



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
INCOME TAX APPEAL NO.7 OF 2013

SOUTH NYANZA SUGAR COMPANY LIMITED.....APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGMENT

1. The appellant, **SOUTH NYANZA SUGAR COMPANY LIMITED**, has lodged this appeal to challenge the decision of the Local Committee, Nairobi Area.
2. The decision, which was made on 6th June 2013, was very brief. It was couched in the following words;

“RE: DECISION

At a meeting held on 6th June 2013, the Nairobi Area Local Committee deliberated on your case and observed that the appeal was not validly before the Local Committee since there was no evidence that the taxes required to be paid as per Sections 35 (6B) (i) and 37 (6) ii, of the Income Tax Act.

The committee ruled that the appeal is invalid.

(Signed)

F.J.O. OYARO

CLERK TO THE NAIROBI, AREA

LOCAL COMMITTEE”.

3. It is the appellant’s contention that no party had raised, before the Local Committee, any question concerning the validity or otherwise of the appeal.
4. In the circumstances, the appellant submitted that it had a legitimate expectation that its appeal would be heard and determined through a fair hearing.
5. However, the Local Committee is accused of having deprived the appellant of its right to a fair hearing.

6. The appellant also faulted the Local Committee for depriving it of the right of access to justice.
7. It was the appellant's position that, as a body which had a duty to decide on matters affecting or concerning the rights of citizens, the Local Committee should have acted in a judicious manner.
8. If the Local Committee had accorded the appellant a hearing, it is the belief of the appellant that it could have persuaded the Local Committee that the appellant was not liable to pay the tax in question. The appellant expressed the view that the Withholding Tax; the imposed Penalties and Interest were not payable because they had been written-off by Parliament.
9. The alleged writing-off of the sums in question was said to have been done through the Sessional Paper No. 12 of 2012.
10. In answer to the appeal, the respondent, the **COMMISSIONER of DOMESTIC TAXES**, submitted that before any person could competently appeal to the Local Committee, he had to first pay all the taxes and penalties imposed on him.
11. The respondent added that it had an obligation to ensure that the taxes in dispute had been paid-off before the Local Committee could grant a hearing to the appellant.
12. So, on the one hand, the appellant blames the respondent for failing to give it a hearing, whilst on the other hand, the respondent asserts that the appellant was the author of its own misfortune.
13. According to the respondent, it would have been obliged to grant a hearing to the appellant if the appellant had fulfilled the pre-condition stipulated by law.
14. In other words, the respondent insists that it was not responsible for making the decision concerning whether or not to give a hearing to the appellant. It is the respondent's reasoning that it was the appellant who made the conscious decision to withhold payment of the taxes in dispute; and that that decision then made it impossible for the respondent to lend its ear to the appellant.
15. As far as the respondent was concerned, if it had given a hearing to the appellant when the appellant had not yet paid the taxes in dispute, the respondent would have been in violation of the statute.
16. In the Memorandum of Appeal dated 19th June 2013, the appellant stated, *inter alia*, as follows;

“5. The Local Committee erred in law when it held that the Appellants Appeal which had been filed on 29th July 2010 pursuant to section 86(1) of the Income Tax Act, and which was pending before her was invalid by virtue of the provisions of sections 35 (6B) (i) and 37 (6) (1) of the Income Tax Act when such an issue was never raised by any of the parties before her?.

17. Section 35 (6B) of the Income Tax Act provides that any person who is aggrieved by the imposition, by the Commissioner, of a penalty under this section may appeal to the Local Committee within 30 days from the date of service of the Notice of the imposition, provided that the person so aggrieved shall, prior making the appeal, pay the tax due and the penalty imposed under section 35 (6B).

18. As the respondent, correctly, submitted, the principle guiding tax legislation should be construed strictly. To back that submission, the respondent quoted the following words of Roland J. in the case of **CAPE BRANDY SYNDICATE Vs INLAND REVENUE COMMISSIONER [1920] 1 KB 64;**

“...in a taxing Act, one has to look at what is clearly said. There is no room for intendment as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used?.

19. The learned Judge went on to emphasise that when the Tax Authority wishes to recover tax, it cannot do so on the basis of the spirit of the law. Whether or not it does appear that there had been an intention

to levy taxes, if such an intention is not clear; and if it can only be discerned from the spirit of the law, the subject cannot be compelled to pay such taxes.

20. Section 35 (6B) makes reference to a situation in which the appellant was aggrieved by the imposition of a **PENALTY**.

21. In this case, it would appear that the appellant was not just aggrieved by the imposition of a penalty. It does appear that the appellant was aggrieved by much more than just the penalty.

22. The question that could then arise is whether or not the appellant's circumstances were covered by that section. That question arises because by specifying that a person who was aggrieved by the imposition of a penalty, it was arguable whether or not the statutory provision was applicable in situations such as that of the appellant.

23. My understanding of the appellant's case is that Parliament had written-off the sums which could otherwise have been payable.

24. At this stage, this court is not required to delve into the substantive issue concerning the alleged decision by the Kenyan Parliament.

25. However, I note the following statement by the respondent, in its submissions;

“29. By various notices and letters the Local Committee convened various meetings to hear the appeal. However, on 22nd June 2011, the Local Committee made a determination to the effect that the matter could not be heard until Parliament made a determination on matters affecting the sugarcane industry?.

26. The appellant says that the decision resulted in the writing-off of the debts it owed.

27. If that were correct, the appellant would not have had to deposit any money with the respondent, before its appeal could be heard by the Local Committee.

28. The respondent faults the appellant for failing to produce the **SESSIONAL PAPER No. 12 of 2012**, which allegedly demonstrated the decision to write-off the appellant's debt.

29. An attempt to make available that sessional paper to this court would be tantamount to adducing fresh evidence which had never been produced before the Local Committee. As the alleged evidence appears to have been in existence before the matter came up at the Local Committee, the evidence ought to have been produced and analysed at that stage.

30. But the appellant's position is that the Local Committee did not accord it a hearing before it struck out the appeal.

31. I find merit in the appellant's submissions, and so now set aside the decision by the Local Committee. In effect, the order striking out the appeal is set aside.

32. However, it would be premature for this appellate court to proceed to make its own determination on the issues which had not yet been adjudicated upon on merit, by the Local Committee.

33. Accordingly, I now direct that the appeal be reinstated, and that the Local Committee should give a hearing to the parties.

34. However, for the avoidance of any doubt, this court is not saying that the substantive appeal must be determined on merits. I recognise that there could be legitimate issues of law concerning whether or not the appellant ought to be given audience by the Local Committee, in respect to the appeal. If that issue was raised, the Local Committee must first give a hearing to the appellant on it, before making a decision.

35. The costs of the appeal are awarded to the appellant.

DATED, SIGNED and DELIVERED at NAIROBI this 25th day of July 2017.

FRED A. OCHIENG

JUDGE

Judgment read in open court in the presence of

Mutahi for Wandago for the Appellant

Miss Ochako for Nyaga for the Respondent

Collins Odhiambo – Court clerk