Commissioner of Investigations & Enforcement v Unique Enterprises Limited (Income Tax Appeal E111 of 2020) [2022] KEHC 281 (KLR) (Commercial and Tax) (31 March 2022) (Judgment)

Neutral citation: [2022] KEHC 281 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E111 OF 2020

WA OKWANY, J

MARCH 31, 2022

BETWEEN

COMMISSIONER OF INVESTIGATIONS & ENFORCEMENT ..... APPELLANT

AND

UNIQUE ENTERPRISES LIMITED ..... RESPONDENT

((Being an Appeal from the Judgment of the Tax Appeals Tribunal at Nairobi delivered by Honourable Tribunal on 28th August, 2020 in Tax Appeals Tribunal Appeal Number 140 of 2018))

JUDGMENT

Background

1. The appellant herein, the Commissioner of Investigations & Enforcement (the Commissioner), is the commission appointed under Section 3 of the *Kenya Revenue Authority Act* and mandated under section 5 of the said Act with the responsibility of assessing, collecting, accounting and the general administration of tax revenue on behalf of the Government of Kenya. The Commissioner/Appellant issued the respondent with a demand letter dated letter dated 13th April 2018 demanding Kshs. 25,569,731 being input VAT of Kshs. 8,893,819 and Corporation Tax 16,671,995.

2. The respondent objected to the assessment through its letter dated 20th May 2018 wherein it provided an explanation and documents to support its objection as required under section 51 of the Tax Procedure Act.

3. The Appellant nonetheless rendered its decision on 4th July 2018, confirming the principal VAT amount of Kes 8,893,819 together with penalties and interest thus precipitating the respondent's

appeal to Tax Appeals Tribunal (the Tribunal) in Income Tax Tribunal (Nairobi) Case No. 140 of 2018.

4. The Tribunal heard the appeal on 5th February 2020 and rendered its verdict on 28th August 2020 wherein it held, inter alia, that: -

    a. The Respondent provided sufficient proof of purchase of goods by providing the documents detailing the transactions as provided under Section 17 of the VAT Act, 2013.

    b. The Respondent's right to claim input VAT cannot be affected by the presence of fraud in the supply chain unless it shown that it had knowledge of fraudulent acts of its suppliers.

    (c) The Appellant fell short of establishing a case that the Respondent knew or ought to have known about the fraud.

The Appeal

5. The appellant was dissatisfied with the judgment of the Tribunal and lodged the present appeal through the Memorandum of Appeal dated 29th October,2020 setting out the following grounds of Appeal: -

    a. That the Honourable Tribunal erred in fact and in law in shifting the burden of proof to the Appellant contrary to Section 30 of the *Tax Appeals Tribunal Act*, 2013 and Section 56(1) of the *Tax Procedures Act*, 2015.

    b. That the Honourable Tribunal erred in law in reading Section 17 of the *Value Added Tax Act*, 2013 in isolation while ignoring the other relevant tax provisions.

    c. That the Honourable Tribunal erred in law and in fact, in failing to find that, the Appellant has the powers to raise additional assessments based on the available information.

    d. That the Honourable Tribunal erred in law and fact by shifting the burden of proof to the Appellant to prove the source of the Respondent's income contrary to express provisions of Section 56(1) of the *Tax Procedures Act*, 2015 and Section 30 of the *Tax Appeals Tribunal Act*, 2013.

    e. That the Honourable Tribunal erred in law and in fact in failing to find that the Respondent had failed to avail the documentation to the dispute over the additional Value Added Tax assessments as required under Section 59 of the *Tax Procedures Act*, 2015.

    f. That the Honourable Tribunal erred in law and in fact in failing to give due regard to Section 43 of the *Value Added Tax Act*, 2013 which requires the Respondent to keep records for a period of 5 years.

    g. That the Honourable Tribunal erred in law and in fact in allowing the Appellant to produce the cashbook ledger which was never availed at the assessment and objection stage.

h. That the Honourable Tribunal erred in law and fact in failing to consider the evidence and submissions tendered by the Appellant;

i. That the Honourable Tribunal misapplied the law and facts and by ignoring all materials facts placed before it and based its judgement on a biased approach without due regard to the balance of the scales of justice.

6. The Respondent filed its response to the appeal through the Statement of Facts dated 25th January, 2021 wherein it states: -

a. The Appellant's description of the "missing trader fraud" tends to suggest a clear case of criminal fraud which the Tribunal had no jurisdiction in the first case. The Appellant contends that the Respondent did not purchase any goods and sought to benefit from the scheme established.

b. It is not factual that the suppliers did not exist because they supplied the items to the Respondent, issued invoices/ delivery notes and received payments, majority of the payments were done through bank transfers directly to the listed bank accounts.

c. The Respondent made adequate responses and availed the relevant documentation in satisfaction to the Appellant's enquiries. The Appellant however, still elected to render its decision to issue a confirmation decision excessive and overstated assessment.

d. The Appellant had not established proof of the Respondent having been a beneficiary of a fraudulent scheme. In fact, we invite this Honourable Court to note that the Appellant did not produce the investigation report into the alleged fraud despite making numerous averments about an alleged report.

e. This is a clear case of the Appellant seeking to penalize the Respondent for non- compliance of its suppliers without a basis in law. Further to the foregoing, nowhere under the *Tax Procedures Act* would the Respondent herein be required to provide details of the suppliers who the Appellant had fronted, accepted and registered as their agents for VAT purposes.

f. The grounds of appeal relied upon by the Appellant fail to address on the substantive issues raised by the Respondent at the Tax Appeals Tribunal that clearly formed the ratio decidendi as explained by the tribunal in its judgement. All the grounds relied upon by the Appellant touch on technicalities surrounding this dispute and, as such, should not be allowed to subvert substantive justice sought by the Respondent herein

Submissions

Appellant's Submissions

7. Pursuant to this court's directions, parties filed their respective written submissions in respect of the Appeal. In its written submissions dated 8th March 2021, the Appellant reiterated its submissions before the Tribunal and highlighted the issues for determination to be as follows:

a. Whether the Tribunal erred in shifting the burden of proof to the Appellant?

b. Whether the Tribunal ignored relevant tax provisions in arriving at its finding on documentation?

c. Whether the Tribunal erred in allowing the Respondent to produce a cashbook ledger after the hearing had closed.

d. Whether the Tribunal ignored the evidence and the submissions of the Appellant in arriving at its judgement?

8. The Appellant submitted that the Tribunal erred in law in shifting the burden of proof to the Appellant contrary to the express provisions of the law that places the burden of proof on the Respondent. For this argument, the Appellant relied on the decision in *Metcash Trading Limited vs Commissioner for the South African Revenue Service and Another* (CCT3/00) [2000] ZACC 21; 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC) where it was held that: -

> " But the burden of proving the Commissioner wrong then rests on the vendor under section 37. Because VAT is inherently a system of self-assessment based on a vendor's own records, it is obvious that the incidence of this onus can have a decisive effect on the outcome of an objection or appeal. Unlike income tax, where assessments can elicit genuine differences of opinion about accounting practice, legal interpretations or the like, in the case of a VAT assessment there must invariably have been an adverse credibility finding by the Commissioner; and by like token, such a finding would usually have entailed a rejection of the truth of the vendor's records, returns and averments relating thereto. Consequently, the discharge of the onus is a most formidable hurdle facing a VAT vendor who is aggrieved by an assessment: unless the Commissioner's precipitating credibility finding can be shown to be wrong, the consequential assessment must stand. '

9. Reference was also made to the decision in *Mulherin vs Commissioner of Taxation* [2013] FCAFC115 where 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 court further held that onus is on the taxpayer to prove that the assessment was excessive by adducing positive evidence to show the taxable income.

10. The Appellant submitted that the Tribunal failed to read the tax statute as a whole and selectively applied and/or interpreted one tax provision while ignoring other applicable tax provisions in the same statute being the *Value Added Tax Act*, 2013.

11. The Appellant also faulted the Tribunal for allowing the Respondent to produce a cashbook ledger after the close of pleadings without any amendment to its Memorandum of Appeal and Statement of Facts contrary to the basic rules governing pleadings. The Appellant relied on the decision in *Dakianga Distributors (K) Ltd Kenya Seed Company Limited* [2015] eKLR where the Court of Appeal stated as follows: -

> " Sir Jack Jacob in an article entitled "The Present Importance of Pleadings' published in (1960) Current Legal Problems and which article was quoted with approval by the Supreme Court of Malawi in *Railways Limited v Nyasulu* [1998] MWSC 3 states of the importance of pleadings:
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> > " As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to

raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is not part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

12. The Appellant observed that the Respondent did not avail the Cash Ledger at the objection stage in its objection letter dated 20th May, 2018 but only produced it before the Tribunal at the request of the Tribunal. The Appellant therefore contended that the Tribunal erred in law and in fact in allowing the Respondent to produce the Cash Ledger when the pleadings had closed and the hearing concluded at a point when the Appellant could not interrogate the documents and give a rebuttal.

13. The Appellant submitted that the Tribunal ignored the Appellant's evidence and submissions to the effect that there was no delivery accompanying the invoices tabulated in the demand notice of 13th April 2018.

The Respondent's Submissions

14. The respondent submitted that the burden of proving the allegations of fraudulent evasion of VAT, either by the 'missing trader' or beneficiary rested on Appellant. It was the respondent's case that since the notice of assessment was based on the allegation of fraud, the Appellant was required to not only particularize the alleged fraud but also to prove it failure of which the appeal would suffer from legal infirmity and must fail.

15. The respondent argued that the Tribunal correctly observed that the Respondent had discharged its obligation of proving that there was a purchase by providing invoices and proof of payments for the supplies. Reference was made to the decision in *John Mbogua Getao vs Simon Parkoyiet Mokare & 4 others* [2017] eKLR, where it was held that: -

> " Allegations of fraud whether in a Constitutional Petition or in an ordinary civil suit had to be specifically pleaded and proved. That in a suit anchored on fraud, the acts of fraud must be particularized with precision and sufficiency."

16. The Respondent submitted that it undertook due diligence regarding its transactions and added that the minimum due diligence that a reasonable taxpayer should conduct to verify the integrity of their suppliers was limited to establishing the following: -

    i. That they have a valid tax Invoice as defined by the VAT regulations, 1994.

ii. Secure an ETR receipt showing the Name and PIN of the Supplier.

iii. Conducting a successful PIN Checker on the I-tax portal.

iv. Received the Physical goods and making the payment directly to supplier through known legal means.

v. Successful claim Input VAT in the monthly VAT return through I-Tax.

17. The Respondent maintained that since the Appellant's allegation that the Respondent was a 'Beneficiary of a fraudulent scheme to evade payment of VAT was based on the Appellant's 'Investigation Report', the said report should have been availed before the Tribunal to enable it make its own assessment and conclusions to determine whether the finding was reasonable. In effect, the Respondent faulted the Appellant for failing to furnish the Tribunal with the Investigation Report. For this argument, the respondent cited the decision in *Samura Engineering Limited & 10 others vs Kenya Revenue Authority* [2012] eKLR, where it was held: -

> " The replying affidavit of Ms Doreen Mbingi sworn on 2nd June 2011 alluded to a business intelligence report which formed the basis of the search and seizure. What was disclosed to the court were certain salient facts and conclusions which I have set out at paragraph 31 above. Since a warrantless search and seizure is a limitation to the right of privacy, the facts forming the basis of the suspicion must be laid before the court for it to conduct an independent assessment to determine whether the acts are reasonable and justifiable in the open and democratic society based on human dignity, equality and freedom as provided in Article 24. The burden to establish that the conduct complained of meets the standards established by Article 24 is borne by the party justifying the limitation that is the respondent in this case. Payment of taxes is the obligation of every citizen. It is a means by which we all support the state and its function for our own welfare. Tax evasion is a cancer the undermines the State and the constitutional structure thus law enforcement and tax collection agencies must have the tools that can effectively deal with this vice. The obligation of the State, through the respondent, to collect taxes by law must be balanced with that of the individual right to privacy and dignity and in balancing these rights, the State must justify its actions. By placing the values of rule of law, good governance, transparency and accountability at the centre of the *Constitution*, we must now embrace the culture of justification which requires that every official act must find its locus in the law and underpinning in the *Constitution*."

18. It was the Respondent's case that it neither dealt in any such fraud nor knew if the said missing traders were part of the missing traders Fraud. Reference was made to Section 107(1) of the *Evidence Act* which provides that 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. The Respondent cited the case of *Evans Otieno Nyakwana vs Cleophas Bwana Ongaro* [2015] eKLR and *Rosemary Wanjiku Murithi vs George Maina Ndinwa* Civil Appeal No 9 of 2014 [2014] eKLR where the courts observed that the onus of proof was much heavier where fraud was alleged. The court further held that proof of fraud involves questions of fact and that simply raising the issue of fraud in a statement of defence and counterclaim was not proof of fraud.

Analysis and Determination

19. I have considered the Memorandum of Appeal, the Statement of Facts, the Record of Appeal, the parties' respective submissions and the authorities that they cited. I find that the main issues for determination are as follows: -

    a. Who shoulders the burden of proof in tax matters?

    b. Whether the Tribunal ignored relevant tax provisions and evidence in arriving at its finding on documentation.

    c. Whether the Tribunal erred in allowing the Respondent to produce a cashbook ledger after the hearing had closed.

20. As the first appellate court, this court is supposed to re-evaluate the evidence presented before the Tribunal with a view to making its own findings. This is the principle that was advanced in the case of *Selle vs Associated Motor Boat co.* 1968 EA 123 where the court rendered itself as follows: -

> " An appeal to this Court from a trial by the High 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 had neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or possibilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif -v- Ali Mohamed Shalan* [1955],22 EACA 270)" See also *Jivanji vs Sanyo Electrical Company Ltd* [2003] KLR 425 at page 431. "

21. The facts of this case are straightforward. The dispute can be traced to the Appellant's demand letter to the Respondent dated 13th April 2018 demanding Kshs. 25,569,731 being input VAT of Kshs. 8,893,819 and Corporation Tax of Kshs. 16,671,995. Following the Respondent's objection to the demand, the Appellant rendered its decision on 4th July 2018, confirming the principal VAT amount of Kes 8,893,819 in addition to penalties and interest thus precipitating the Appeal before the Tribunal whose findings I have already highlighted in this judgment. The appeal arises from the decision of the Tribunal.

Burden of proof and the relevant tax laws.

22. The Appellant argued that burden of proof rested on the Respondent/tax payer to establish that a tax decision is incorrect. The Respondent, on the other hand, contended that the Appellant was under a duty to prove the allegations of fraudulent evasion of VAT by the alleged 'missing trader' or beneficiary as that was the basis of the tax assessment. The Respondent argued that since the Appellant's claim was based on an 'Investigation Report' which revealed that the respondent was engaged in a fraudulent scheme aimed at tax evasion, the appellant was required to avail the said 'Investigation Report' to court.

23. The appellant contended that its investigations revealed that the respondent's suppliers were not identifiable despite the fact that they had allegedly traded with the Respondent for a long period of time during which they made huge deliveries to the Respondent. The Appellant doubted the existence of the companies that the Respondent allegedly traded with as the Respondent was unable to show that it was dealing with companies that exist in reality. The main issue before the Tribunal was the missing trader. The Appellant maintained these missing traders were but a fraud.

24. In this regard, Ms. Gitau, counsel for the Appellant submitted as follows before the Tribunal: -

> "...what I am trying to say is that these companies that invoices were disallowed, purchases that were disallowed, basically they trade in everything.... In all the companies that the Appellants have filed appeals here you will see there are different goods and when the Appellants were asked to show where those companies are based, they were unable to..... It would be prudent for any business person to say, the person I trade with is located at this place. How difficult is it? I know that they are trying to shift the blame to the Respondent that they are not required to cater for the tax liability of their suppliers....."

25. The Chairperson of the Tribunal acknowledged the Appellant's concerns over the existence of the companies and observed as follows: -

> ".....the basis of the files which we have looked at is that these people were non-existent and the Appellants could not show you where they are.....The basis of your cases is that these suppliers didn't exist."

26. The Appellant further contended that it had established that the said entities that the Respondent had allegedly traded with had no physical address from where they either traded or stored the huge materials allegedly purchased by the respondent. The Appellant also doubted the invoices produced by the Respondents which, it observed, did not match the goods allegedly supplied and added that even if they had the goods, they were not from the supplier shown in the invoices. The discrepancies in the invoices and the goods supplied, coupled with the lack of the identities of the suppliers, prompted the Appellant to request for further documents outside those set out in section 17 of the VAT Act to verify or satisfy itself on the tax that was the subject of the dispute.

27. The dispute herein relates to the credits for VAT input that the respondent had claimed. Section 17 of the VAT Act provides for credit for input tax. Sub-section (3) thereof provides for the documentation that is required for purposes of the credit on input tax as follows: -

> "(3) The documentation for the purposes of subsection (2) shall be-
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> a) an original tax invoice issued for the supply or a certified copy;
>
> b) ...
>
> c) ...
>
> d) a credit note in the case of input tax deducted under section 16(2); or
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> e) a credit note in the case of input tax deducted under section 16(5)".

28. In the instant case, the appellant questioned the authenticity of the documents relied on by pointing out that the invoices did not match the goods supplied and were from companies implicated in missing traders scheme. It was the Appellant's case that an analysis of the documents presented by the Respondent showed that there was no evidence of purchase and delivery of goods. It is for this reason that the Appellant sought additional information from the respondent to justify the alleged transactions but none was availed.

29. At paragraph 48 and 49 of its judgment, the Tribunal appreciated that the list of documents availed by the Respondent as required under section 17 of the VAT Act was not exhaustive. The Tribunal rendered itself as follows: -

> "While this list is not exhaustive on the documents that must be furnished as proof of the purchase, the Tribunal is of the view that the Respondent should have furnished information to prove that the invoices submitted by the Appellant to support its claim was fictitious. It is not enough to just allege that the documents presented were fictitious.
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> The Tribunal was therefore of the view that the Appellant furnished sufficient proof of purchase".

30. I find that the position taken by the Tribunal over the list of documents presented by the Respondent is erroneous. I say so because what the Respondent did, by presenting the invoices, was only prima facie evidence of purchase. Upon presenting the said invoices, the evidentiary burden of proof shifted to the Appellant. The Appellant discharged this burden when it informed the Tribunal that he investigated the alleged suppliers and found that they never existed and that there was no supply of any goods at all.

31. Upon the Appellant discharging his burden, the evidentiary burden of proof shifted back to the Respondent to show that its documentation was valid and that the entities that supplied it with the goods exist. The Respondent could have discharged this burden by producing other transactional documentation to support the legitimacy of the alleged transactions. Indeed, sections 59 of the *Tax Procedures Act* and section 43 of the VAT Act empower the appellant to request for more and additional information in order to satisfy himself on the taxable income declared by the taxpayer. The said section 43 requires the taxpayer to keep a full and true record of every transaction made for five years and provides that the said record should be availed for inspection by the taxman. It is also worthy to note that the section is couched in mandatory terms and stipulates as follows: -

> "(2) The records to be kept under subsection (1) shall include—
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> a. copies of all tax invoices and simplified tax invoices issued in serial number order;
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> b. copies of all credit and debit notes issued, in chronological order; (c) purchase invoices, copies of customs entries, receipts for the payment of customs duty or tax, and credit and debit notes received, to be filed chronologically either by date of receipt or under each supplier's name;
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> (d) details of the amounts of tax charged on each supply made or received and in relation to all services to which section 10 applies, sufficient written evidence to identify the supplier and the recipient, and to show the nature and quantity of services supplied, the time of supply, the place of supply, the consideration for the supply, and the extent to which the supply has been used by the recipient for a particular purpose;
>
> (e) tax account showing the totals of the output tax and the input tax in each period and a net total of the tax payable or the excess tax carried forward, as the case may be, at the end of each period;

(f) copies of stock records kept periodically as the Commissioner may determine;

(g) details of each supply of goods and services from the business premises, unless such details are available at the time of supply on invoices issued at, or before, that time; andsuch other accounts or records as may be specified, in writing, by the Commissioner." (Emphasis added).

32. In the present case, I note that besides the Appellant's claim that the Respondent was not able to provide the identity of its suppliers, there was also the claim that that the invoices were not matching the goods and further, that the goods were not from the supplier shown in the invoices. On its part, the Respondent argued that the Appellant's report ought to have been availed before the Tribunal for verification.

33. This court is alive to the fact that the investigations conducted by the Appellant are ordinarily confidential in nature owing to the fact that they may relate to other entities that may be prejudiced in the event of future investigations. The bottom line however, is the undeniable fact that the said investigations provided sufficient details that unearthed glaring gaps in the Respondent's financial affairs. This court is of the view that the Respondent should have responded to the Appellant's allegations as provided for under section 59 of the Tax Appeals Tribunal and section 43 of the VAT Act as to additional information and documents required to support commercial transactions for tax purposes.

34. In *Pz Cussons East Africa Limited vs Kenya Revenue Authority* [2013] eKLR stated as follows: -

> " In the case of Pearson Belcher (supra) it was stated as follows; "...there is an assessment made by the Additional Commissioners upon the Appellant; it is perfectly clearly settled by cases such as *Norman v Golder*, 26 T.C. 293, 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 so. That is sufficient to dispose of the appeal, which I accordingly dismiss with costs."

35. The principle that emerges from the above highlighted cases and provisions is that in tax matters, the burden of proof is on the tax payer to show that the assessment made upon him is excessive and incorrect. This position is reinforced by Section 56(2) of the *Tax Procedures Act* which provides that: -

> " In any proceedings under this part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.'

36. Section 30 of the *Tax Appeals Tribunal Act*,2013 further provides that: -

> " In a proceeding before the Tribunal, the Appellant has the burden of proving;
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> (a) Where an appeal relates to an assessment, that the assessment is excessive; or
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> (b) In any other case, that the tax decision should not have been made or should have been made differently. "

37. In the present case, I note that the Tribunal held as follows on the issue of burden of proof at paragraph 46 of the judgment: -

> " Following the submission of documents by the Appellant to prove that it had made actual purchases of taxable supplies, it was the onus of the Respondent to prove that there was actual supply of taxable supplies and that the supplies existed only in paper."

38. My finding is that the Tribunal did not appreciate the fact that the burden of proof set out in Section 30 of the *Tax Appeals Tribunal Act* and ended up shifting the burden of proof to the appellant which was contrary to law. I find guidance in *Metcash Trading Limited -vs- Commissioner for the South African Revenue Service and Another* Case CCT 3/2000 where the court emphasized the basis of the burden of proof upon the taxpayer: -

> " But the burden of proving the Commissioner wrong then rests on the vendor under section 37. Because VAT is inherently a system of self-assessment based on a vendor's own records, it is obvious that the incidence of this onus can have a decisive effect on the outcome of an objection or appeal. Unlike income tax, where assessments can elicit genuine differences of opinion about accounting practice, legal interpretations or the like, in the case of a VAT assessment there must invariably have been an adverse credibility finding by the Commissioner and by like token such a finding would usually have entailed a rejection of the truth of the vendor's records, returns and averments relating thereto. Consequently, the discharge of the onus is a most formidable hurdle facing a VAT vendor who is aggrieved by an assessment unless the Commissioner's precipitating credibility finding can be shown to be wrong, the consequential assessment must stand."

39. My further finding is that the Appellant established that there was loss of VAT in the subject transactions. The Appellant proved, on a balance of probabilities, that there was no supply of goods and that the respondent cannot be said to have been blameless in the transactions. This court is of the view that as a prudent trader, the Respondent was expected to keep all the transactional documentation besides conducting business with credible and identifiable entities. The onus of proof rested on the Respondent to establish that there was actual supply of taxable goods as the taxpayer is the custodian of such information.

40. My finding on the issue of burden of proof would have been sufficient to determine this appeal, but I am still minded to consider the other issues listed hereinabove for determination.

Production of a cashbook ledger after the hearing had closed.

41. The Appellant faulted the Tribunal for allowing the Appellant to produce a cashbook ledger after the close of pleadings and hearing contrary to the principles governing production of evidence in civil proceedings. According to the Appellant, the respondent should have amended its Memorandum of Appeal and Statement of Facts before producing the cashbook ledger as evidence. It was the appellant's case that the introduction of the cashbook ledger, after the pleadings and the hearing had closed, robbed it of the opportunity to interrogate the said evidence thus leading to trial by ambush.

42. A perusal of the record of appeal shows that hearing before the Tribunal was conducted and concluded on 5th February 2020. The respondent's cashbook ledger in question filed on 27th March 2020. It is apparent that the respondent filed the cashbook ledger before the Tribunal, long after the conclusion of the hearing. It therefore goes without saying that the cashbook ledger was not served on the Appellant prior to the hearing at the Tribunal thus lending credence to its claim that it was denied the opportunity to interrogate the respondent's evidence.

43. Courts have taken the position that parties are bound by their pleadings and cannot be allowed to raise a different or fresh case without making proper amendments. This is to say that each party should be made aware of the case he has to meet, way in advance so as to enable him prepare adequately thus removing any element of surprise or trial by ambush. In an adversarial system of litigation, the court cannot enter into the arena of the dispute by asking to be supplied with documents that did not form part of the parties' pleadings. The above position was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Anor. vs. Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC* SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

> "…..it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……
>
> …In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

44. As I have already noted in this judgement, the Tribunal on its own motion requested to be supplies with the cashbook ledger after the close of the hearing. I find that this was an error on the part of the Tribunal and that the Appellant's grievance over the said request is justified as it was denied the chance to counter the contents of the said cashbook ledger.

45. Having regard to the findings and observations that I have made in this judgment, I find that the instant appeal is merited and I therefore allow it with in the following terms: -

    a. The judgment and orders of the Tax Appeals Tribunal at Nairobi delivered on 28th August 2020 in Tax Appeals Tribunal Appeal No. 140 of 2018 is hereby set aside.

    b. The objection decision dated 4th July 2018 is hereby upheld.

    c. The respondent shall pay the sum of Kshs. 8,893,819 being VAT tax arrears owed to the Appellant.

    d. Each party shall bear its own costs of the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF MARCH 2022.

W.A. OKWANY

JUDGE

In the presence of: -

Ms Onyango for Gitau for Appellant.

Mr. Bosire for Mbae for Respondent.

Court Assistant - Sylvia