JUDGMENT

BACKGROUND

1. The Appellant is a male Kenyan Citizen and a sole proprietor based in Nairobi. He is registered as a taxpayer.

2. The Respondent is a principal officer of the Kenya Revenue Authority, (KRA). KRA is established under Chapter 469 laws of Kenya and is charged with the responsibility of among others, assessment, collection, accounting and the general administration of all tax revenue on behalf of the Government of Kenya.

3. The Appellant made a declaration of his imported goods vide Entry No. 2020ICD191568 on 16th March 2020 and paid Kshs 174,083.00 as the total amount of taxes.

4. This entry was targeted by the National Targeting Centre (NTC) alerting the verification officers that the declared unit values were low and raised suspicion of under declaration of quantities. The goods were as such to be verified and the verification report forwarded to valuation for guidance on declared values. The physical verification report was forwarded to valuation
officers at ICD Nairobi on 18th March 2020 and the declared values were found to be low as compared to values of similar imported goods from the same region.

5. An uplift of the values was done based on reference values of similar importations by valuation officers at ICD Nairobi resulting to a demand of Kshs 258,904.00 in extra taxes.

6. On 21st March 2020, the Appellant appealed the decision by the valuation officers at ICD Nairobi to the Deputy Commissioner Valuation. The Deputy Commissioner appointed three officers to look into the appeal.


8. The matter was reviewed and the uplifted values sustained and the decision communicated online via the Simba System on 31st March 2020.

9. Vide a letter dated 2nd April 2020, the Appellant further appealed the decision to the Respondent and was advised to file this dispute before the Tax Appeals Tribunal or take it for Alternative Dispute Resolution (ADR).

10. The Appellant, through his affidavit sworn on 2nd April 2020, confirmed that the dispute would be escalated to either the ADR or the Tax Appeals Tribunal. As a sign of goodwill on the strength of this undertaking, the Respondent released the goods to him to mitigate on losses that might be occasioned by a prolonged dispute.


THE APPEAL

13. The Appeal is premised on the grounds that: -

a) The Respondent erred in law and in fact by failing to find out whether the Appellant had met the different conditions required to be fulfilled at Paragraph 2 of the Fourth Schedule to test the acceptability of the Appellant’s Transaction Value as per Section 122 (1) of the EACCMA, 2004 and Parts I and II of the Fourth Schedule. The same provides as hereunder:

EACCMA Section 122 (1) states:

"Where imported goods are liable to import duty ad valorem, then the value of such goods shall be determined in accordance with the Fourth Schedule and import duty shall be paid on the value."

EACCMA Fourth Schedule, Part I, Paragraph 2 states:

"The Customs Value of imported goods shall be the transaction value, which is the price actually paid or payable for the goods when sold for export to the Partner State adjusted in accordance with the provision of Para. 9…"

EACCMA Fourth Schedule, Part II, Paragraph 1 states:

"Paragraphs. 2, 3, 4, 5, 6, 7, and 8 define how the customs value of imported goods is to be determined under provisions of this Schedule. The methods of valuation are set out in a sequential order of application. The primary methods for customs valuation is defined in Paragraph 2 and imported goods are to be valued in accordance with the provisions of this paragraph whenever the conditions prescribed therein are fulfilled."
b) The Respondent’s decision of failing to respond to the Appellant’s letters that requested an explanation on how and why it ignored the supporting documents furnished by the Appellant as evidence of transaction values at the point of verification was contrary to Section 122 (2) of EACCMA, 2004 customs laws which states that: “Upon written request, the importer shall be entitled to an explanation in writing from the proper officer as to how the Customs value of the importer's goods was determined.”

c) The Respondent erred in law and fact by basing the decision to uplift on arbitrary and fictitious figures stipulated on a Microsoft Excel worksheet in total violation of the Fourth Schedule Paragraph 8 (2) (g) of the World Trade Organisation (WTO) GATT 1994 which states: “No customs value shall be determined under the provisions of this Article on the basis of: (g) Arbitrary or fictitious values.”

d) The Respondent rejected the Appellant's values without giving the Appellant an opportunity to be heard which is in violation of WTO GATT 1994 Article 1 paragraph (2) which states that:

"Where the customs value cannot be determined under the provisions of Article 1 there should normally be a process of consultation between the customs administration and importer with a view to arriving at a basis of value under the provisions of Article 2 or 3. It may occur, for example, that the importer has information about the customs value of identical or similar imported goods which is not immediately available to the customs administration in the port of importation. On the other hand, the customs administration may have information about the customs value of identical or similar imported goods which is not readily available to the importer. A process of consultation between the two parties will enable information to be
exchanged, subject to the requirements of commercial confidentiality, with a view to determining a proper basis of value for customs purposes."

14. In conclusion, the Appellant states that the Respondent erred in law and fact by failing to appreciate the concept of Customs Taxable values as related to valuation of imported home use goods and more specifically in failing to appreciate the valuation of goods imported ad valorem.

15. The Appellant therefore prays that:

   a) The impugned decision be annulled by this Honourable Tribunal and that the Respondent's impugned assessment be amended to nil and vacated.

   b) The Respondent be asked to refund the Appellant demurrages and storage charges incurred during the process.

THE RESPONSE

16. The Respondent opposed the Appeal vide its Statement of Facts and Written Submissions dated 22nd May 2020 and 8th September, 2021, respectively. It averred as hereunder:

   a) On 21st March 2020, the Appellant appealed the decision by the valuation officers at ICD NAIROBI to the Deputy Commissioner Valuation. The Deputy Commissioner appointed three officers to look into the appeal.

   b) In his appeal, the Appellant failed to attach any supporting transaction documents to support the declared values, certified funds transfer to the supplier documents and sale contracts.
c) In the absence of value supporting documents or any new evidence of value transactions the appeals committee sustained the uplifted values at ICD NAIROBI and a report to that effect was filed online in the SIMBA SYSTEM on 23rd March 2020.

d) The Respondent indicated at Paragraph 15 of its Statement of Facts dated 21st May 2021 as follows "At the hearing of this dispute, the Respondent will be raising a preliminary objection that the pleadings filed herein are improper and offend the Tax Appeals Tribunal Act."

e) At the time when this Appeal was filed, the Respondent was opposed to the representation of the Appellant by a person not recognized by law as having authority to appear before the Tribunal. While it is true that representation has since changed and an Advocate of the High Court of Kenya taken up the conduct of the case, the pleadings remain bearing the name of this unqualified person. What this means is that the offence has not yet been purged. The preliminary objection therefore still stands.

f) The Respondent draws the attention of the Tribunal to the ruling of the High Court in HCCOMMCTA E001 OF 2021 EL-AMIGOS VS COMMISSIONER INVESTIGATIONS & ENFORCEMENT. The High Court had the following to say about the same unqualified person as in the present case:

"The appellant's Memorandum of Appeal dated 8th April 2021 and the Notice of Motion dated 14th April 2021, the supporting affidavit and Certificate of Urgency are all drawn and filed by a one Christine Makungu Mukangi/Magot Freight Services Ltd for and on behalf of the appellant. A strikingly disturbing question arises touching on the competence of the said pleadings which are admittedly filed by a non-advocate on behalf of a litigant."
Interestingly, that is the same ground upon which the appellant/applicant lost its case before the Tax Appeals Tribunal (the TAT) in Misc. Application No. 12 of 2019 where the same person represented the appellant. The TAT in its ruling dated on 1st April 2021 was emphatic that she is not a registered tax agent pursuant to section 25(1) of the Tax Appeal Tribunal Act, (the TAT Act) and therefore she lacked audience before the TAT to conduct a matter on behalf of a taxpayer."


g) The Respondent contends that the issue of pleadings being filed by unqualified persons has been extensively handled by the courts. The courts have never been kind to counsels who were late by only a month in renewing their practice certificate let alone pleadings drafted by non-lawyers.


h) The Respondent was therefore justified in rejecting the Appellant's values and uplifting the same and charging the extra taxes.


17. Furthermore, the Respondent avers that the Appellant failed to attach any supporting transaction documents in his appeal to support the declared values, certified funds transfer to the supplier documents and sale contracts.


18. Moreover, the Respondent asserts that in the absence of value supporting documents or any new evidence of value transactions its appeals committee sustained the uplifted values at ICD Nairobi and a report to that effect was filed online in the Simba System on 23rd March 2020.


19. In conclusion, the Respondent submitted that the appeal is **void ab initio** since the pleadings were drawn and filed by an unqualified person. Further, it submitted that the Appellant has failed to demonstrate by way of evidence that the tax assessment is erroneous and excessive and that he has also not demonstrated that he presented the requisite documents for verification to the Respondent.
20. In view of the above, the Respondent prays that:

   a) The decision of the Respondent be upheld as the true reflection of the Appellant’s tax liabilities.

   b) The appeal herein be dismissed with costs to the Respondent.

ISSUES FOR DETERMINATION

21. The Tribunal has carefully studied the pleadings and documentation together with the submissions of both parties and is of the respectful view that the issues that call for its determination are as hereunder:

   a) Whether the Appeal herein has been drawn and filed by a tax agent duly registered by the Commissioner pursuant to Section 25(1) of the Tax Appeals Tribunal Act.

   b) Whether the Respondent erred in fact and in law by upholding its decision to confirm the additional tax assessment.

ANALYSIS AND FINDINGS

22. It is to these two issues that the Tribunal will now turn to as hereunder.

   a) Whether the Appeal herein has been drawn and filed by a tax agent duly registered by the Commissioner pursuant to Section 25(1) of the Tax Appeals Tribunal Act.

23. The Tribunal notes that the Respondent averred in its Statement of Facts at Paragraph 15 that it "...will be raising a preliminary objection that the pleadings filed herein are improper and offend the Tax Appeals Tribunal Act."
24. In its Written Submissions, the Respondent avers that at the time this Appeal was filed, the Appellant was represented by a person not recognized by law as having the authority to appear before this Tribunal.

25. In this regard, the Tribunal notes that the pleadings of this matter were drawn and filed by one Ms. Christine Mukangi also practising as a Clearing Agent under the name Magot Freight Services Ltd.

26. In interrogating the issue of representation, the Respondent further argues that whilst the representation of the Appellant has since changed and an Advocate of the High Court of Kenya taken up the conduct of the case, the pleadings remain bearing the name of “this unqualified person”. In light of this argument by the Respondent, the question that begs an answer is whether Christine Mukangi is a qualified person to file the appeal.

27. Before answering the question posed above, the Tribunal notes the Respondent’s argument on the change of representation by the Appellant in an attempt to overcome the legal challenge of pleadings filed by an unqualified person. Specifically, the Respondent avers that an appeal that is void ab initio by reason of pleadings being filed by an unqualified person cannot be cured by a mere change of representation in the nature of filing of a Notice of Appointment by a qualified person.

28. The Respondent proceeds to cite various other case laws to buttress its position and of which the Tribunal will reference one, namely, ELC CASE NO. 52 OF 2019 COSMAS WAFULA NGUTUKU vs JOHN WAITHAKA & 2 OTHERS, where the Court observed as follows:

"Again also in the case of Abraham Mwangi Njihia v Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR, the court held that;

"The general principle resonating from the authorities both from this Court and the Court of Appeal is that pleadings drawn, signed and
presented by unqualified persons cannot stand and ought to be struck out. I have no reason to divert from this principle."

I see no reason to depart from the position taken by the authorities cited above. I find that the pleadings in this matter were drawn, signed and filed by an unqualified person and are void ab initio."

29. In answering the question posed earlier, the Tribunal wishes to reference case law EL-AMIGOS v COMMISSIONER INVESTIGATIONS & ENFORCEMENT (SUPRA), where the High Court affirmed the Tribunal's ruling that the same person known as, one, Christine Mukangi, was not qualified and went further to point out what the Appellant ought to have done in that case, as quoted below:

"... Interestingly, that is the same ground upon which the appellant/applicant lost its case before the Tax Appeals Tribunal (the TAT) in Misc. Application No. 12 of 2019 where the same person represented the appellant. The TAT in its ruling dated on 1st April 2021 was emphatic that she is not a registered tax agent pursuant to section 25(1) of the Tax Appeals Tribunal Act, (the TAT Act) and therefore she lacked audience before the TAT to conduct a matter on behalf of a taxpayer.

One would have expected that the appellant would have taken the cue from the ruling and retrace its steps to reconstruct its case."

(Emphasis added).

30. The Tribunal refers to Section 25(1) of the Tax Appeals Tribunal Act which states as follows: - "For the hearing of proceedings before the Tribunal, the appellant may appear in person or be represented by a tax agent". The preamble to the said Act defines a tax agent as "a person acting on behalf of another person on matters relating to tax and is registered as such by the Commissioner". (Emphasis supplied).
31. Consequently, the Tribunal finds that the Appeal herein has not been drawn and filed by a tax agent duly registered by the Commissioner pursuant to Section 25(1) of the Tax Appeals Tribunal Act.

32. The Tribunal notes that despite the holding hereinabove, it has taken into account all the circumstances in this matter and being guided by the provisions of Article 159(2) (d) of the Constitution of Kenya 2010 which emphasizes on the overriding objective that considers substantive justice as opposed to procedural technicalities, is of the view that the mistake of the Appellant’s tax representative ought not to be visited on the Appellant.

b) Whether the Respondent erred in fact and in law by upholding its decision to confirm the additional tax assessment.

33. The Tribunal will not delve into the issue (b) hereinabove as the same is moot.

**FINAL DECISION**

34. The upshot of the above is that the Appeal is incompetent with pleadings having been drawn by an unqualified person. However, in view of our holding in Paragraph 32 hereinabove in this Judgement and with a view to doing justice to both parties, the Tribunal makes the following orders:

a) The Appeal is incompetent and is hereby struck out.

b) The Appellant be and is hereby granted leave to file a fresh appeal out of time.

c) The Appellant to file and serve its Notice of Appeal, Memorandum of Appeal and the Statement of Facts within Twenty-One (21) days of the date of delivery of this Judgment.

d) Each party to bear its own costs.

35. **Orders** accordingly.
DATED and DELIVERED at NAIROBI on this 19th day of November, 2021.

JOSEPHINE K. MAANO
CHAIRPERSON

PATRICIA M. ANAMPIU
MEMBER

TANVIR ALI
MEMBER

GEOFFREY KARUU
MEMBER

WAMBUI NAMU
MEMBER