REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Income Tax Appeal 318 & 319 of 1998

RICHARD BONHAM SAFARIS LTD……………… APPELLANT

VERSUS

THE COMMISSIONER OF INCOME TAX…….. RESPONDENT

JUDGMENT

On 28/8/1998, the Appellant – RICHARD BONHAM SAFARIS LTD. moved to this Court by way of two appeals against the COMMISSIONER OF INCOME TAX arising from the decisions of the Local Committee for Nairobi South, dated 20/5/1998. The appeals are under Rule 4 of the Income Tax (Appeals to the High Court) Rules.

The grounds of the Appeals, which were consolidated, are as under:

1. **The Local Committee erred in law is not giving and/or providing reasons for their decision to dismiss the appeal before them.**

2. **The Local Committee erred in law in declining to exercise its jurisdiction to reverse the Respondent's assessment for tax due from the appellant for the year 1990**

3. **The said assessment ought to have allowed deductions in respect to capital expenditure incurred by the Respondent for the construction and/or improvement of OL DONYO WUAS Hotel/Lodge (OL DONYO WUAS) during the material time.**

4. **The Local Committee erred in law in failing to reverse the Respondent's decision not to certify Ol Donyo as an "Industrial Building" under paragraph 5(1)(c) of the Second Schedule of the Income Tax Act Cap. 470 of the Laws of Kenya.**

5. **The Local Committee erred in law and fact by not appreciating the full cumulative effect of the evidence that was presented before them by the Appellant and in particular by not giving due consideration to that fact that the Appellant had applied and obtained a Hotel Licence under the Hotels and Restaurants Act Cap. 494 of the Laws of Kenya and that the Commissioner for Income Tax had designated Ol Donyo Wuas as a Hotel for the purposes of charging Value Added Tax.**

6. **The Local Committee erred in law and fact by not considering the opinion of the Ministry of Tourism and Wildlife with regard to the status of Ol Donyo Wuas as a Hotel.**

7. **The Local Committee erred in law and fact by not holding that the Respondent's decision (and assertions advanced by the Respondent in support of that decision) not to certify Ol Donyo Wuas as an industrial building was wholly irrational and unjustified.**

Wherefore the appellant prays that the decision of the Local Committee for Nairobi South made on 20/5/1998 dismissing the appellant's 1990 appeal hereby appealed against be set aside; that the 1990 Income Tax assessment be revised to allow from taxable income an investment deduction in the sum of Kshs.822,969.00 and an industrial building allowance in the sum of K.Shs.5,800.00; that the tax assessment for Kshs.276,411.00 be set aside; an order that the appellant is not liable to pay any income tax for the year 1990; costs and incidentals to this appeal and the costs of the appeal to the Local Committee; and any other or further relief as this Court may deem fit.

At the commencement of the hearing of the conjoined appeals, the parties, and the court, agreed that the appeals would be conducted by way of written submissions. The parties written submissions were filed in court as under: On 7/3/2006 and 18/4/2006 Appellants written and supplementary submissions respectively, and on 3/4/2006 Respondents written submissions.

The facts in the case are not in dispute between the parties and they are briefly as follows:

The appellant constructed a lodge called Ol Donyo Wuas, which construction was completed in 1990. When it submitted its 1990 tax returns it claimed an investment deduction on its income for the year of the sum of Kshs.822,969/= (85% of the cost of constructing Ol Donyo Wuas) and an annual industrial allowance of Kshs.5,809/= (4% of the balance of the cost of construction which is not part of the investment deduction). These claims were made on the basis that Ol Donyo Wuas was an industrial building. When included the appellant's 1990 returns it shows a loss and hence no taxable income.

The Respondent disallowed both claims because in its view Ol Donyo Wuas was not an industrial building and assessed tax due from the appellant at kshs.332,000/=. The Appellant appealed against the Respondent's determination of the tax due from it to the Local Committee for Nairobi South.

When it submitted its returns for the year 1991, the Appellant carried forward the loss for the year 1990 to its computation of taxable income. The Respondent disallowed the said loss on ground that Ol Donyo Wuas is not an industrial building. Further, the Respondent imposed upon the appellant a completely inexplicable penalty of K.Shs.57,890/=. The basis of this penalty was not explained (nor was any explanation put forward to the Local Committee). The Appellant appealed to the Local Committee for Nairobi South against both of these assessments.

On 20/5/1998 the Local Committee dismissed both appeals.

That is when the Appellant appealed to the High Court for appropriate redress, as contained in the grounds of appeal herein above.

In its statement of facts, the Respondent - Commissioner of Income Tax –filed on 28/9/1998, it is stated in the relevant parts, that:

a) The Local Committee is not required to give reasons for arriving at any particular decision;

b) The Respondent did not, in his assessment of the appellants 1991 tax due, incorporate deductions in respect of loss allegedly sustained by the Appellant in 1990 and annual Industrial Building allowance for the cost of construction of Ol Donyo Wuas camp because these were disregarded in the 1990 year of Income assessment.

c) The Respondent believed that the Appellants Income Tax Return for 1991 was not true and correct because the appellant had allowed itself capital Allowances claimed on certain buildings while such buildings had not been certified by the Respondent as an Hotel Industrial Building."

As stated earlier, the facts are not in dispute. The Respondent, as per the above paragraphs, admits all that is complained of by the Appellant, but then tries to explain why the complaints are untenable.

Before delving into the submissions on each of the grounds of appeal, I wish to raise several problems

or difficulties that arise from appeals arising from Income Tax matters. I may not be, and I have every reason to believe that I am not the first judge or person to raise these concerns. But until the situation is attended to, the concerns will perpetually be repeated in such appeals as the one before me.

I begin at the springboard provided by the Respondent when he states, in the statements of his facts that:

"………………. **The Local Committee is not required to give reason for arriving at any particular decision."**

The impact of the above statement rocks the very basis and foundation of any appellate system. Appellate tribunals/courts proceed on the basis of the record of the proceedings from either the subordinate court or tribunal or the body whose decision is being challenged in the appeal. There is no record of the proceedings or what transpired at the Local Committee. And that is the truth and position with respect to the appeal before me.

Several questions naturally arise from the above unhappy situation. In the absence of the record of the proceedings [or even minutes] of the Local Committee, how is this court supposed to decipher where and how the local Committee went wrong? In the absence of record or reasons by the Local Committee, how is the aggrieved party supposed to know the grounds of the decision and assess his position before exercising his right of appeal to this court?

Without proceedings/reasons from the Local Committee, it is not harsh to say that the rights of a party who wishes to challenge the assessment of the tax due from him is arbitrarily taken away.

The above issues are not frivolous or trivial. They need to be addressed by the relevant authorities through an amendment of the requisite law/rules.

The concerns also lead to the question, "What is the Local Committee? Who appoints the Local Committee and what is the relationship between the Local Committee and the Commissioner of Income Tax"?

From Section 82 of Cap.470, the Local Committee is established – appointed by the Minister who controls the Commissioner of Income Tax as per the provisions of Section 122 of the said Act, and in turn, the Commissioner is responsible for the control and management of the Department and for the collection of and accounting for tax.

There is no indication as to the qualifications that a person must possess to be eligible for appointment as a member of the Local Committee. What is clear is that any person – natural or corporate who feels aggrieved by an assessment by the Commissioner is entitled to an appeal against such an assessment to the Local Committee, which as alluded to hereinabove, is effectively under the Commissioner.

The natural question is the impartiality of such Local Committee as far as the appellant is concerned and generally in a *quasi – judicial tribunal* or body as the Local Committee in adjudication of such an important matter as taxes payable by all who qualify to be taxed in this country. To me, the Commissioner, through the Local Committee, is sitting in judgment of his own.

To re-capitulate, the overall effect of lack of the record of the proceedings at the Local Committee is leaving Counsel for both the appellant and the Respondent, and the court, to speculate on why and how the Local Committee erred or not, and craft their submissions on such speculation; a situation that is utterly unsatisfactorily and cries for urgent attention.

Turning to the appeal itself, ground of appeal No.1 has already been touched, howbeit in passing, in the general observations herein above. It raises the very fundamental issue as to

whether or not the Local Commissioner should have provided or given reasons for their decision to dismiss the appeal before the Committee.

It is not disputed, that no reasons are given for the decision of the Local Committee in dismissing the appellant's appeal before that Committee.

It is however the contention of the learned Counsel for the appellant that the Local Committee should, as a *quasi-judicial* body give reasons for its decision. For this the appellant cited several English decisions: *MARTA STEFAN V. GENERAL MEDICAL COUNCIL [1999] 1 WLR 1293 per Lord Clyde; REGINA V. LAMBETH LONDON BOROUGH Exparte WALTERS [1993] TLR 483 QB at p.483 and 484; and FLANNERY & ANOTHER V. HALIFAX ESTATE AGENCIES LTD [2000] 1 WLR 377, CA, at p.381 per Henry LJ.*

I note that all the above authorities are foreign – English, and accordingly only of persuasive, rather than binding authority in our system. Whereas I am tempted to persuasion on the basis that even where a statute does not impose the obligation to give reasons for a decision of a body adjudicating on dispute between parties, the trend is towards a duty to give reasons, as an integral function of due process, that is subject to express provisions of the statutory law, if any. And here the relevant statute is silent on the issue.

The only local authority cited by the Appellant is O it al V THE COMMISSIONER OF INCOME TAX, MISC. CIVIL APPEALS NOS. 10, 11 and 12 of 1953 – Court of Appeal Civil Appeals Nos. 96, 97 and 98 of 1953 Tanganyika, where the Court of Appeal for Eastern Africa held that "on an appeal from a Local Committee the High Court is obliged to make its own findings of fact regardless of any findings by the Local Committee."

Generally, an appellate Court should not be bogged down with matters of fact. Such an appellate body should confine itself with matters of law. But given the situation where the Local Committee record of the proceedings and reasons for the decision are not required by the statute to be part and parcel of the documentation in the appeal to the High Court that may explain the above holding, which is now replicated in Section 86, 92) of Cap.470 where it is provided:

"------------ an appeal to the Court --------- may be made only on a question of law or mixed law and fact."

Learned Counsel for the Respondent submitted that "the Local Committee is not required to give reasons for arriving at any particular decision."

This submission is not wholly true. If the submission means that the Local Committee, just like any other quasi-judicial body is not required to give detailed reasoning and analysis of its decision, as a Court, I have no quarrel with it. But if it means that the Local Committee's record of the proceedings is not required, then that runs counter to Rules 10 (i) and (k) of the Local Committee Rules made pursuant to Section 82 of the Act. Rule 10(i) provides:

"Before the Local Committee considers its decision, the parties to the appeal shall withdraw from the meeting, and the Local Committee shall deliberate the issue according to law."

Then 10 (k) says:

"Minutes of the meeting shall be kept and the decision of the Local Committee recorded thereon."

Without belabouring the point, such minutes of the Local Committee would go a long way towards meeting the lacuna referred to herein. They should be attached and would show what was deliberated by the Local Committee and would meet the requirements of Rule 5 (c) of the Appeals to The High Court Rules made pursuant to Section 91 of the Act. The Rule provides:

"A Memorandum shall be accompanied by: (a) (b) (c) " <u>a statement, signed by appellant or his advocate, setting out the facts upon which the appeal is based, and respectively specifying and referring to documentary or other evidence which it is proposed to adduce at the hearing of the appeal</u>."

From the pleadings and records before me, there were no minutes of the Local Committee meeting at which the appellant's appeal at that level was dismissed. Had such minutes been there, I see no good reason why and how they are not included in this appeal.

Accordingly, I am inclined to disagree with the learned Counsel for the Respondent. The law may not be specifically demanding the Local Committee to give reasons for their decisions. But the scanty provisions that I have referred to herein above require some keeping of record of the proceedings, by whatever name called, here minutes, and that does not seem to have been done by the Local Committee in the appeal before me. Hence, the Local Committee cannot shield itself behind "*<u>we are not required to give any reasons</u>*, then fail to observe the law which imposes obligations on that Committee.

The core of the dispute between the parties hinges on whether or not Ol Donyo Wuas is a hotel, because depending on the status of that building the appellant may or may not claim industrial building deduction for the year 1990 of Income Tax as per the Second Schedule of the Income Tax Act, Cap. 470 paragraph 5(1) (c).

Part I of the above Second Schedule is headed: DEDUCTIONS IN RESPECT OF CAPITAL EXPENDITURE ON CERTAIN BUILDINGS, and paragraph 5(1) (c) thereof provides as under:

"Subject to this paragraph, in this Schedule <u>industrial building</u> means a building which is in use as a hotel or part of an hotel and which the Commissioner has certified to be an industrial building where such a building in use as a hotel includes any building directly related to the operations of the hotel contained within the grounds of the hotel complex, including staff quarters, kitchens and entertainment and sporting facilities."

The Appellant's contention is that Ol Donyo Wuas, falls within those provisions, with the consequence that the Appellant is entitled to an industrial building deduction for the year 1990 and no tax is payable for that year and tax computations for the year 1991 will have to include a loss carried forward from 1990 of Kshs.172,584/= and an annual building allowance of Kshs.5,509/= with the effect that the tax payable by the Appellant for that year will be Kshs.253,128/= instead of Kshs.389,890/=.

To counter the claim, the Respondent avers that the building was not certified by the Respondent as a hotel as it was a stopover place, not incidental to the Appellant/company's business.

In the Respondent's written submission, it is averred that the Local Committee had, on 20/5/1998,, dismissed both appeals giving the *reason that "the building used as a hotel is not an Industrial Building."*

This is an interesting submission in two aspects. First, because as will be recalled, the same Respondent had contended that the local committee is not bound to give any reasons for its decisions, and that there are no record of proceedings. Now reasons are given by, the proceedings referred to are not attached. Either the Respondent has a copy of the proceedings, not availed to the Appellant, or as alluded to herein earlier, the Leaned Counsel for the Respondent is generating reason on his own motion. Either way, the record containing the reasons for the committee's decision is not available to this Court. That is not acceptable since it is a requirement that all the material/records from the Lower Court/tribunal/Committee should be part of the Record of Appeal for all the parties, and the Court.

I have tried to get the meaning of the word "hotel" from both the income Tax Act and the schedules thereto, with no success. The word hotel is not defined in that statute or the schedules thereto. This is important because in his submissions, the respondent had not certified Ol Donyo Wuas – the building – as an industrial building, (here read hotel). The immediate question is why had the Respondent not certified Ol Donyo Waus as a hotel, and how would one challenge refusal or failure to certify a building to be a hotel?

The answer seems to be that the decision is wholly left at the capricious and whimsical discretion of the Respondent. This is because the word hotel is not defined in the statute or schedules, nor are the criteria to be taken into consideration in deciding whether a building is or not an industrial building (read hotel) given.

Given the loud silence of the statute on Income Tax on such an important mater, the only place one can turn to is other statues for guidance. The Appellant, in his submissions turned to the Hotels and Restaurants Act, Cap 494, where "*Hotel*" is defined to mean *"…Premises on which accommodation, with or without food or services., to five or more adult persons at one time in exchange for money or moneys worth, and includes premises known as service flats, service apartments, beach cottages, holiday cottages, game lodges and bandas….."*

I have also looked at Cap 301 – The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, where the term hotel is defined to mean *"…any premises in which accommodation or accommodations and meals are supplied or are available for supply to five or more adult persons in exchange for money or other valuable considerations……"*

From the above two statutes that touch or deal with hotels, it is clear that notwithstanding the different purposes to which each targets, the similarities are adequate to warrant a statement that the world is clearly understood and the meaning cant be so radical as to anybody's mind as to create any controversy.

The above conclusion is important because in the Respondent's submissions, it is averred that *every Act referring to a thing has its own parameters for defining that thing* because of the varying intentions of the legislative in enacting different laws. The essence of this submission is, in my understanding, that the term hotel does not mean hotel within the Income Tax Act, even if the other two statutes earlier on referred to, are agreed on the term notwithstanding the different purposes targeted by each of those statutes.

With all due respect, the submission is flawed because Cap 470 does not, on its own, define what a hotel is or means. Secondly, where a statute intends to give a word whose meaning has acquired a public domain meaning a different meaning, that statue clearly goes out to give the word the meaning to be used in the statute or uses the commonly familiar phrases like "*means and includes*" within the word includes the statute can bring into its ambit, whatever else it wants brought within its definition.

Here, Cap. 470 is totally silent on the word hotel. How then can it be argued, the hotel within the second schedule thereof, does not mean what is in other paramateria statutes and in the public domain?

I have already held that there is no criteria given to assist in deciding what is or is not a hotel or an Industrial Building within the Income tax Act, and the schedules thereto.

The question then is whether the respondent is given a blanket discretion to refuse or certify a premise to be or not to be an Industrial Building or hotel? That cannot be the case, given the *quasi-judicial* role of that office and the committee supposed to look into complaints of those aggrieved by such decisions.

I wish to underline the fact that failure or refusal by the Respondent to certify Ol Donyo Waus

as a hotel/industrial building cannot, and should not, be through discretion exercised whimsically and irrationally.

It is on that above basis that I find and hold that the Local Committee, failed or erred in not reversing the Respondent's decision in not certifying the premises herein as a hotel – Industrial Building, a matter on which this Appeal revolves.

From the statement of facts, and I am entitled, by the statute to come up with a factual, as well as legal finding, I see no reason how any reasonable person or body could find that Ol Donyo Waus did into qualify to be certified as a hotel – Industrial Building., if any criteria, rather than whims, were applied.

Finally, the difficulties alluded to in separating the income center points and the expenditure of a capital nature, *vis a vis* loss sustained are technicalities which can be soughted out if the first questions are properly answered or dealt with in the first instance. The point is that the income year becomes irrelevant if the premises are irrationally denied certification as hotel/Industrial Building.

All in all, and for reasons given herein above, I find and hold that, notwithstanding the absence of a record on how/and/why the Local Committee erred, that local Committee for Nairobi Couth erred in upholding the decision of the Respondent in holding that Ol Donyo Waus was not a hotel or Industrial Building entitled to the deductions stipulated in the second schedule of the Income Tax Act, Cap. 470 of the Laws of Kenya. I further find and hold that the Respondents discretion in not certifying Ol Donyo Wuas as hotel was exercised unjudiciously, and against what is expected of a body like the Commissioner for Income Tax in imposing taxation on tax payers.

Accordingly, the Appeal herein succeeds and the decision of the Local Committed for Nairobi South, made on 20/5/1998, dismissing the Appellant's 1991 Appeal, is hereby set aside. Further, the 1991 Income Tax Assessment, is hereby revised, allowing deductions form taxable income in the tune of Kshs.172,584/= being loss brought forward form 1990 and Industrial Building allowance in the sum of kshs.5,809/=; Tax Assessment for Kshs.389,890/= is hereby reduced by Kshs.137,762/=; the additional assessment of Kshs.57,890/= is hereby set aside.

I further order that the Respondent do pay the costs and incidentals to this Appeal and the costs of the Appeal to the Local Committee of Nairobi South to the Appellant herein.

DATED and DELIVERED in Nairobi this 7th day of December, 2006.

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O. K. MUTUNGI

JUDGE