Acorp Gifts Kenya Limited v Commissioner of Domestic Taxes (Income Tax Appeal E087 of 2022) [2024] KEHC 15334 (KLR) (Commercial and Tax) (28 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15334 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E087 OF 2022

MA OTIENO, J

NOVEMBER 28, 2024

BETWEEN

ACORP GIFTS KENYA LIMITED ..... APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT

(An appeal from the Judgment of the Tax Appeals Tribunal delivered on 8th March 2024 in the Tax Appeal Case No. 235 of 2022)

JUDGMENT

Introduction

1. This is an appeal from the Judgment of the Tax Appeals Tribunal delivered on 8th March 2024 in the TAT Case No. 235 of 2022 where the Tribunal struck out the Appellant's appeal against the Respondent (Commissioner) on the basis that no Objection Decision was attached to the pleadings at the Tribunal contrary to the requirements of Section 13(2) of the *Tax Appeals Tribunal Act*, 2013.

2. The background of the matter is that sometime in the year 2000, the Appellant was subjected to a tax audit by the Commissioner in relation to its tax affairs for years of income 2017-2019. As a result of the audit, the Respondent issued a notice of additional Assessment dated 25th August 2021 fin the sum of Kshs. 56,329,670/= for income taxes and a further Kshs. 33,364,496/= for Value Added Tax.

3. Disputing the Assessment, the Appellant Objected to the tax Assessment vide its notice of Objection dated 23rd September 2021.

4. The Respondent reviewed the Appellant's said Objection but did not allow it on the basis that the Appellant had not provided sufficient documentation and information in support of the Objection.

According to the Respondent, the Appellant only provided bulk documentation without schedules and workings.

5. In the circumstances, the Respondent vide its letter of 12th October 2021, wrote to the Appellant seeking for further information and documentation in support of the Objection. In the said letter, the Respondent requested for information which included sales ledges, signed financial ledges, schedule of credit notes, bank reconciliation, and payroll for the year 2019.

6. On 20th January 2022, the Respondent issued a Notice of Invalidation of the Objection under Section 51(3) of the *Tax Procedures Act* (hereinafter also referred to as 'TPA') on the basis that the Appellant had not provided sufficient information in support of the objection.

7. Dissatisfied with the Respondent's said Notice of Invalidation, the Respondent, vide its memorandum of appeal dated 4th March 2022 commenced proceedings before the Tax Appeal against the said decision on the grounds that the Respondent failed to appreciate that it had provided the requested documents and that the documents in support of the objection and that the Respondent failed to appreciate that; -

    i. The Appellant supported credit notes issued in the reversal of sales invoices.

    ii. The Appellant sufficiently supported the variance between expected sales and sales as reported in the income tax returns and that the reconciling items were accurate and verifiable.

    iii. The Appellant supported its importation costs including import VAT.

    iv. The salaries and wage expenses were supported in spite of the error in the income tax declaration.

8. In response to the Appellant's Appeal at the TAT, the Respondent filed its Statement of Facts dated 20th September 2023 taking the position that its Invalidation Notice of 20th January 2022 was lawful and had been issued in line with the provisions of Section 51(3) of the TPA.

9. It was the Respondent's position at the Tribunal that the invalidation notice was issued after the Appellant's objection was found to be invalid due to the failure by the Appellant to provide the additional documentation and information as requested by the Respondent vide its letter of 12th October 2021.

10. On 8th March 2024, the Tribunal rendered its judgment in the matter and struck out the Appellant's appeal for the reason that the Appellant did not include in its appeal to the Tribunal, a copy of the Respondent's Objection Decision contrary to the provisions of Section 13(2) of the *Tax Appeals Tribunal Act*, 2013.

The Appeal

11. Aggrieved by the Judgment of the TAT, the Appellant lodged this appeal vide its Memorandum of Appeal dated 12th April 2024 and raised the following three (3) grounds of appeal; -

    i. That the Tribunal erred in fact and in law by making a decision based on an issue that was not before it for determination.

    ii. The Tribunal erred in fact and law by failing to determine the Appellant's appeal on its merits and only opted to rely on technicality contrary to the provisions of article 159(2) (d) of *the Constitution*.

    iii. The Tribunal failed to apply its mind properly to the facts before it and failed to hold the scales of justice evenly in the circumstances.

12. The appeal was canvased by way of written submissions. The Appellant filed its submissions dated 3rd September 2024 whilst that of the Respondent is dated 16th October 2024.

Appellant's submissions

13. The Appellant submitted that the main issue for determination in this appeal is whether the Tribunal erred in striking out the Appellant's Appeal for the reason that the Appellant did not attach, as part of the appeal, a copy of the Objection Decision.

14. According to the Appellant, the Tribunal committed an error of law in striking out the Appellant's Appeal since the issue of whether the appeal was competent was not one of the issues before the Tribunal for consideration.

15. The Appellant submitted that in any event, none of the parties, in their respective pleadings or submissions before the TAT, raised the issue of the competency of the appeal. According to the Appellant, the Tribunal should not have moved Suo Moto on the issue.

16. Referring to among others, the case of Hewlett Packard East Africa Ltd v Commissioner of Domestic Taxes [2019] eKLR, the Appellant maintained that the determination by the Tribunal that the appeal was incompetent was not based on any of the issues raised before it for determination and therefore ought to be reversed by this court.

17. While admitting that the Objection Decision was not attached as part of the record of appeal to the Tribunal, the Appellant submitted that the failure to attach the same was inadvertent and was caused by the failure on the part of the Appellant's tax agents who had conduct of the matter on behalf of the Appellant at the Tribunal.

18. It was further the Appellant's submissions that the failure by its tax agents to attach a copy of the Objection Decision in its pleadings to the Tribunal was not of itself sufficient reason for the Tribunal to strike out the appeal.

19. The Appellant asserted that in any event, the failure to attach the Objection Decision was a procedural technicality that ought not to be punished harshly by striking out of its appeal. According to the Appellant, Article 159 (2) (d) of *the Constitution* places an obligation on the Tribunal to administer justice without undue regard to procedural technicalities.

20. According to the Appellant, its case at the Tribunal ought to have been heard and determined by the Honourable Tribunal on merits.

21. It was further the Appellant's submissions that in any event, the contents of the said objection decision had been brought to the attention of the Tribunal by the Respondent in its Statement of Facts (SoF) dated 1st April 2020 at paragraph 11 thereof and that the Tribunal was therefore well aware of its existence and the full extent of its provisions. The Appellant therefore argued that if the Tribunal needed to have the objection decision filed, they could have equally asked the Respondent to produce the same under Section 15 (2) of the TAT Act.

22. Pointing out that the Appellant was being presented at the Tribunal by a person not qualified as an Advocate, it was submitted on behalf of the Appellant that the mistake of the tax agent should not be visited upon the Appellant. The case of Belinda Murai & 9 others v Amos Wainaina [1979] eKLR was cited by the Appellant in support of this argument.

23. Further the Appellant submitted that striking out of pleadings or summary dismissal of suits is a draconian measure with very devastating consequences to litigants and that courts should always exercise their discretion in favour of sustaining cases and having disputes decided on merits.

24. The Appellant therefore urged this court to allow the appeal with costs and set aside the Tribunal's judgment.

Respondent's Submissions

25. On his part, the Respondent supported the judgment by the Tribunal and urged this court to uphold the same. According to the Respondent, the Tribunal was right in its conclusion that the failure by the Appellant to attach the Objection Decision to its appeal to the Tribunal was contrary to the express provisions of Section 13(2) of the Tax Appeals Tribunal, 2013.

26. The Respondent submitted that contrary to the Appellant's submissions that the competency of the appeal was not before the Tribunal for determination, the Tribunal, in the exercise of its inherent judicial authority still had the powers to raise and determine the issue suo moto.

27. According to the Respondent, no valid appeal could lie against a decision that had not been placed before the Tribunal for purposes of evaluating it and thereafter making a decision on its validity or otherwise.

28. It was further the Respondent's position that an Appeal before the Tax Appeals Tribunal is an appeal against the Objection Decision issued as provided under section 52 of the *Tax Procedures Act*. That the Appellant having failed to follow the law by attaching a copy of the decision in its appeal to the Tribunal, no court or Tribunal should come to its aid.

29. Regarding Article 159 (2) (d) of *the Constitution*, the Respondent submitted that the Article is not a panacea for breaking rules of procedure. According to the Respondent, failure to follow rules and procedures amounts to abuse of the judicial process. The case of Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] eKLR was cited by the Respondent in support of this argument.

30. The Respondent therefore urged this court to dismiss the appeal with costs to the Respondent.

Analysis and determination

31. This is an appeal from the Tax Appeals Tribunal to this court pursuant to Section 53 of the *Tax Procedures Act*, Cap. 469A of the Laws of Kenya which provides as follows; -

> " 53. A party to proceedings before the Tribunal who is dissatisfied with the decision of the Tribunal in relation to an appealable decision may, within thirty days of being notified of the decision or within such further period as the High Court may allow, appeal the decision to the High Court in accordance with the provisions of the *Tax Appeals Tribunal Act* (Cap. 469A)"

32. Further Section 32 of the *Tax Appeals Tribunal Act* (Cap. 469A) provides that appeals from the Tribunal lie with the High Court and that the rules applicable in the High Court are those set out by the Chief Justice.

> " 32.
>
> (1) Appeals to the High Court on decisions of the Tribunal (1) A party to proceedings before the Tribunal may, within thirty days

after being notified of the decision or within such further period as the High Court may allow, appeal to the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party.

(2) The High Court shall hear appeals made under this section in accordance with rules set out by the Chief Justice."

33. The Appeal to this court from the decision of the Tribunal being one limited to the points of law only, this court is not therefore expected to entertain an invitation to interfere with the factual findings of the Tribunal, except where it is shown that the Tribunal considered matters it should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse (See: Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR).

34. In Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR the Court of Appeal, distinguishing between matters of law and matters of fact stated as follows: -

> " First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it, and come to its own independent conclusion. In other words, a first appeal is by way of a retrial and facts must be revisited and analysed a fresh, - see Selle and Another vs. Associated Motor Boat Company Ltd and Others (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

35. Again, in Charles Kipkoech Leting v Express (K) Ltd & another [2018] eKLR the Court of Appeal further clarified that where a right of appeal is confined to questions of law only, an appellate court is duty bound to accept the findings of fact by the lower court. That it should not interfere with the findings of the trial on the factual issues unless it is apparent that, based on the evidence on record, no reasonable tribunal or court could have reached the same conclusion, in which case, the holding or decision would be bad in law and therefore qualify to be reviewed on a second appeal. The court stated as follows; -

> " This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina versus Mugiria [1983] KLR 78, Kenya Breweries Ltd versus Godfrey Odongo, Civil Appeal No. 127 of 2007, and Stanley N. Muriithi & Another versus Bernard Munene Ithiga [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of Martin versus Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

36. I have carefully reviewed and considered the Appellant's memorandum of appeal dated 12th April 2024, the record of appeal as well as the submissions by the parties in support of their respective positions. The Court notes that the sole and only issue for determination in this appeal is whether the Tribunal erred in striking out the Appellant's appeal thereat on the basis that no Objection Decision was attached by the Appellant.

37. Section 13 of the *Tax Appeals Tribunal Act* provides for the procedure of appeal to the Tribunal in the following terms; -

> '13. Procedure for appeal
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> (1) A notice of appeal to the Tribunal shall—
>
> (a) be in writing or through electronic means;
>
> (b) be submitted to the Tribunal within thirty days upon receipt of the decision of the Commissioner.
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> (2) The appellant shall, within fourteen days from the date of filing the notice of appeal, submit enough copies, as may be advised by the Tribunal, of—
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> (a) a memorandum of appeal;
>
> (b) statements of facts; and
>
> (c) the appealable decision; and
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> (d) such other documents as may be necessary to enable the Tribunal to make a decision on the appeal.

38. From the above, it is evident that among the documents which the law requires the Appellant to submit to the Tribunal includes a copy of "the appealable decision."

39. The term "appealable decision" is defined under Section 3 (1) of the *Tax Procedures Act* as follows; -

> " 3.
>
> (1) In this Act, except where when the context otherwise requires—
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> "appealable decision" means an objection decision and any other decision made under a tax law other than—
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> (a) a tax decision; or
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> (b) a decision made in the course of making a tax decision."

40. In this case, I note that the Tribunal struck out the Appellant Appeal thereat on the basis that a copy of the appealable decision (Objection decision was not submitted to the Tribunal by the Appellant as required under Section 13 (2) of the *Tax Appeals Tribunal Act*.

41. From the Judgment of the Tribunal, I note that the reasoning of the Honourable Tribunal was that the term "shall" as appearing under Section 13 (2) or the TAT Act makes it mandatory for an appellant to submit the documents enumerated under the section of the Act and that the failure to comply is fatal to the Appeal.

42. While this court agrees with the Tribunal that an 'appealable decision' is central in an appeal to the Tribunal, I do not think the failure by an Appellant to attach a copy of an appealable decision to an appeal should automatically result into the appeal being struck out, particularly where the contents of the appealable decision has been pleaded by both the taxpayer and the Commissioner, as was the case herein.

43. Further, this court of the view that the use of the word "shall" does not always mean that an act is obligatory or mandatory in nature. It is imperative that in construing statutes, any interpretation that is likely to lead to an absurd result or injustice to any of the parties must always be avoided. see the case of Henry N Gichuru vs. the Minister for Health the Kenyatta National Hospital Board [2002] eKLR where the Court stated that; -

> " In looking for the meaning of the word "shall" and give it its proper construction, a judicial mind must take into account the purpose for which the relevant provision is made and its nature, considered in its setting, the connected provisions and other similar matters, the serious general inconvenience or injustice to person resulting from reading the provisions as directory or mandatory, where the cause of justice is promoted or retarded as a consequence of construing the provision one way or the other.
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> No general rule running in fixed grooves is either possible or desirable to be prescribed, and indeed each case depends on the object sought to be achieved by the lawmaker. Not being rigid and fixed, the construction of the word "shall" in a given statute must be adapted to the fitness of the matter the subject of the statutory provision being considered: Yamin v Mohammad, AIR 1968 Delhi 149. The use of the word "shall" in a statutory rule is not finally determinative of a particular direction in a law being mandatory, and there have been occasions when it has been held that, though the word "shall" has been used in a legislative enactment, the direction given by the law-making authority is only meant to be directory; and, also, that it may be qualified by different circumstances, such as by a reference to the object of the legislation, or regard being had to the punctuation of the provision or the other significant words around it."

44. From the above and taking into account that Tribunals are by their very nature expected to be flexible and adaptable in their procedures and that the overarching policy of the Tax Appeals Tribunal, like all the other Tribunals, is to deliver substantive justice and not to be unduly tied to procedural technicalities. This explains why in such Tribunals, as was the case herein, persons who are not qualified as Advocates are permitted to appear and represent parties.

45. From the proceedings at the Tribunal, it is clear that the Appellant was represented by a tax agent, a person not qualified in law. It would occasion great injustice to the Appellant if its appeal against the Commissioner's decision (Assessment) were not to be addressed on merits. In any event, I note that the Commissioner was also obliged under Section 15 (1) (b) of the *Tax Appeals Tribunal Act* to file a copy of the Objection Decision with the Tribunal.

46. It is settled law that rules of procedure are intended to serve as the handmaidens of justice and not to defeat it. I fully associate with the decision in Henry N Gichuru vs. the Minister for Health the Kenyatta National Hospital Board (supra), where the court stated a complaint or objection based on

procedural transgressions would only be upheld where such a transgression would result in injustice, hardship, or prejudice to a party objecting. The Court stated that; -

> "If the court is satisfied that the effect of the rule concerned, construed in a particular way would result in injustice, then sections 3A and 81 say that it should not be construed in such a manner. Any rule that purports to take away the inherent jurisdiction of the courts to do justice or to prevent abuse of the process of the court will normally not be upheld, and it must be looked at very carefully before it is construed in such a manner: Sir Charles Newbold, P, in Rawal v. Mombasa Hardware, Ltd [1968] EA 392, at 394.
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> This is because Rules do not purport to be exhaustive: In re Keshavlal Punja Parbat Shah (1955), 22 EACA 381; Abdalla Mohamed v Ahmed bin Salam Makharran, (1956), 23 EACA 260. As it has been repeatedly said, the Rules of procedure are intended to serve as the handmaidens of justice, not to defeat it: Iron & Steelwares, Ltd v C W Martyr & Co (1956), 23 EACA 175; and a pathological attachment to technicality without enquiring into the essence and purpose of a rule can only work injustice. Procedural rules are not for fetishism; they are for justice. A complaint about ordinary procedure makes sense only where a transgression would be productive of injustice and undeserved hardship or prejudice."

47. In the instant case, I am of the view that no prejudice or injustice will be suffered by the Respondent in having the Commissioner's Objection Decision/Invalidation Notice of 20th January 2022 placed before the Tribunal for consideration on merits. In fact, none was raised by the Respondent, either at the Tribunal or in this appeal. On the contrary, the failure by the Tribunal to consider whether or not the Commissioner's invalidation notice was properly issued is likely to occasion significant injustice to the Appellant, particularly, if the Tribunal were to make a finding that the documents supplied by the taxpayer (Appellant) could to some degree (even if not fully), explain the Appellant's position in respect of the Commissioner's tax Assessment.

48. Concerning the Appellant's argument that the issue of validity of Appeal was not a matter placed before the Tribunal for consideration, I find that this cannot be the correct position in law. The Tribunal in the exercise of its inherent powers still had the authority to examine, suo moto, whether or not the Appeal was competently before it. However, as indicated in the preceding paragraphs of this Judgment, in exercising that inherent jurisdiction, the Tribunal must always be guided by the overarching policy considerations behind the establishment of Tribunals, that is, the need to deliver substantive justice to parties without undue regard to procedural technicalities.

49. In the circumstances, I find the appeal meritorious and allow the same. Consequently, I remit the matter back to the Tribunal with the direction that the Commissioner's Invalidation Notice of 20th January 2022 be placed in the record of Appeal by the Respondent under Section 15 (1) (b) of the Tax Appeals Tribunal and that the Appellant's memorandum of appeal dated 4th March 2022 to the Tribunal be considered on merits, taking into account the Commissioner's said Invalidation Notice.

50. Due to the age of the Appeal, I direct that the appeal be heard by the Tribunal on a priority basis.

51. I note that this appeal was necessitated by the Appellant's failure to comply with the requirements of Section 13 (2) of the *Tax Appeals Tribunal Act*, consequently, I will not award any costs to the Appellant despite the appeal having been decided in its favour.

52. It is so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 28TH DAY OF NOVEMBER 2024

ADO MOSES

JUDGE

In the presence of:

Moses – Court Assistant