IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

TAX APPEAL NO. 15 OF 2014

BETWEEN

TYRE WORLD AND ACCESSORIES KENYA LIMITED.....APPELLANT

AND

COMMISSIONER OF INVESTIGATION AND ENFORCEMENT.....RESPONDENT

(Being an appeal from the decision of the Value Added Tax Appeals Tribunal at Nairobi dated 19th December 2013)

JUDGMENT

Introduction and Background

1. This is an appeal from the decision of the Value Added Tax Appeals Tribunal ("the Tribunal"). That Tribunal was abolished and replaced by the Tax Tribunal established under ***Tax Appeals Tribunal Act, 2013***.

2. The appellant's case was triggered by a confirmation notice dated 17th August 2012 issued by the Commissioner of Investigations and Enforcement. The notice was as a result of an investigation into the appellant's tax affairs following a tip-off from an informer alleging that the appellant was engaged in tax evasion. The respondent seized documents from the appellant's premises and conducted its investigations leading to the initial assessment.

Grounds of appeal

3. The appellant has raised 12 grounds of appeal against the decision of the Tribunal but at the hearing and in its written submissions condensed them into 3 grounds or issues as follows:

(i) Whether by raiding the appellant's premises and seizing documents, the respondent committed an illegality which rendered the tax assessment unlawful, null and void.

(ii) Whether the Honourable Tribunal in conducting the hearing failed to accord the appellant a fair hearing and the implication thereof.

(iii) Whether the tax assessment demanded taxes dating over 5 years and the implication thereof.

Submissions

4. On the first issue, the appellant relied on **section 30** of the ***Value Added Tax Act (Repealed)*** to submit that the respondent failed to adhere to the provisions of the law in carrying out its power of search and seizure. Counsel averred that on the material day, the respondent's officers visited the appellant's premises and indiscriminately confiscated the appellant's documents without taking an inventory or permitting the appellant to take copies of the documents. It complained that the respondent did not disclose the reasons for carrying out the raid. Counsel cited the case of ***Samura Engineering Limited and 10 Others v Kenya Revenue Authority*** **[2012] eKLR** to support the proposition that such a raid was unconstitutional as there was no reasonable basis for the respondent to conduct the search and seizure.

5. The second ground of challenge is that the Tribunal did not accord the appellant a fair hearing. The appellant contended that throughout

the proceedings, it protested the respondent's decision to confiscate its documents making it unable to prepare its appeal. Its position was that those documents were crucial in preparing its defence and since the respondent did not supply the documents required its right to a fair hearing was violated. It further argued that it was unreasonable for the Tribunal to conclude that it was the appellant who failed to take an inventory yet it was the respondent's officers who carried away the documents without taking an inventory. Counsel for the appellant emphasised the importance of a fair hearing and contended that the appellant was incapacitated to the extent that it was unable to prepare for its appeal.

6. On the last issue, the appellant's case was that the tax assessment by the respondent was defective, null and void for covering a period dating back to over 5 years from the time of assessment contrary to **paragraph 7(6)** of the ***Value Added Tax Regulations*** which provides that all records should be kept for a period of 5 years. Counsel referred to the case of ***Republic v Commissioner of Domestic Taxes (Large Taxpayers Office) Ex-parte Unilever Tea Kenya Limited*** **[2017] eKLR** to support its position. The appellant's position was that the respondent's tax assessment subject of the appeal was issued on 11th July 2007 and the letter of assessment related to the period 1999 – 2003 hence the period before 10th July 2002 fell outside the 5-year statutory period. The appellant submitted that only the period subject of the demand was that falling between 11th July 2002 and 2003.

7. In response to the first issue, counsel for the respondent submitted that although the appellant focused on the issue of the raid, the matter of legality or otherwise of the raid was not raised before the Tribunal. Counsel pointed out that the issues for determination before the Tribunal were limited to the memorandum and statement of appeal which the Tribunal pointed out were not properly drawn as required by the ***Value Added Tax (Appeals) Rules, 1990***. Further and despite the fact that the appellant was given sufficient opportunity to submit a properly drawn memorandum and statement of facts, the appellant failed to do so leaving the only issue for determination as, *"The adjusted sales and purchases were based on estimates."*

8. Counsel further submitted that based on the documents and material before it, the Tribunal came to the correct conclusions after weighing all the facts. Counsel added that the issue of the objection of the decision being past 5 years was dealt with as the appellant had engaged in a tax evasion scheme.

9. The respondent also submitted it acted within its statutory powers and that it adhered to the provisions of **sections 30** and **21** of the ***Value Added Tax Act*** in carrying out an inspection, search and seizure at the appellant's premises. Counsel pointed out that at the first meeting of the Tribunal all the documents were returned to the appellant who was granted an opportunity to present its case. After the first meeting the issue was not raised again and that the appellant produced some of the documents to support its case and that in due course the Tribunal dealt with the issue of documents comprehensively in its decision.

10. The respondent contends that the appellant had a fair hearing before the Tribunal. Counsel pointed out that the Tribunal held 3 sessions, gave the appellant an opportunity to amend his memorandum of appeal and conducted the case in a proper manner.

Duty of appellate court

11. As this is a first appeal, the duty of this court is to review the entire record and evidence and reach my own independent conclusion bearing in mind that I neither heard or saw the witnesses testify (see ***Selle and Another v Associated Motor Boat Co., Ltd and Another*** **[1968] EA 123**).

Lack of Tribunal proceedings and records

12. Before I proceed with consideration of the issues settled for determination, it is necessary to deal with the fundamental issue raised by the respondent regarding the incompleteness of the record. The respondent submitted that the record of appeal did not contain a record of the proceedings before the Tribunal. Counsel cited the case of ***Bwana Mohamed Bwana v Silvano Buko Bonaya and 2 Others*** **[2015] eKLR** where the Supreme Court held that without a record of appeal, the court could not exercise its adjudicatory function and that the appeal was incompetent.

13. In response to that objection, the appellant's case was that it had applied to the Tribunal for proceedings but they have not been furnished to date. Further, that the Tribunal has since been dissolved following the repeal of the ***Value Added Tax Act (Repealed)*** and that there was no direction on Tribunal records.

14. The decision of the Supreme Court in the ***Bwana Mohamed Bwana Case*** **(Supra)** is instructive. In that case, the Court of Appeal struck out an appeal because it did not contain a certified copy of the decree and the record of 8 witnesses who had testified. Those documents are mandatory documents required for preparation of the record of appeal in the Court of Appeal in terms of **Rule 87** of the ***Court of Appeal Rules***. In declining to admit the petition for hearing, the Supreme Court observed as follows:

> *[39] Rule 87 prescribes the contents of a record of appeal, such as will render such a cause a competent one before the Court of Appeal. It specifies the requisite documents to form part of the bundle to accompany the memorandum of appeal–all being such material as will enable the Court to make a determination on the issues of law and fact that may be the subject of contest.*
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> *[40] In the case of* ***Law Society of Kenya v. Centre for Human Rights and Democracy & 12 Others*** *Sup. Ct. No. 4 of 2014, this Court held that:*
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> *"The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not be able to determine the appeal before it.*
>
> *[41] Without a record of appeal a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is*

omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or the Constitution, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.

15. At first blush, it appears that the aforesaid case is decisive of this matter as it implies that failure to include a complete record automatically dooms an appeal. However, the decision concerns the interpretation and application of the ***Court of Appeal Rules***. I do not think the Supreme Court intended to make such a hard and fast rule without regard to the circumstances of the case and more importantly the right of access to justice contained in **Article 48** of the Constitution where a party is entitled to exercise its undoubted right of appeal where one is conferred by statute.

16. In the ***Bwana Mohamed Bwana Case*** **(Supra)**, the Court of Appeal was dealing with compliance with its rules. When it considered the matter it came to the conclusion that the counsel for the appellant had not exercised due diligence in ensuring that the documents were included in the record. This case is distinguishable as counsel for the appellant did apply for typed proceedings from the Tribunal by a letter dated 27th January 2014. It was received by the Secretary of the Tribunal on 28th January 2014. By the time the record of appeal was due for filing, the Tribunal had been dissolved by operation of law and replaced by the Tax Appeals Tribunal. It is not clear what happened to the proceedings of the former Tribunal. The appellant cannot be faulted for failing to obtain proceedings and the exercise of its undoubted right of appeal cannot be prejudiced for the reason only that the Tribunal which heard the appeal had been dissolved.

17. There is substantial case law within this jurisdiction particularly in the area of criminal law which accepts the principal that where the court file or court records are missing, the aim of the court is to do justice in each case depending on the circumstances of the case. The Court of Appeal in ***John Nyagah Njuki and 4 others v Republic*** **NKU CA Criminal Appeal No. 160 of 2000 (UR)** and ***John Ooko Otieno v Republic*** **KSM CA Criminal Appeal No. 137 of 2003 [2008]eKLR** distilled the principles applicable when court records go missing. In the latter case, the Court of Appeal observed as follows;

*In **Pius Mukaba Mulewa and Another v Republic, Court of Appeal Criminal Appeal No. 103 of 2001**, this Court, faced with that situation had the following to say:*

"What we can take from ZAVER'S case is that the courts must try to hold the scales of justice and in doing so, must consider all the circumstances under which the loss has occurred. Who stands to gain from the loss? Is it merely coincident that both the magistrate's file and that of the police are lost? Does the available evidence point to anyone as being responsible for the loss? And if so, can such a party be allowed to benefit from a situation of his own making? In final analysis, the question to be answered must be whether the order proposed to be made is the one which serves the best interest of justice. We reject any proposition that in cases where a file has disappeared, and it is not reasonably feasible to order a retrial, an acquittal must follow as a matter of course. After all a person who has been tried or has pleaded guilty before a court with competent jurisdiction and has been convicted by such court has lost the benefit of the presumption of innocence given to him by section 77 (2) (a) of the Constitution and on appeal the burden is on him to show that the court which convicted him did so in error. The loss of the file may deprive him of the ability to discharge that burden, but it by no means follows that he must of necessity be treated as innocent and automatically acquitted. The interest of justice as a whole must be considered."

18. In this case, the failure to include the record cannot be laid at the feet of the appellant or his counsel. It was as a result of a factor outside its control. The exercise of the right of appeal must on the other hand, be balanced by the fact that a competent Tribunal had determined the matter. The mere fact that the record of proceedings was not included is not, of itself, a ground to strike out the appeal. The court must consider the nature of the appeal, the decision appealed from and the evidence available to support the appeal in order to reach a decision that is in the interests of justice.

19. **In addition, it must be recalled that this court, exercising appellant jurisdiction under section 78(2)** of the ***Civil Procedure Act (Chapter 21 of the Laws of Kenya)*** has the same powers as are conferred and imposed on the lower court or Tribunal in exercise of that jurisdiction on the following terms:

78(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this act on courts of the original jurisdiction in respect of suits instituted therein.

20. The role of this court on first appeal is to re-evaluate all the evidence availed in the lower court and to reach its own conclusions in respect thereof, as was restated in ***Selle & Another v Associated Motor Boat Co. Ltd & Another (Supra).*** *This duty can be performed based on all the material available in order to reach a just conclusion of the matter.* I therefore decline to strike out the appeal on that basis.

Legality of the raid

21. I now turn to consider the substantive appeal and the grounds raised by the parties. The first issue concerns the legality or otherwise of the raid on the appellant's premises. The legality of the raid was not an issue before the Tribunal nor was it contested in any other forum. Under **sections 30** and **31** of the ***Value Added Tax Act (Repealed)***, the respondent was empowered to inspect books of accounts, records etc and could enter premises without a warrant if he had reasonable grounds to believe that a person is carrying on business in contravention of the ***Act***. Whether the raid was based on reasonable grounds is a question of fact. In ***Samura Engineering Limited and 10 others v Kenya Revenue Authority*** **(Supra)**, after considering the facts before the court, I held as follows:

[78] The respondent has not placed before the court material, which was available to it on 2nd February 2012, upon which the court may make its own assessment and conclusions to determine whether the action it took was reasonable. In the circumstances, I must therefore conclude that there was no reasonable basis upon which a warrantless search and seizure was effected. It therefore follows that the search and seizure contravened the provisions of Article 31 of the Constitution.

[79] There is also no material before the court to demonstrate that the petitioners' property seized was reasonably suspected to contain evidence of commission of an offence under the Act. ……

22. From the foregoing, it is clear that the court cannot go into the legality or otherwise of the search in appeal where the matter was not raised at the Tribunal. Like in the ***Samura Engineering Case*** **(Supra)**, the appellant had an opportunity to contest that issue either before the Tribunal or before this court in a separate forum. I therefore dismiss this ground of appeal.

Fair hearing

23. Closely connected to the issue of the illegal raid is the second issue regarding a fair hearing. The thrust of the appellant's arguments is that the documents collected from the raid were never returned to it hence it could not conduct its appeal. The appellant raised this matter several times during the proceedings as evidenced in the ruling.

24. The hearing of the appeal took place on 13th August 2013, 10th September 2013 and 23rd October 2013. At paragraph 10 of the decision, the Tribunal recorded as follows:

[10] He submitted that the Appellant's documents had been seized by the Respondent and they had sought the documents from the Respondent to assist the Appellant to prepare its case. That the documents had not been returned in full to the Appellant and was thus pleading with the Tribunal to give them more time.

[11] In response, Mr. Okelo who had initially attended the Tribunal confirmed that they had received the request and that it was a request that they could deal with.

[12] Both parties then requested for an adjournment up to 8th October, 2013 which was granted.

25. The Tribunal further noted as follows:

[17] That the Appellant is challenged because its documents were seized by the Respondent ……

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[20] That they do not have any evidence to support this claim, since all their documents were seized by the Respondent which has never returned the same to the Appellant.……..

[21] In response, the Respondent on the hand submitted that it gave the Appellant all the documents it had taken from the Respondent's premises. That Mr Wahome himself had affirmed that he had lost the documents, (see page 4 of the Respondent statement of facts). That by 4th November 2009, Mr. Wahome himself had affirmed that he had lost the documents.

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[32] The Tribunal thereafter adjourned the meeting up to 23rd October 2013, when the Appeal would be heard on that date at 9.00am. The Tribunal further gave an order that 5 copies of the said documents, showing side by side the source of funds deposited/transferred to the bank account as alleged by the Appellant should be tabulated and shown, side by side against the amounts deposited, which must be supported by documentary evidence. These should be served on the Secretary to the Tribunal and on the Respondent as well by 17th October 2012 in preparation of the said meeting to be held on 23rd October 2013.

[33] During the hearing on 23rd October 2013, the Mr. Wahome said that they had embarked on the task as required during the last meeting. That they had identified where the money that was deposited into the account came from.

26. Having outlined the instances in which the question of documents was raised, the Tribunal then framed one of the issues as follows, *"(d) Are there any reasonable grounds for this Tribunal to believe that the Appellant had been disadvantaged if the claim by its representative is true that the Respondent has not returned all the documents it seized from its premises?"*

27. In answering the question, the Tribunal stated as follows:

[97] During his submissions, Mr Wahome stated that all the documents that were seized by the Respondent were not returned and for this reason, the Appellant has been disadvantaged in preparing its case. On its part the Respondent averred that it returned all the documents that it seized from the Appellant.

[98] The Tribunal inquired from Mr Wahome if an inventory was taken and signed for, for the documents that the Respondent seized from the Appellant which he had cross checked against the documents that were returned. The answer by Mr Wahome was that no inventory was taken when the documents were seized.

[99] Further asked by the Tribunal to then explain the basis on which he alleges that not all documents were returned if he did not keep an inventory of the documents seized against which he cross-checked and found that not all documents were returned, he gave no answer.

[100] Based on this allegation which he could not substantiate, we find that we cannot believe Mr Wahome that not all documents were returned by the Respondent. Moreover, and even in their absence, we find that the Respondent has demonstrated its case well, to the extent that even if all the alleged missing documents were not returned, we could still reach the same conclusion.

28. I agree with counsel for the appellant that the Tribunal was wrong in imposing on the appellant the burden of preparing an inventory when in fact, the search was a warrantless search and the burden to prepare an inventory was on the respondent. However, the record, as I have shown above was that the appellant's accountant was given documents which he lost. In addition, there is on record evidence including minutes of several meetings and correspondence annexed to the respondent's statement of facts filed before the Tribunal that shows that the parties engaged and several documents were exchanged. The decision of the Tribunal is clear that it considered the evidence available and came to the conclusion that taxes were due. That decision has not been challenged in this appeal. I find and hold that in the circumstances of this case, the appellant was accorded a fair hearing at the Tribunal.

Assessment time barred

29. The final issue is whether the tax assessment demanded taxes dating over 5 years and the implication thereof. This question was not raised before the Tribunal. Whether an appellate court can take a grounds of appeal based on a matter that was not raised before the trial court was matter considered and summarised by Platt JA in ***Wachira v Ndanjeru*** **[1987] KLR 252** as follows:

The principles can be summarised as follows: the discretion to allow a point of law to be taken for the first time on appeal will not be exercised unless full justice can be done between the parties. It will not usually be allowed when to do so would involve disputed facts which were not investigated or tested at the trial. Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court, even though evidence taken in that court supports the new case. (See ***Tanganyika Farmers Association Ltd v Unyamwenzi Development Corporation [1960] EA 620, Overseas Finance Corporation Ltd v Administrator General (1942) 9 EACA 1****). But the court will allow a new question concerning the construction of a document or the legal effect of admitted facts, since no question of evidence arises, and it will usually be regarded as expedient in the interests of justice to do so.*

30. The appellant is correct that based on **Paragraph 7(6)** of the ***VAT Regulations 1994*** which stipulates that a tax payer *cannot* be expected to keep records beyond 5 years precludes an assessment outside the period of 5 years (see ***Republic v Commissioner of Domestic Taxes (Large Taxpayers Office) ex-parte Unilever Tea Kenya Limited*** **(Supra)**. However, that is not the end of the matter as neither the ***Valued Added Tax Act (Repealed)*** nor the ***VAT Regulations, 1994*** specifically prohibit an assessment outside the 5-year period. As I understand the rule is one governing the keeping of records for a specific period not one declaring assessment beyond 5 years time barred. In fact, in the case cited the issue raised was whether the assessment was unreasonable and a breach of the principle of legitimate expectation.

31. Thus the issue whether the assessment was time barred is a question of fact which if raised would entitle the respondent to reply and put up a defence. Failure to raise the issue before the Tribunal denied the respondent an opportunity to contest the same and put forth facts which would enable the Tribunal assess whether the assessment was barred. As the respondent urged, there may well be facts upon which the Tribunal would conclude that the appellant was involved in a fraudulent scheme hence an assessment outside the period of 5 years was permitted. In the circumstances, I hold that the issue of limitation is one that ought to have been taken up before the Tribunal.

Conclusion

32. The appellant has not succeeded on the issues raised in this appeal. I do not find any merit in this appeal. It is dismissed with costs to the respondent.

DATED and **DELIVERED** at **NAIROBI** this **___ 19th ____ day of __DECEMBER ___ 2019.**

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Ms Makori instructed by Muumbi and Company Advocates for the appellant.

Ms Sega, Advocate instructed by Kenya Revenue Authority for the respondent.