Nakuru Cement Supplies Limited v Commissioner of Investigations and Reinforcement (Tax Appeal E038 of 2021) [2022] KEHC 16518 (KLR) (Commercial and Tax) (16 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16518 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

TAX APPEAL E038 OF 2021

A MABEYA, J

DECEMBER 16, 2022

BETWEEN

NAKURU CEMENT SUPPLIES LIMITED ..... APPELLANT

AND

THE COMMISSIONER OF INVESTIGATIONS AND REINFORCEMENT ..... RESPONDENT

(Being an appeal from the judgment of the Honorable chairman and members of the Tax appeals tribunal delivered on 16th April 2021 at Nairobi, Appeal No 187 of 2017)

JUDGMENT

1. On 26/5/2016, the respondent invited the appellant for interview from which interview, the respondent concluded that the appellant had not filed returns for the period 2011 and 2015. The respondent then investigated the appellant and on 14/8/2017 raised a tax assessment of Kshs.3,833,386,520/- for Corporation tax and VAT.

2. By a letter dated 15/9/2017, the appellant objected to the assessment but the respondent issued an objection decision on 10/11/2017. Aggrieved by the objection decision, the appellant lodged an appeal at the Tax Appeals Tribunal ("the Tribunal"). By a judgment delivered on 16/4/2021, the Tribunal ruled in favor of the respondent.

3. Being dissatisfied by that decision, the appellant appealed to this court vide a Memorandum of Appeal dated 6/5/2021raising seven grounds of appeal. Those grounds can be summarized into two as follows: -

    a. That the Tribunal erred in finding that the appellant was accorded a fair hearing.

b. That the Tribunal erred in failing to hold that the respondent had exceeded the statutory time limit of five years.

4. The respondent opposed the appeal vide a statement of facts dated 22/10/2021. The respondent contended that his investigations on the appellant was precipitated by the appellant's failure to file tax returns for the years 2011 to 2015. The investigations revealed that the appellant had been receiving bonuses and discounts which were not accounted for. That the purchase data received from the suppliers showed that the appellant had been overstating the purchases in the financial account thereby reducing its tax liability. The respondent issued to the appellant the findings of his investigations vide a letter dated 11/7/2017.

5. The appellant objected to the said findings and requested for a review of the same. It was invited for a meeting by the respondent but failed to honor the same. It was advised to validate its objection which the respondent found to have been not in accordance with the law but it failed to do so. It further failed to provide the information requested by the respondent. The appeal was canvassed by written submissions which I have considered.

6. The appellant submitted that the Tribunal erred in finding that the appellant was accorded a fair hearing before the assessment by the respondent. That it had supplied the respondent with information on soft copy which was not considered by the respondent. It was further submitted that the assessment period was out of the reporting period of five years.

7. The respondent submitted that it accorded the appellant more time to validate its objection and further engaged the appellant in alternative dispute resolution mechanisms despite the absence of cooperation on the appellant's side. It was further submitted that despite the law requiring the taxpayers to keep records the appellant withheld records which in turn forced the respondent to get the same from the suppliers. It was submitted that the appellant had the burden of proving the incorrectness of a tax assessment.

8. This being a first appeal, this Court is enjoined to re-evaluate and re-consider the evidence tendered before the Tribunal with a view of making its own independent findings and conclusions. See *Selle & Another v Associated Motor Boat Co. & Others* [1968] EA 123.

9. I have considered the record, the statement of facts and the submissions by the parties. I have also re-evaluated the evidence that was before the Tribunal. The first ground is that the Tribunal erred in finding that the appellant was accorded a fair hearing. It was the appellant's contention that the respondent had acquired data from third parties in coming up with its assessment and the same was not shared with the appellant. It was further contended that the appellant was not given an opportunity to examine the veracity of the information acquired from the third parties. The Tribunal's findings were that the appellant had been accorded an opportunity to present its case to the respondent.

10. What amounts to a fair hearing was discussed broadly by the Supreme Court of Kenya in the case of *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others* Petition No 18 of 2014 as consolidated with Petition No 20 of 2014 [2014] eKLR. Njoki Ndungu, SCJ observed: -

> "(257) Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem (hear the other side or no one is to be condemned unheard) and nemo judex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias. Peter Kaluma, Judicial Review: Law, Procedure and Practice 2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural

fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that "although the necessity of hearing is well established, its scope and contents remain unsettled."

(258) What then are the norms or components of a fair hearing? The Supreme Court of India, in *Indru Ramchand Bharvani & others v Union of India & others*, 1988 SCR Supl (1) 544, 555 found that a fair hearing has two justiciable elements:

(i) an opportunity of hearing must be given; and

(ii) that opportunity must be reasonable (citing *Bal Kissen Kejriwal v Collector of Customs Calcutta & others* AIR 1962 Cal 460). (259). That court in *Union of India v JN Sinha & another*, 1971 SCR (1) 791 and *CB Boarding & Lodging v State of Mysore*, 1970 SCR (2) 600 held that with regards to fair hearing, each case has to be decided on its own merits. In *Mineral Development Ltd v State of Bihar*, 1960 AIR 468, 160 SCR (2) 909 the court further observed that the concept of fair hearing is an elastic one and "is not susceptible of easy and precise definition."

11. From the foregoing, a fair hearing is to be considered at two levels, firstly, an opportunity of hearing must be given and secondly, the opportunity must be reasonable.

12. In the present case, the appellant was interviewed after being invited by the respondent on 26/5/2016. The interview revealed failure to file returns. The appellant was allowed to file its returns for the years 2011 to 2015, albeit late. The respondent noticed inconsistencies with the returns and wrote to the appellant for more clarification where the appellant in response in a letter dated 17/5/2017 stated that the credits had been entered accordingly.

13. The respondent contended that it requested for more information and clarification from the appellant which was not forthcoming. As a result, the respondent resorted to sourcing information from the appellants' suppliers. This prompted an objection from the appellant in a letter dated 14/7/2017 and the respondent invited the appellant for a meeting to discuss the matter further. However, the appellant failed to attend.

14. The appellant was served with notices of assessments to which it objected. The respondent requested the appellant to validate its objection as it had not met the threshold under section 53(3) of the *Tax Procedures Act*, 2015. An extension of 10 days was granted to the appellant in October, 2017 but the appellant failed to validate its objection where after the respondent issued his objection decision on 10/11/2017.

15. From the foregoing, it is evident that the appellant was given reasonable opportunity to present its case. The appellant being the custodian of the necessary documents, it was required by law under section 58 of the *Tax Procedures Act* 2015 to keep records and submit them to the commissioner if and when called upon to do so.

16. The information sought for would have proved or disproved the information acquired from the suppliers and relied upon by the respondent.

17. In *Commissioner of Domestic Taxes v Golden Acre Limited* [2021] eKLR the court noted with approval the Australian case of *Mulheim v Commissioner of Taxation* |2013| FCAFC 115 where the Full Federal Court of Australia (PFC) held: -

> "A taxpayer must satisfy the burden of proof to successfully challenge income tax assessments. The PFC held that it is not enough for a taxpayer to simply demonstrate that the assessment issued by the Commissioner is incorrect. Rather, the onus is on the taxpayer in proving that an assessment issued by the Commissioner is excessive can only be discharged by the taxpayer by adducing positive evidence which demonstrates the taxable income on which tax ought to have been levied. That onus requires the taxpayer to positively prove his or her 'actual taxable income' and in doing so, must show that the amount of money for which tax is levied by the assessment exceeds the actual substantive liability of the taxpayer".

18. From the chronology of events as set out above, I find no error in the Tribunal's holding that the appellant was accorded a fair hearing.

19. There was a submission that there was some information that was submitted to the respondent in soft copy which the respondent failed to consider. Firstly, there was no evidence to show that any such information was supplied, when it was supplied or the nature of the information. Secondly, the appellant did not produce that evidence before the Tribunal for consideration by the Tribunal if it existed and its nature. Accordingly, that submission is rejected.

20. The next ground is that the Tribunal erred in failing to hold that the respondent had exceeded the statutory time limit of five years. The appellant stated that the assessment of the taxes was communicated in 14/8/2017 thus making it outside the reporting period of five years.

21. I have considered the Tribunal's decision. On this issue, the Tribunal held that time started running on 4/11/2016 being the day the corporate returns were filed with respect to the years 2011 to 2015.

22. Section 31(4)(b) of the *Tax procedures Act* provides that: -

> " The commissioner may amend an assessment-
>
> a) in the case of gross or willful neglect, evasion or fraud by, or on behalf of, the tax payer, at any time; or
>
> (b) in any other case, within five years of-
>
> (i) for a self-assessment, the date that the self-assessment taxpayer submitted the self-assessment return to which the self-assessment relates or
>
> (ii) for any other assessment, the date the commissioner notified the taxpayer of the assessment."

23. From section 34(4)(b)(i), it is clear that the period of 5 years started to run from the date the appellant submitted its returns and not from 2011 when it had deliberately failed to submit the same. If that were the case, a tax payer will fraudulently will evade tax by failing to submit his returns with the hope that the tax authorities will not catch up with him until after 5 years.

24. In view of the foregoing, I agree with the Tribunal that time started running after the returns were amended on 4/11/2016 when the appellant was allowed to amend its returns and file the proper ones. There is no error on the part of the Tribunal in interpreting the said section.

25. From the foregoing, I find that the appellant has not made out a case to warrant the interference of the Tribunals decision dated 16/4/2021. The appeal is therefore without merit and is dismissed with costs.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

A. MABEYA, FCIArb

JUDGE