



Monaco Engineering Limited v Commissioner of Domestic Taxes (Tax Appeal E126 of 2020) [2024] KEHC 9879 (KLR) (Commercial and Tax) (29 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9879 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
TAX APPEAL E126 OF 2020
DKN MAGARE, J
JULY 29, 2024**

BETWEEN

MONACO ENGINEERING LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

(Appeal from the Judgment of the Tax Appeals Tribunal given in Nairobi in Tribunal Case No. 529 of 2021 on 25/9/2020)

JUDGMENT

1. This is an appeal from the Judgment of the Tax Appeals Tribunal given in Nairobi in Tribunal Case No. 529 of 2021 on 25/9/2020.
2. The appeal challenges the dismissal of the Appellant's appeal to the Tribunal. The grounds of appeal are contained in the Memorandum of Appeal dated 13/11/2020. The Appellant chiefly appeals on the ground that that the tribunal reached the conclusion to dismiss the Appellant's appeal in error as they did not consider the full tenor of the evidence adduced by the Appellant.
3. According to the Appellant, the Appellant presented sufficient material to support its case and the tribunal erred in not finding that the Appellant had established its case and allowing it.
4. The Respondent's case on the other hand is that the Appellant did not avail the necessary material to support its objection to taxation and as such the tribunal correctly dismissed the Appellant's case for being unsupported.



Pleadings

5. Vide the Respondent's letter dated 26/10/2016, the Respondent raised issues with the Appellant alleging that the Appellant had not declared the correct turnover in its self-assessment returns in respect of VAT, Corporation Tax, PAYE and Withholding Tax for 2013 to 2015 years.
6. Consequently, the decision of the Respondent dated 15/2/2017 raised tax liability against the Appellant as follows: Corporation Tax 13,812,585/=, VAT 47,497,661/= and PAYE 3,227,011/=.
7. In its rejoinder, the Respondent averred that there was no sufficient evidence presented by the Appellant to dislodge the tax assessment and therefore the appeal was unmerited.
8. The tribunal considered the dispute and rendered its judgment on 25/9/2020. In the judgement, the tribunal dismissed the Appellant's appeal on the ground that there was no evidence to support the Objection to taxation and therefore the assessment was upheld.
9. Aggrieved, the Appellant appealed to the tribunal and the tribunal upheld the assessment by the Respondent. This appeal is from the finding of the tribunal.

Submissions

10. The Appellant filed submissions dated 22/11/2023. It was submitted that the Respondent misapplied the banking methods and arrived at an erroneous assessment of the appellant's income and therefore tax liability. They relied on among others on *Bachmann v The Queen 2015 TTC* to submit that it was the burden of the Respondent when using banking test to arrive at tax liability and that the assessment arrived at was unreasonable.
11. It was thus submitted further that the Appellant discharged its burden to the required standard and the Tribunal erred by not shifting the evidentiary burden thereby to the Respondent. Reliance was placed in the case of *Commissioner of Domestic Taxes v Trical & Hard Limited (2022)e KLR* as follows:

The core of this appeal is that the Commissioner impugned the records and documentation submitted by the Respondent. It maintained that no supplies were actually made in support of those records. The question before the court that was also before the Tribunal was whether the Respondent sufficiently discharged its burden when it availed those records to the Commissioner as proof of supply.
25. I agree with the Tribunal's holding that the burden of proof in tax matters is not stationary but is like a pendulum swinging between the taxpayer and taxman at different points but more times than not swings towards the taxpayer. The uniqueness of our tax system in placing the evidential burden of proof on the tax payer is neither a mistake nor is it unconstitutional.
12. It was also submitted that the tribunal ignored the basic canon of interpretation of tax statute and considered intendments and implications in error. They relied on *Republic v Commissioner of Domestic Taxes ex parte Barclays Bank of Kenya (2012) eKLR*. I was urged to allow the Appeal.
13. On the part of the Respondent, they filed submissions dated 13/12/2023. It was submitted that the Appellant did not satisfy the burden of proof. They relied on Section 29(1) and 31(1) of the [Tax Procedures Act](#) to submit that in the absence of sufficient documents, the Respondent was entitled to assess tax based on its best judgment.
14. It was also submitted that under Section 56 of the [Tax Procedures Act](#) the Appellant has the burden to prove that the tax decision was incorrect as follows:

56.



- (1) In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.

15. Reliance was further placed on the following authorities:

Commissioner of Investigations and Enforcement v Pearl Industries Limited (Tax Appeal E086 of 2020) [2022] KEHC 51 (KLR);

It is incumbent upon the Respondent to prove that the Commissioner's findings were wrong. How could it do so? By providing evidence and supporting documentation to dislodge the Commissioner's findings.

In the case of *Primarosa Flowers Ltd v Respondent of Domestic taxes*

[2019] eKLR, where the court observed that;

Section 107 of the *Evidence Act* provides; -

- 1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- 2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

In the instant Appeal, I find the burden of proof that TAT Tribunal relied on extraneous factors and that the Appellant carried out multiple conversions lies with the Appellant. In the instant case, the Appellant has not produced any filed documentary evidence, that the currency of the transaction or export documents were in Dollars or payment were received in Dollars. I find the Appellant has not discharged the burden of proof to the required standard of proof.

In *Mulherin vs Respondent of Taxation* [2013] FCAFC 115 the Federal Court of Australia held that in tax disputes, the taxpayer must satisfy the burden of proof to successfully challenge income tax assessments. The onus is on the taxpayer in proving that assessment was excessive by adducing positive evidence which demonstrates the taxable income on which tax ought to have been levied.”

Justice D.S Majanja in *PZ Cussons East Africa vs Kenya Revenue Authority (Petition No.309 of 2012)* referred to *Pierson v Belcher* (HM Inspector of Taxes), “that the onus is upon the Appellant to show that the assessment made upon him is excessive and incorrect and of course he has completely failed to do. That is sufficient to dispose of the appeal, which I accordingly dismiss with costs.” 57.....the Appellant in the present appeal has manifestly failed to discharge such an onerous burden of proof placed squarely on it....”

16. I was urged to dismiss the Appeal.

Analysis

17. This Court is under the duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.



18. In the cases of *Peters vs Sunday Post Limited* [1958] EA 424 , the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

19. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

20. In *Mercy Kirito Mutegi v. Beatrice Nkatha Nyaga & 2 Others* [2013] eKLR, the Court of Appeal held:

“An appellate court will not ordinarily differ with the findings on a question of fact, by a trial Judge who had the advantage of hearing and seeing the witnesses. Our role is to review the evidence and determine whether the conclusions reached are in accordance with the evidence and the law. A conclusion although based on primary factual evidence that is erroneous becomes a point of law. This is a demonstration that there will be occasion when facts or evidence matter in determining a question of law”.

21. The Appellant’s point of contestation *pari materia* is that the tribunal erred in its finding that the Appellant had not produced evidence enough to support its objection to taxation.

22. I understand that an appeal before court, from the Tax Appeals Tribunal lies on a question of how law was considered in the case *Oceanfreight (E.A) Limited –VS- Commissioner of Domestic Taxes* [2018] eKLR where Justice F. Tuiyott stated:

“Whilst the jurisdiction of this Court in this Appeal is to hear and determine questions of law only, issues of facts may turn out to give rise to a question of law. In *Mercy Kirito Mutegi – vs- Beatrice Nkatha Nyaga & 2 Others* [2013] eKLR, the Court of Appeal said as follows:-

“What are the points of law raised in this appeal? an appellant Court will not ordinarily differ with the findings on a question of fact, by the trial Judge who had the advantage of hearing and seeing the witnesses. Our role is to review the evidence and determine whether the conclusions reached are in accordance with the evidence and the law. A conclusion although based on primary factual evidence that is erroneous becomes a point of law.”

This is a demonstration that there will be occasion when facts or evidence matter in determining a question of law.

23. On the burden of proof in tax disputes, in *Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte) (Judicial Review Application E023 of 2021)* [2022] KEHC 5 (KLR) (24 January 2022) (Judgment) the court stated that:



The most significant justification for placing the burden of proof on the tax payer is the practical consideration that the Commissioner cannot sustain the burden because he does not possess the needed evidence. Under the system of self-reporting tax liability, the taxpayer possesses the evidence relevant to the determination of tax liability. It is simply fair to place the burden of persuasion on the taxpayer, given that he knows the facts relating to his liability, because the commissioner must rely on circumstantial evidence, most of it coming from the taxpayer and the taxpayer's records. The taxpayer must present a minimum amount of information necessary to support his position. This safety valve seems to place the burden of production on the taxpayer without relieving the Commissioner of the overall burden of proof. The tax payers' evidence must meet this minimum threshold. A presumption of correctness arises from the Commissioner's determination/assessment. The presumption remains until the taxpayer produces competent and relevant evidence to support his/her position. When the taxpayer comes forward with such evidence, the presumption vanishes and the case must be decided upon the evidence presented.

24. Similarly on the burden of proof, Section 59(1) of the TPA also provides that a tax payer shall produce records when required to do so by the Commissioner as follows:

Production of records

- (1) For the purposes of obtaining full information in respect of the tax liability of any person or class of persons, or for any other purposes relating to a tax law, the Commissioner or an authorised officer may require any person, by notice in writing, to—(a) produce for examination, at such time and place as may be specified in the notice, any documents (including in electronic format) that are in the person's custody or under the person's control relating to the tax liability of any person; (b) furnish information relating to the tax liability of any person in the manner and by the time as specified in the notice; or (c) attend, at the time and place specified in the notice, for the purpose of giving evidence in respect of any matter or transaction appearing to be relevant to the tax liability of any person.
25. The foregoing bespeak the burden of proof which exemplifies the principles guiding taxation as restated in *Republic vs. Commissioner of Domestic Taxes Large Tax Payer's Office Ex-Parte Barclays Bank of Kenya LTD* [2012] eKLR as doth:

“The approach to this case is that stated in the oft cited case of *Cape Brandy Syndicate v Inland Revenue Commissioners* [1920] 1 KB 64 as applied in *T.M. Bell v Commissioner of Income Tax* [1960] EALR 224 where Roland J. stated, “...in a taxing Act, one has to look at what is clearly said. There is no room for intendment as to a tax. Nothing is to be read in, nothing it to be implied. One can only look fairly at the language used... If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.” As this case concerns the interpretation of the *Income Tax Act*, I am also guided by the dictum of Lord Simonds in *Russell v Scott* [1948] 2 ALL ER 5 where he stated, “My Lords, there is a maxim of income tax law which, though it may sometimes be overstressed yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him” adopted in *Stanbic Bank Kenya Limited v Kenya Revenue Authority CA Civil Appeal No. 77 of 2008 (Unreported)* [2009] eKLR per Nyamu JA (See also *Jafferli Alibhai v Commissioner of Income Tax* [1961] EA 610, *Kanje Naranjee v Income Tax Commissioner* [1964] EA 257). Any tax imposed on a



subject is dictated by the terms of legislation and taxing authority must satisfy itself that the transaction fits within the definition of the statute. In *Adamson v Attorney General* (1933) AC 257 at p 275 it was held that, “The section is one that imposes a tax upon the subject, and it is well settled that in such cases it is incumbent on the Crown to establish that its claim comes within the very words used, and if there is any doubt or ambiguity this defect-if it be in view of the Crown a defect can only be remedied by legislation.”

26. Therefore, tax legislation should be stated in clear and simple terms. In *Tanganyika Mine Workers Union vs. The Registrar of Trade Unions* [1961] EA 629, it was held that where the provisions of an enactment are penal provisions, they must be construed strictly and that in such circumstances you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no-one is brought within it who is not brought within it in express language.

27. The words were even better described in *Commissioner of Income Tax vs. Westmont Power (K) Ltd Nairobi High Court Income Tax Appeal No. 626 of 2002*, the Court while citing *Inland Revenue vs. Scottish Central Electricity Company* [1931] 15 TC 761 expressed itself as follows:

“ Even though taxation is acceptable and even essential in democratic societies, taxation laws that have the effect of depriving citizens of their property by imposing pecuniary burdens resulting also in penal consequences must be interpreted with great caution. In this respect, it is paramount that their provisions must be express and clear so as to leave no room for ambiguity...any ambiguity in such a law must be resolved in favour of the taxpayer and not the Public Revenue Authorities which are responsible for their implementation.”

28. Therefore, it is settled law that whereas the tax payer bears the burden to support an allegation of wrongful taxation, the legislation that imposes tax must be unambiguous. I add that the rules of taxation should be published and only then can the citizens be liable. Whereas the court appreciates the need to collect taxes, in carrying out their statutory obligations the tax authorities must adhere to the law. As was held in *Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others* (2007) eKLR:

“ It is no good answer for the taxman to proclaim that Kshs 1 billion (appx) is intended to swell the public treasury because due to the application of the above principles that money is not lawfully due...Applying the same reasoning, to the matter before this court, it does not matter that the respondents say and think they are owed over a billion Kenya shillings - what matters is whether the amount is lawfully due and whether the law allows its recovery? It is not a question of impression or perception of what is owed, instead it is what if anything, is owed under the relevant law and whether its assessment and recovery is permitted by the applicable law. If rightly due, the huge amount notwithstanding the court must uphold the right of recovery regardless of its consequence to the applicant and if not due under the law it must not hesitate to disallow it and must disallow it to among other things to uphold both the law the integrity of the rule of law.”

29. The Respondent in exercise of its taxation roles does so while advancing what is its statutory power. This court is alive to the trite law that statutory powers can only be lawful if exercised reasonably, rationally and properly in accordance with the statutory provisions in question. This does not exclude tax legislation. As was held in *Republic vs. Commissioner of Co-operatives ex-parte Kirinyaga Tea Growers Co-operative Savings and Credit Society Ltd* [1999] 1 EA 245 (CAK) at page 249, statutory powers can only be exercised validly if they are exercised reasonably, rationally and properly and no statute ever allows any public officer to statutory power arbitrary or capriciously. The same finding was



made in *Republic vs. Kenya Revenue Authority ex parte Aberdare Freight Services Limited* [2004] eKLR that statutory powers and duty must be exercised and performed reasonably.

30. On the backdrop of the above stated principles, I have to reevaluate the dispute before the tribunal to establish whether the tribunal committed an error of law.
31. I note that the position of the tax payer in this appeal is that the material that the Appellant availed were sufficient to support its claim. The position of the Respondent on the other hand is that as established by the tribunal, the Appellant indeed failed to prove its case and which was rightly dismissed.
32. The Appellant submitted that the tribunal erred in failing to find that the material produced by the Appellant supported the argument that the Respondent misapplied the banking analysis test by failing to adjust non-income deposits from the bank which are stated to have included loan advanced and interbank transfers. However, this is a question of fact that would be proved by evidence. I find no evidence produced by the Appellant that pointed to proving this allegation.
33. I am therefore unable to find the manner in which the tribunal is said to have erred in its interpretation of the law to the extent that the loan advancements and interbank transfers were erroneously computed for the purposes of taxation.
34. In *Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte) (Judicial Review Application E023 of 2021)* [2022] KEHC 5 (KLR) (24 January 2022) (Judgment) the court held as doth:

The most significant justification for placing the burden of proof on the tax payer is the practical consideration that the Commissioner cannot sustain the burden because he does not possess the needed evidence. Under the system of self-reporting tax liability, the taxpayer possesses the evidence relevant to the determination of tax liability. It is simply fair to place the burden of persuasion on the taxpayer, given that he knows the facts relating to his liability, because the commissioner must rely on circumstantial evidence, most of it coming from the taxpayer and the taxpayer's records. The taxpayer must present a minimum amount of information necessary to support his position. This safety valve seems to place the burden of production on the taxpayer without relieving the Commissioner of the overall burden of proof. The tax payers' evidence must meet this minimum threshold. A presumption of correctness arises from the Commissioner's determination/assessment. The presumption remains until the taxpayer produces competent and relevant evidence to support his/her position. When the taxpayer comes forward with such evidence, the presumption vanishes and the case must be decided upon the evidence presented.
35. Consequently, I find and hold that the evidential burden of proof rests with the taxpayer to disprove the Commissioner and only once prima facie evidence is adduced by the tax payer does the burden shift to the tax man. The Appellant has not placed material based on which this court can infer that the tribunal did not consider evidence or that the evidence produced was sufficient to establish the matters complained about.
36. Consequently, I find no merit in the appeal and dismiss it.

Determination

37. In the upshot, I make the following orders:
 - a. The Appeal is dismissed in limine.
 - b. Each party to bear own costs in the appeal.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 29TH DAY OF JULY, 2024.



Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for Appellant

Almadi for Ms. Wambui for the Respondent

Court Assistant – Jedidah

