in section 158 (1) of the Customs and Excise Act, In the circumstances of this case, the appellant cannot claim not to have been heard.



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once a principal pays the duty to its agent, it has no way of knowing if such duty ends up with the respondent

We agree with counsel for the respondent and the trial judge that the exchange of correspondence in this instance, provided the appellant an opportunity to be heard and to present its case. That opportunity was afforded from the time the demand was made in February and was still available in May when the appellant filed the suit. The appellant never took advantage of that window of opportunity. The appellant cannot then turn around and claim breach of the rules of natural justice and want of hearing by the respondent.

The judge was right in denying the appellant the judicial review orders of certiorari and prohibition and cannot be faulted or impugned since the threshold for the issuance of such orders had not been attained. The respondent established that the appellant had not warehoused the consignment in the upcountry bonded warehouse pending payment of the duty which was in breach of the law. The matter has been in the court corridors since 2001 and to ask the appellant to pay the amount is tantamount to punishing it for seeking judicial intervention. It would be oppressive, unconscionable, punitive and unjust. The upshot of all the foregoing is that the appeal lacks merit and is accordingly dismissed with costs to the respondent.

[Read the full judgment here](#)

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Tulipe Ushuru, Tujitegemee!

