



**Commissioner of Domestic Taxes v Ibangua Investments Co. Ltd (Tax Appeal E093 of 2023)
[2023] KEHC 26013 (KLR) (Commercial and Tax) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26013 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
TAX APPEAL E093 OF 2023
DAS MAJANJA, J
NOVEMBER 30, 2023**

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

IBANGUA INVESTMENTS CO. LTD RESPONDENT

*(Being an appeal against the judgment of the Tax Appeals Tribunal
at Nairobi dated 20th April 2022 in Tax Appeal No. 207 of 2022)*

JUDGMENT

Introduction and Background

1. Before the court for determination is an appeal by the Appellant (“the Commissioner”) against the decision of Tax Appeals Tribunal (“the Tribunal”) dated 20.04.2023. The appeal is premised on the following grounds contained in the amended Memorandum of Appeal:
 1. The Honourable Tribunal erred in fact and law by failing to objectively examine the parties’ pleadings and issues raised therein. The Respondent did not allude themselves to the issue of timelines in the trial court, subsequently the Appellant did not have an opportunity to substantively address the issue thus being condemned unheard.
 2. The Honourable Tribunal erred in fact and law by failing to appreciate that whereas the Objection was lodged on 24 July, 2021 there was no valid objection within the provisions of Section 51(3) until 29th November, 2021
 3. The Honorable Tribunal erred in fact and law by solely relying on the Respondent’s letter dated 18th August, 2021 in its computation of time.



4. The Honorable Tribunal erred in fact and law failing to appreciate Appellant could not have commenced the objection until a valid objection is lodged.
 5. The Honourable Tribunal erred in law and in fact by failing to appreciate that the Objection decision made on 28th January, 2623 2022 was made within statutory timelines.
 6. The Honorable Tribunal erred in fact and law failing consider the Respondent's Objection as well as the Appellant's Objection Decision thereon before arriving at its findings
 7. The Honorable Tribunal erred in law and fact in not making a decision on the merits of the case before it and only opted to rely on a procedural issue, which it also based on miss-appreciation of the principles of tax law, particularly the provisions of section 51 of the [Tax Procedures Act](#).
2. Based on these grounds outlined above, the Commissioner prays that the appeal be allowed and the court find that the Objection Decision dated 28.01.2022 ("the Objection Decision") was issued within the prescribed timelines. It further urges that the court directs the Tribunal to consider the appeal on merits. The appeal has been canvassed by way of written submissions which are on record.
 3. The background and facts leading to the appeal can be gleaned from the record. The Respondent's ("the Company") principal business is the distribution of beer and alcoholic spirits for Kenya Breweries Limited and UDV Kenya Limited. By a letter dated 08.12.2020, the Commissioner evinced its intention to conduct an audit of the Respondent's tax affairs for the period 2017-2019. Thereafter on 24.06.2021, the Commissioner raised additional assessments of Kshs. 97,384,343.00 and 2,092,644.00 in respect of VAT and Corporation Tax respectively, bringing the Respondent's total tax liability to Kshs. 99,476,987.00.
 4. The Company lodged an objection on 22.07.2021("the Objection"). On 12.08.2021, the Commissioner wrote an email to the Company requiring it to provide supporting documents in line with the Objection and the amendments required to be made to those assessments by 19.08.2021. The Company responded to the Commissioner's email through its letter of 18.08.2021 stating that its principal shareholder and who was also the Executive Director Hon. Peter Gichohi Muriithi passed away on 03.08.2021 and that the family required time to recover and settle from the shock of his death and appoint another Executive Director to deal with the day to day activities of the Company including tax matters. The Company therefore requested for 60 more days to produce the documents sought by the Commissioner. The Commissioner then informed the Company that it would consider the request by 23.08.2021. On 24.08.2021, the Commissioner informed that the Company that it had allowed it 30 days from the said date to avail the documents noting that the Commissioner was required to conclude objections within the set timelines in accordance with section 51 of the [Tax Procedures Act](#), 2015 ("the TPA").
 5. The Commissioner made a follow up email on 24.09.2021 stating that the time allowed had since lapsed and that the Objection was still not valid as required under section 51 of the TPA. To this end, the Company was required to provide the following to support the objection; Sales invoices and receipts, Bank statements, Audited financial statements and Credit notes. That these were to be provided for the period January 2016 to December 2020, and not later than 27.09.2021 failure to which the Objection would be invalidated.
 6. Between September and November 2021, the Company forwarded sale tax invoices for the year 2019, bank statements for the period between December 2016 and December 2019 and; audited accounts for the periods 2017,2018 and 2019. The Company promised to follow through with the audited accounts for the years 2016 and 2020 which the Commissioner urged the Company to avail them by 03.12.2021 together with the general ledgers. On 11.01.2022, the Commissioner made a



further follow up on the general ledgers sought and informed the Company that should it fail to provide them by 13.01.2022, it would proceed to issue a decision based on information provided. The Company responded on 14.01.2022 by stating that it is “doing everything possible to acquire/ retrieve the documents requested” and it was doing everything to comply as its Executive Director who was running the Company personally had passed away in August, 2021. The Company requested for about a week to enable it obtain the documents sought and close the matter as soon as possible. On 28.01.2022, the Commissioner rendered the Objection Decision where the Objection was fully rejected and the initial additional assessments totalling Kshs. 99,476,987.00 confirmed.

7. Aggrieved, the Respondent lodged an appeal with the Tribunal which after considering the pleadings and submissions of the parties, rendered a judgment on 20.04.2023. The Tribunal framed two issues for determination; Whether the Objection Decision was valid and whether the Commissioner’s tax assessment was justified. On the validity of the Objection Decision, the Tribunal held that under section 51(11) of the TPA, the Objection Decision ought to have been issued on or before the 21.09.2021 and that the only exemption to this rule would have occurred if there were intervening actions that fell within the remit of section 51(11) (b) of the TPA. That section 51(11) (b) of the TPA intervenes and kickstarts the statutory timelines from the time the requested documents are provided and it is in these circumstances that the Commissioner would justify its reason for not issuing the Objection Decision on time.
8. The Tribunal found that in this matter, the Objection decision was issued 130 days after its ordinary due date from the date of receipt of the Objection and that from the Company’s letter of 18.08.2021, it had sought more time to avail the requested documents. However, the Tribunal noted that there was no evidence to show that the Commissioner conceded to this request and that even if the Commissioner would have conceded to this request, then the timelines arising thereof would work out as follows:
 - a. The Company’s requested deadline for submission of documents as a result of this intervening action would have been on the 18.10.2021
 - b. The Commissioner’s deadline for issuing an Objection decision within 60 days would have lapsed on or before the 17.12.2021 and that even from the foregoing arguments, the Objection decision would have still been late by about 42 days.
9. The Tribunal relied on the court’s decision in Equity Group Holdings Limited v Commissioner of Domestic Taxes [2021] KEHC 25 (KLR) and the above chronology of events to find and hold that the Objection Decision was issued beyond the prescribed statutory time limit. That it is invalid for reasons that it has breached the mandatory provisions of section 51(11) of the TPA which is couched in peremptory terms.
10. Having held that the Objection Decision is a nullity, the Tribunal found that the Objection was deemed to have been allowed and in the circumstances, the determination of the issue of whether the Commissioner’s tax assessment of Kshs 99,476,987.00 was justified was rendered moot. The Respondent’s appeal thus succeeded and the Objection Decision was set aside.
11. It is this decision that has led to the filing of the instant appeal and to which I now turn in my analysis and determination below.

Analysis and Determination

12. In determining this appeal, I am cognizant of the fact that this court is exercising appellate jurisdiction that is circumscribed by section 56(2) of the TPA which provides that “An appeal to the High Court or to the Court of Appeal shall be on a question of law only”. This means that an appeal limited



- to matters of law does not permit the appellate court to substitute the Tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts (See *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR)
13. In its submissions, the Commissioner has collapsed the 7 grounds in its amended memorandum of appeal into two issues for the court's determination; whether the Tribunal erred in fact and law by failing to objectively examine the parties' pleadings and issues raised therein and whether the Tribunal erred in its finding that the Objection Decision was made beyond the statutory period prescribed in section 51 (11) of the TPA and thus the Objection was deemed allowed by operation of the law.
 14. On the first issue, the Commissioner submits that from the Respondent's pleadings filed before the Tribunal, the Respondent did not allude to the issue of timelines and that the Tribunal delved into a case not raised by either parties. That subsequently, the Commissioner did not have an opportunity to substantively address the issue thus being condemned unheard. The Commissioner submits that had this particular issue been pleaded by the Respondent, it would have had an explanation by way of documentary evidence that the Objection Decision was issued within timelines.
 15. In response, the Respondent submits that the Tribunal, while making determination on the issue of timelines did so having interrogated all of the pleadings before it since the question whether an objection decision is valid is a question of Law and touches on the jurisdiction of the Tribunal to the extent that whenever the Tribunal finds that an objection decision was made outside the 60-day period, it has to down its tools and could not proceed to determine the merits of the appeal. The Respondent submits that it raised the issue of timelines at para. 2 of its submissions dated 12.11.2022 filed before the Tribunal and that the Commissioner had an opportunity to respond to that aspect of the but chose not to.
 16. Having gone through the Respondent's pleadings, that is the Memorandum of Appeal and its statement of facts filed before the Tribunal, and as has been impliedly admitted by the Respondent, the issue of whether the Objection Decision was valid was never pleaded by Respondent. Whereas the Respondent states that the issue of the timeline of the Objection Decision was aired out in its submissions, submissions are not pleadings but the parties' "marketing language" and that parties are bound by their pleadings (see *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another NRB CA Civil Appeal No. 240 of 2011* [2014] eKLR and *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others NRB CA Civil Appeal No.219 of 2013* [2014] eKLR).
 17. In an appeal, the pleadings are the Memorandum of Appeal and Statement of Facts which define the issue the Tribunal is to consider. In its Memorandum of Appeal filed at the Tribunal dated 25.02.2022, the Respondent complaint was that the Objection Decision was based on lack of supporting documents and that the Commissioner refused to give the Respondent adequate time to trace the documents. It stated that the Respondent was tracing the documents and was willing to present them. It prayed that, "the Tax Appeals Tribunal to direct that the Respondent to issue amended assessments in accordance with supporting documents and explanations provided by our client." It is therefore clear that the issue of the delay in issuing the Objection Decision was not pleaded as a basis for the appeal before the Tribunal.
 18. The issue of non-compliance with section 51(11) of the TPA was raised by the Respondent in its submissions before the Tribunal. While nothing prevented the Commissioner from seeking leave of the Tribunal and filing supplementary submissions to counter this submission by the Commissioner, section 56(3) of the TPA provides that, "In an appeal by a taxpayer to the Tribunal, High Court or Court of Appeal in relation to an appealable decision, the taxpayer shall rely on the grounds stated in



the objection to which the decision relates unless the Tribunal or Court allows the person to add new grounds.” The Tribunal therefore had an obligation to inform the Commissioner that it intended to consider a ground that had not been raised in the Memorandum of Appeal or Statements of Facts. Even if the issue concerned jurisdiction, the party adversely affected had the right to be heard and to put its position forward as provided by section 26 of the Tax Appeal Tribunal Act which requires the Tribunal to ensure that the parties have the opportunity to put their case forward

Conclusion and Disposition

19. At the end of the day and looking at the Commissioner’s submissions before the Tribunal, I am doubtful whether it was afforded a full opportunity to present its position. I therefore allow the appeal and set aside the judgment of the Tribunal.
20. I direct the matter be placed before the Tribunal to determine the issue of the validity of the Objection Decision raised by the Respondent.
21. Each party shall bear its own costs.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT 30TH THIS DAY OF NOVEMBER 2023.

A. MABEYA

JUDGE

