



**Tropical Oil Movers Limited v Commissioner of Domestic Taxes (Tax Appeal E063 of 2021)
[2022] KEHC 12126 (KLR) (Commercial and Tax) (22 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12126 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
TAX APPEAL E063 OF 2021
DAS MAJANJA, J
AUGUST 22, 2022**

BETWEEN

TROPICAL OIL MOVERS LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

*(Being an appeal against the judgment of the Tax Appeals Tribunal
at Nairobi dated 13th May 2021 in Tax Appeal No.15 of 2020)*

JUDGMENT

Introduction and Background

1. The Appellant is a fuel brokerage company. On 6th September 2018, the Commissioner wrote to the Appellant stating that the records it held indicated that the Appellant was a non-filer of Corporation Tax from the period 2016 to the date of the letter contrary to sections 24 and 26 of the [Tax Procedures Act, 2015](#) (“the TPA”). The Commissioner thus required the Appellant to file all outstanding returns and pay all taxes due within 7 days of the letter failing which it would raise default assessments under section 29 of the TPA.
2. As the Appellant did not comply with the Commissioner’s demand, it proceeded to raise default assessments on 29th October 2018 for KES. 59,566,842.32 and KES. 58,373,669.85 for the income years 2016 and 2017 respectively. On 25th November 2019, the Appellant raised an objection on the grounds that the demanded tax was way above the Appellant’s self-assessments for the said period, that the Appellant was a fuel broker and the gross margins were below KES. 2.00 per litre hence the turnovers could not attract such high taxes which had been assessed at 80% of the turnover and that the Appellant had experienced low business sales in the month of August 2016 and closed business hence VAT and PAYE taxes were made dormant on 19th October 2016 and 7th July 2016 respectively.



The Appellant also forwarded copies of its 2016, 2017 and 2018 returns together with its PAYE and VAT PIN certificate.

3. In an email dated 26th November 2019, the Commissioner requested additional documents from the Appellant to verify the sums represented in the audited accounts for the years 2015 and 2016 that the Appellant had submitted to the Commissioner. The said documents requested included Bank Statements for the period 2014 to 2016, Sales Invoices for the period 2014 to 2016, Purchase Invoices for the period 2014 to 2016, Expense Invoices, Monthly ETR Z-Reports, Sales Schedules, Purchases Schedules and Expense Schedules and the Commissioner expected the same to reach it by 29th November 2019.
4. The Commissioner states that it only received the Bank statements and consequently, it rendered its objection decision on 19th December 2019 (“the Objection Decision”). The Commissioner stated the Appellant was not only late in submitting its objection application but that it also failed to give valid reasons for objecting within the statutory timelines. The Commissioner referred to its email dated 9th December 2019 seeking valid reasons for the Appellant’s late objection application noting that there was no response to the email. The Commissioner stated that the Appellant failed to provide documentary evidence in support of the objection contrary to the TPA.
5. Aggrieved by the Objection Decision, the Appellant appealed to the Tax Appeals Tribunal (“the Tribunal”) replicating its grounds of objection. In its decision dated 13th May 2021, the Tribunal stated that the appeal raised one issue for determination; whether the Commissioner erred in confirming the initial assessment in its Objection Decision.
6. The Tribunal held that the Appellant contravened section 24(1) of the TPA by failing to submit its returns, as demanded by the Commissioner, in a timely manner and that the returns in fact offended the system of self-assessment in place. The Tribunal observed that upon receipt of the assessment orders, the Appellant failed to object within the permitted 30 days as it only objected on 26th November 2019, over a year upon receipt of the assessment, an act no less instigated by the Commissioner’s notice of agency upon the Appellant’s director. The Tribunal pointed out that under section 51(6) and (7) of the TPA, the Appellant was required to apply to the Commissioner for extension of time to apply to object to the assessment and that for the extension to be granted, the Appellant ought to have given reasons for the late objection, such as absence from Kenya or other reasonable cause.
7. The Tribunal noted that while the Appellant delayed in lodging its objection, the Commissioner was nonetheless prepared to consider the late objection as evidenced by the email dated 26th November 2019 requiring the Appellant to provide documents that support its grounds of objection no later than 29th November 2019. The Tribunal further remarked that although the Appellant provided its audited financial statements for the period under assessment, the Appellant failed to provide relevant source documents to enable the Commissioner verify the contents of the financial statements. The Tribunal concluded that the Appellant’s objection failed to meet the validity threshold underscored by section 51(3)(c) of the TPA.
8. The Tribunal further stated under section 56(1) of the TPA, a tax payer bears the burden of proving that the Commissioner’s decision was incorrect and that in doing so, the taxpayer is aided substantially by the grounds of objection with the backing of evidence in the form of relevant documents. The Tribunal held that in addition to its failure to file its returns and objection notice in a timely manner, the Appellant failed to discharge the burden of proof placed upon it. The Tribunal concluded that the net effect of the failures by the Appellant was that its letter of 26th November 2019 could not be said to be an objection notice as contemplated under section 51(3) of the TPA as it did not meet the validity threshold and that the Appellant’s inability to mount a proper and valid objection notice therefore left



the assessments unaffected and effectual. The Tribunal dismissed the Appellant’s appeal and upheld the Objection Decision.

9. The Appellant now appeals against the Tribunal decision on the grounds set out in the Memorandum of Appeal dated 2nd June 2021. In response, the Commissioner filed its Statement of Facts dated 12th July 2021. The parties have also filed written submissions in support of their respective positions mirroring the positions they had taken before the Tribunal.

Analysis and Determination

10. In exercising appellate jurisdiction, this court’s jurisdiction 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”. 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. The Court of Appeal in *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR summarised what amounts to “matters of law” as follows:

(38) [T]he interpretation or construction of the *Constitution*, statute or regulations made thereunder or their application to the sets of facts established by the trial Court. As far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the trial court.

11. The main issue for determination in this appeal is similar to what the Tribunal framed, that is, whether the Commissioner erred in confirming its initial assessment in the Objection Decision. This court is to determine whether the Tribunal erred in affirming the Objection Decision.
12. It is not in dispute that the Appellant failed to file timely returns for the income period 2016 and 2017 prompting the Commissioner’s demand. It is also common ground that the Appellant failed to file its returns as requested leading to the Commissioner issuing default assessments under section 29 of the TPA. The Appellant also conceded that it filed a late objection on 26th November 2019 and that this is what largely made the Commissioner reject the objection and confirm the earlier assessments.
13. The Tribunal faulted the lateness and validity of the Appellant’s objection stating that the delay was unreasonable and without explanation and it did not precisely state the grounds of objection. Based on the uncontested facts, I could not agree more with the Tribunal’s holding and reasoning. Although lateness of filing an objection can be condoned and an extension of time granted under section 51(6) and (7) of the TPA, the taxpayer must establish reasons that is; absence from Kenya, sickness or such other reasonable cause. The Appellant did not seek extension of time nor give any reasons for the late objection filed almost a year after the assessments. I agree with the Tribunal’s conclusion that the delay was inordinate. Once the Appellant failed to file its objection within time, the Commissioner cannot be faulted for confirming the assessments (see *Tumaini Distributors Company (K) Limited v Commissioner of Domestic Taxes* ML ITA No. 3 of 2020 [2020] eKLR).
14. I also note that the Commissioner indulged the Appellant and sought source documents to enable it verify the Appellant’s audited accounts. In as much as the Appellant claims that it submitted documents that could have aided the Commissioner determine its correct tax position, I agree with



the Tribunal that the Appellant never furnished the Commissioner with all documents requested by the Commissioner in its email dated 26th November 2019 which included Sales Invoices for the period 2014 to 2016, Purchase Invoices for the period 2014 to 2016, Expense Invoices, Monthly ETR Z-Reports, Sales Schedules, Purchases Schedules and Expense Schedules.

15. The documents are the kind which the Appellant is required to keep under section 23 of the TPA and which the Commissioner was entitled to demand and the Appellant obliged to produce under section 59(1) of the TPA. I do not find any evidence where the Appellant informed the Commissioner that the documents sought were unreasonable. In addition, under section 56(1) of the TPA, the Appellant bears the burden of demonstrating that Commissioner's decision in reaching the assessments complained of was incorrect. By failing to provide the documents requested, the Commissioner's position on the assessments remained unchallenged as the Appellant failed to prove the Commissioner was incorrect.

Disposition

16. For the reasons I have set out above, I hold that the Tribunal's decision was sound and judicious and a different Tribunal seating in its place could not have arrived at any other conclusion other than the one it did bearing the circumstances of this matter.
17. The Appellant's appeal lacks merit. It is accordingly dismissed.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF AUGUST 2022.

D. S. MAJANJA

JUDGE

Ms Nyaribo instructed by Cheptinga and Company Advocates for the Appellant.

Ms Kithinji, Advocate instructed by Kenya Revenue Authority for the Commissioner of Domestic Taxes.

