

IN THE HIGH COURT OF THE UNITED REPUBLIC  
OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM

COMMERCIAL CASE NO. 116 OF 2021

PAN AFRICA EQUIPMENT  
TANZANIA LTD..... PLAINTIFF  
VERSUS  
KAS FREIGHT LIMITED ..... DEFENDANT

Last order: 20<sup>th</sup> March, 2022  
Date of Ruling: 13<sup>th</sup> May, 2022

**RULING**

**NANGELA, J.**

The Plaintiff is suing the Defendant praying for judgment and Decree as follows:

1. Declaration that the Defendant breached its contractual duties by failing to pay to the Tanzania Revenue Authority (TRA) a sum of TZS 442,443, 102.52, being import taxes on the Plaintiff's goods cleared by the Defendant.
2. A declaration that the Defendant acted fraudulently and actively concealed the fraud to the Plaintiff in failing to pay the requisite taxes

to the TRA in breach of contractual obligations on his part.

3. An order for payment of TZS 442,443, 102.52 being taxes paid to the TRA as a result of the Defendant's failure to pay the appropriate taxes as required by law and as per the contractual arrangement with the Plaintiff.
4. And order for payment of TZS 49,227, 523.20 and USD 23,611, being costs incurred by the Plaintiff for legal representation during the objection stage, the Tax Revenue Appeals Board and Tax Revenues Appeals Tribunal.
5. General damages as will be assessed by this Court arising from the Plaintiff's reputational damages owing to the Defendant's submission of false and incorrect documentation to the TRA in connection with the payment of the said taxes.
6. Commercial interest at the rate of 25% pa, on the said amount calculated from the 11<sup>th</sup> March 2016 to the date of Judgment
7. Interest on the decretal amount from the date of judgment to the date of full and final satisfaction;
8. Costs of this Suit; and

9. Any other relief as the Court may find just to grant.

When the Plaintiff was served upon the Defendant, the latter filed its Written Statement of Defence and raised a Notice of Preliminary Objection to wit, that:

1. The suit is premature by bypassing the machinery of justice.
2. This Honourable Court lack jurisdiction to entertain the matter.
3. Once a matter has been compounded by the Commissioner for Customs, it can neither be reopened in civil nor criminal action.

On 28<sup>th</sup> March 2022, the suit was called on for the hearing of the preliminary objection. In terms of representation, Mr. Wilson Mukebezi and Robert Mosi, learned advocates, appeared for the Plaintiff while Mr Jimmy Mrosso, learned advocate, appeared for the Defendant.

Submitting in support of the objection, Mr Mrosso was of the view that, the pleadings are erroneous for having pleaded herein an issues of fraud which are of criminal nature since, as per the rules of this Court, the jurisdiction of this Court deals with matters commercial nature. He concluded that, in the first place, the suit is based on fraudulent transactions which ought to be examined by the criminal

machinery in the name of the Director of Criminal Investigations (the DCI).

Secondly, he argued that, this suit is a tax matter dealt with by the Tanzania Revenues Authority (TRA), specifically the department of Customs as it involves matters of payment of taxes and, that, the TRA dealt with it and the Commissioner of Customs compounded the offences under the East African Community Customs Management Act, 2004 (as amended) as well as the Customs Management and Tariffs Act, Cap.403 R.E 2019.

He contended that, once the Commissioner has compounded the offence, the order of the Commissioner becomes a decree of the Court which cannot be challenged except by way of judicial review. He relied on the case of **Khofu Mlelwa vs. Commissioner General of TRA and Commissioner of Customs and Excise Duty**, Civil Application No.229 of 2019, as a case in support of that position. He argued that, the Plaintiff's act is akin to the attempt to re-open the compounding order of the Commissioner for Customs and Excise Duties. In view of such submissions, he asked this Court to strike of the matter with costs and make a finding that it had no jurisdiction to entertain the suit.

In reply to such submissions made by Mr Mrosso, Mr Wilson Mukebezi adopted his earlier filed in Court skeleton argument and stated that, the contention that the matter at

hand arises from fraudulent transactions is erroneous. Instead, he contended that, the suit is premised on a breach of contractual obligations on the part of the Defendant, which breach arose from fraudulent acts established by the TRA.

Referring to paragraphs 5 to 13 of the Plaintiff, he surmised that, the major complaint by the Plaintiff in this suit is that, the Defendant never remitted taxes which the Plaintiff had instructed her to remit/pay as per their contractual arrangement to clear the Plaintiff's goods at the Dar Port. He contended that, the non-payment of the said taxes was established by the TRA under Section 229 of the EAC Customs Management Act and the TRA Appeals Board following an appeal lodged by the Plaintiff.

In view of that, Mr Wilson submitted that, the Plaintiff is not referring to fraud between itself and the Defendant but the fraud which was established by the TRA which confirmed to the Plaintiff that, the Defendant did not adhere to their contractual terms as he cleared the Plaintiff's goods without paying the requisite taxes.

He concluded that, the argument by Mr Mrosso that fraud is only a criminal issue was incorrect. He contended that, much as the dispute is not about fraud, fraud can still be established under the civil machinery of the Court.

In his second point, Mr Wilson submitted that, the argument that this Court lacks jurisdiction as the matter is one that touches on payment of taxes is also erroneous because,

the complaint here is not about payment of taxes but about the Defendant's duty to reimburse the amount which the Plaintiff incurred in paying taxes.

He contended that, the Plaintiff has not filed a disputed against the Commissioner General of the TRA and, for that matter; there is nothing to do with the TRA here which would make this suit to be a tax matter. He also submitted that, the issue of compoundment has nothing to do with this suit at hand. As such, he distinguished the **Khofu Mlelwa's case** (supra) as being inapplicable to the matter at hand because it involves the tax payer and the Commissioner General and the Commissioner for Customs and Excise Duties, which is not a fact in this case.

In view of the above, he prayed that, the preliminary objections raised by the Defendant be dismissed with costs.

In a brief rejoinder, Mr Mrosso submitted that, although Mr Wilson's submission is to the effect that the suit arises from breach of contract, which breach was a result of fraudulent acts committed by the Defendant within the TRA, the fact is that, the parties could not have agreed to commit fraud and if that was the case, then, their contract was void. He contended that, under the East African Community Customs Management Act, 2004 ("the EACCMA"), the duty to pay taxes rests with the tax payer who, in this circumstances of this suit, is the Plaintiff.

Mr Mrosso rejoined further that, fraud is typically criminal in nature and cannot be pleaded in civil cases unless one lifts the veil of incorporation. He contended that, the same cannot be argued in a civil machinery of the civil justice. As regard the submission that the matter at hand is not against the Commissioner General of the TRA, Mr Mrosso submitted that, the case cited had established a principle that, the decision of the Commissioner General can only be challenged by way of judicial review. As such, he prayed that the suit be dismissed with costs.

I have taken a careful approach in considering the rival submissions by the learned advocates for the parties. The question I am invited to address is whether the objections have merit.

In the first place, let me address the issue which Mr Mrosso raised, regarding alleged fraudulent acts in this suit which the Plaintiff has argued that constituted a breach of the terms of contract between the Plaintiff and the Defendant. In his submission, Mr Mrosso was of the view that, matters of fraud cannot be pleaded in and dealt with by way of a civil case but rather should be confined to the realm of criminal cases.

In my view, I find that to be a rather erroneous view. Essentially, fraud is both a civil tort and criminal wrong. In civil litigation, allegations of fraud might be based on a misrepresentation of fact that was either intentional or

negligent. In view of that fact, much as fraud entails also a criminal wrong, it can still as much be a civil wrong and thus be pleaded in a civil suit.

As a matter of principle, when fraud is pleaded, particulars of it must be given and proven. It is as well trite that, the standard of proof of fraud in civil cases is higher than a mere balance of probabilities. See the case of **International Commercial Bank Limited vs. Jademcam Estate Limited** [2021] TZCA 673.

Fraud may as well be linked to breach of contract. In essence, a breach of contract occurs when one party fails to follow through with a contract while fraud occurs when one party has no intention of completing his contractual obligations. If a party entered into a contract with no intention or ability to follow through with the contract that could be a case of fraud.

However, the person who suffered as a result will have to establish that the other party misrepresented himself, and that being a victim, the affected party relied on such other party's with good cause to enter into an agreement, which contract led to a detrimental outcome to him. For those reasons as stated herein, it is clear to me that, the first ground of objection by Mr Mrosso is without merit and should, and I hereby dismiss it.

Mr Mrosso's second ground was argued based on similar reasoning as the first ground. He contended that, this



being a tax matter, this Court lacks jurisdiction. He submitted that, it was a matter already dealt with by the the Commissioner of Customs who, under the East African Community Customs Management Act, 2004 (as amended) as well as the Customs Management and Tariffs Act, Cap.403 R.E 2019, compounded the tax offences. He submitted, therefore, that, entertaining it is akin to reopening the Commissioner's compoundment orders. Mr Wilson has vehemently opposed Mr Mrosso's submission contending that, this matter has nothing to do with the tax authorities and the Defendant here is not the Commissioner General of the TRA or the Commissioner of Customs and Excise Duties as the was in the **Khofu Mlelwa's case** (supra).

In my humble assessment, I do share the views of Mr Wilson. The **Khofu Mlelwa's case** (supra) was, indeed, between the Tax Payer and the TRA Officials in the name of Commissioner General of TRA and that of Customs and Excise Duties. This is not the case in the present suit which is between a Principal and its Agent and the suit being premised on matters based on their agency relationship.

It will therefore mean to me, that, the **Khofu Mlelwa's decision** (supra) is quite distinguishable from the current case at hand. With that in mind, the second objection should and I hereby dismiss it as well for lacking merit.

My final lap of consideration goes to the third ground of objection which is in relation to the compoundment orders.

Mr Wilson submitted that, the issue of compoundment has nothing to do with this suit at hand. In my view, and taking into account the earlier consideration and the inapplicability of **Khofu Mlelwa's case** (supra) in the circumstances of this case, I do also find that, Mr Wilson is right in saying that, the current suit is not about the orders of the Commissioner of Customs and Excise Duties. That being the case, I also find this final issue of compoundment is baseless, and in the same manner I hereby dismiss the 3<sup>rd</sup> ground of objection.

In the upshot, all grounds of objection raised by Mr Mrosso are without merit and are hereby dismissed with costs. The suit is to proceed to the next stage of its hearing course.



**It is so ordered**

A handwritten signature in black ink, appearing to read "Deo John Nangela".

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**HON. DEO JOHN NANGELA**  
**JUDGE**