



**Commissioner of Investigations & Enforcement v Jiang (Income Tax Appeal E036 of 2021)
[2023] KEHC 21181 (KLR) (Commercial and Tax) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21181 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E036 OF 2021**

A MABEYA, J

JULY 28, 2023

BETWEEN

COMMISSIONER OF INVESTIGATIONS & ENFORCEMENT APPELLANT

AND

QINQXIA JIANG RESPONDENT

JUDGMENT

(Being an appeal from the decision of the Tax Appeals Tribunal dated April 1, 2021)

1. The facts leading up to this appeal are that, the appellant invited the directors of Nippo Suppliers Limited (Nippo) for a meeting and requested for documents under section 59 of the [Tax Procedures Act](#). The directors were further invited for another meeting in order to ascertain the affairs of the company.
2. By a letter dated March 7, 2019 addressed to the directors of NIPPO, the appellant made a demand of Kshs 405,369,279/- for Corporation Tax and vat of Kshs 394,369,523/-. In the same demand, the appellant made a demand from the respondent of Kshs 231,270,228/- as income tax and Kshs 83,012,778/- for vat.
3. By a letter dated April 4, 2019, Nippo objected to the assessment and indicated that it could not comment on the bankings that had been made to the respondent's private account. The appellant thereupon issued an objection decision to the respondent on May 31, 2019 confirming the taxes. Dissatisfied with the objection decision, the respondent filed an appeal before the Tax Appeals Tribunal ("the Tribunal") which was upheld on April 1, 2021.
4. Aggrieved by that decision, the appellant has lodged this appeal vide a Memorandum of Appeal dated May 4, 2021 setting out 4 grounds of appeal that:



- a. The Tribunal erred in law and in fact in finding that the appellant's letter dated March 7, 2019 was not properly served on the respondent
 - b. The Tribunal erred in law and in fact in deciding on an issue of service which was not a ground of appeal.
 - c. The Tribunal erred in law and in fact in failing to consider sections 78 and 79 of the [Tax Procedures Act](#) No 29 of 2015.
 - d. The Tribunal erred in law and in fact in finding that the appellant's objection decision dated May 31, 2019 was null and void ab-initio.
5. In response to the appeal, the respondent filed a statement of facts dated May 20, 2021. The respondent's contention was that the appellant had a meeting with the directors of Nippo on December 11, 2018 and requested for documents as required by section 59 of the [Tax Procedures Act](#) ("the TPA").
 6. The parties had another meeting on December 20, 2018 where more documents were requested for which included the audited accounts and the bank statements for both Nippo and the directors. That the appellant did not involve the respondent in the said meetings and was not asked to provide any documents.
 7. The respondent stated that she was summoned to the appellant's office and coerced to make a statement and assessments were made for both the respondent and Nippo. That Nippo objected to the assessment and thereafter the appellant issued an objection decision to the respondent despite there being no assessment on her.
 8. The appeal was canvassed by way of written submissions which I have considered.
 9. The appellant submitted that the respondent was a daughter to the directors of Nippo and she worked there as a manager. It was on this basis that the appellant claims to have served the respondent and therefore the respondent could not state that she was unaware of the demand letter served on Nippo.
 10. Counsel further submitted that the issue of service was not among the respondent's grounds of appeal and therefore the Tribunal erred in pronouncing itself on that issue. It was further submitted that the Tribunal did not consider section 78 of the [TPA](#) which provides that the notice of assessment would not be invalidated by any mistake, defect or omission. According to the appellant, the Tribunal ought to have considered the notice of assessment as valid despite the respondent's address being omitted.
 11. On her part, the respondent submitted that the issue of service came up during the trial and the parties had sufficiently addressed themselves on the same. Counsel submitted that the issue of service was not new to the parties as it emerged early in the pleadings and parties had an opportunity to submit on it. With respect to sections 78 and 79 of the [TPA](#), the respondent submitted that the said provisions were only applicable to assessments made to a tax payer which was different to the present case where no assessment had been made on the respondent.
 12. Counsel further submitted that the subject for the assessment was Nippo and it being a different entity from the respondent, no valid assessment was issued with respect to the respondent. It was further submitted that an objection decision could only be issued when an objection had been raised. Since there was none in this case, the objection decision raised against the respondent was null and void.
 13. I have considered the record of appeal, the statement of facts and the submissions by Learned Counsel. The first ground of appeal is that the Tribunal erred in finding that the appellant's letter of March 7,



- 2019 was not properly served on the respondent. The appellant's position was that the respondent was duly served with the letter of March 7, 2019. According to him, the respondent being a manager at Nippo, she was procedurally and properly served.
14. The respondent's position was that the appellant's failure to serve her with the letter of demand denied her an opportunity to ascertain the case against her and as a result violated her constitutional right to procedural fairness. Further that, the assessment was served upon the company and not herself.
 15. It is not in dispute that the letter dated March 7, 2019 was addressed to the directors of Nippo and not the respondent. What is in issue is whether service on the directors of Nippo could be deemed to be service on the respondent by virtue of her being a manager and the daughter of the directors of Nippo.
 16. With regard to service, section 74 of the TPA provides: -
 - “(1) Except as otherwise provided in a tax law, a notice or other document required to be served on, or given to, a person by the Commissioner under a tax law may be served or given by—
 - (a) delivering it to the person or the person's tax representative;
 - (b) leaving it at, or sending it by post to, the person's usual or last known place of business or residence; or
 - (c) transmitting it in electronic form.
 - (2) When a person—
 - (a) refuses to accept delivery of a letter addressed to him or her; or
 - (b) fails to collect a letter after being informed that the letter is available for collection at a post office;
 - (c) the letter shall be treated as having been delivered to the person on the date on which that person refused to accept delivery of the letter or was informed that the letter was at the post office.
 - (3) The validity of service of a notice or other document shall not be challenged by a person who complies wholly or partly with the notice or document.
 - (4) In this section, "tax representative", in relation to a taxpayer, shall include the tax agent of the taxpayer.”
 17. From the foregoing, it is clear that in its wisdom, the Legislature made a detailed procedure as to service. This is because any failure on the part of the tax payer to respond to a notice by the Commissioner has grave financial consequences that can lead to deprivation of property.
 18. In this case, the notice itself shows that it was addressed to and served upon the directors of Nippo and not the respondent. The name of the respondent only appeared in the middle of the notice. In this regard, it is doubtful if it can be safely stated that the notice of demand was served upon the respondent. In any event, it was not addressed to her.
 19. Further, the principle of corporate personality is well known. A company is an independent legal person from the subscribers and the directors, leave alone the children of such directors of whom the respondent is said to be one.



20. Therefore, it cannot be said that the respondent was properly served or served at all in this case. As stated, section 74 of the TPA does not favour the appellant. Service of the demand notice was meant to afford the respondent an opportunity to defend her position on the case raised against her.
21. In this case, I agree with the Tribunal that the respondent and Nippo were two separate persons and it was wrong for the appellant to mix up different tax payers in the same demand notice without specifying and/or addressing them separately. The first ground fails.
22. The second ground was that the Tribunal erred in deciding an issue of service despite it not being a ground of appeal. Having perused the Memorandum of Appeal that was before the Tribunal, it is clear that the respondent's case was premised on the fact that the assessment and demand was made against Nippo and not herself. In this regard, it was incumbent upon the Tribunal to establish whether any demand was made on her and how it was communicated. Service was at the centre of the appeal before the Tribunal and I see no error on the part of the Tribunal in addressing the issue. That ground also fails.
23. The third ground is whether the Tribunal erred in failing to consider sections 78 and 79 of the TPA. Section 78 provides:
 - “(1) When a notice of assessment or any other document purporting to be made, issued, or executed under a tax law is, in substance and effect, in conformity with, is consistent with the intent and meaning of, the tax law under which it has been made and the person assessed, intended to be assessed, or affected by the document, is designated in it according to common intent and understanding—
 - a. the validity of the notice of assessment or other document is not affected by reason that any of the provisions of the tax law under which it has been made or issued have not been complied with;
 - b. the notice of assessment or other document shall not be quashed or deemed to be void or voidable for want of form; and
 - c. the notice of assessment or other document shall not be affected by reason of any mistake, defect, or omission therein.
 - (2) An assessment shall not be impeached or affected by reason of a mistake in the assessment as to—
 - (a) the name of the person assessed;
 - (b) the description of any income, supply, or removal; or
 - (c) the amount of tax charged; or
 - (d) any variance between the assessment and the duly served notice of the assessment that is not likely to deceive or mislead a person affected by the assessment.
79. When a notice of an assessment or other document served by the Commissioner under a tax law contains a mistake that is apparent from the record and the mistake does not involve a dispute as to the interpretation of the law or facts of the case, the Commissioner may, for the purposes of rectifying the mistake, amend the assessment or document any time before the expiry



of five years of the date of service of the notice of the assessment or other document.”

24. The appellant submitted that omitting to include the respondent’s address of service on the notice of assessment did not invalidate the notice. My take is that, the notice of March 7, 2019 was clearly addressed to the directors of Nippo. It was not addressed to the respondent. Failure to include the respondent’s name on the address meant that the notice was for Nippo. The assessment of the tax for the respondent in the body of the notice to the directors of Nippo cannot be said to be a mistake curable under section 78 of the *TPA*.
25. It therefore goes without say that the letter of March 7, 2019 was only a notice to the directors of Nippo and not the respondent. The tax assessment notice gives the taxpayer an overview of the tax expected from him/her and gives him/her an opportunity to file an objection. Failure to address the respondent meant that she was denied an opportunity to be heard and present her case. Accordingly, the Tribunal was not in error on this also.
26. On the final ground as to whether the Tribunal was in error in declaring the appellant’s objection decision of May 31, 2019 null and void, nothing could be far from the truth. The law is clear. Section 51 of the *Tax Procedures Act* provides an elaborate procedure where there is an objection to a tax demand.
27. When the process is flawed, justice cannot be said to be upheld in such a scenario. There having been no tax demand on the respondent, she could not and did not raise any objection within 30 days. There can be no objection decision without an objection. Accordingly, the Tribunal was right in holding the objection decision as null and void as it was not based on any objection as required by law.
28. For the foregoing reasons, I find the appeal to be without merit and dismiss the same with costs. The judgment of the Tribunal dated April 1, 2021 is hereby upheld.

It is so decreed.

DATED and **DELIVERED** at Nairobi this 28th day of July, 2023.

A. MABEYA, FCIArb

JUDGE

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