



**Commissioner of Investigations and Enforcement v Kingstone
Construction Company Limited (Income Tax Appeal E161 of 2024)
[2025] KEHC 3248 (KLR) (Commercial and Tax) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 3248 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E161 OF 2024
BM MUSYOKI, J
FEBRUARY 14, 2025**

BETWEEN

**THE COMMISSIONER OF INVESTIGATIONS AND
ENFORCEMENT APPELLANT**

AND

KINGSTONE CONSTRUCTION COMPANY LIMITED RESPONDENT

*(Being an appeal from judgment of the Tax Appeals
Tribunal in its appeal number 78 of 2023 dated 9-05-2024)*

JUDGMENT

1. This appeal arises from the judgment of the Tax Appeals Tribunal in its appeal number 78 of 2023 dated 9-05-2024 where it held as follows;
 - a. The appeal be and is hereby allowed.
 - b. The respondent's decision issued on 19th August 2022 be and is hereby set aside.
 - c. Each party to bear its own costs.
2. The short background of the matter is that on 19-01-2022 the appellant issued an additional assessment for Value Added Tax against the respondent for a sum of Kshs 16,330,701.00 for the period between 2016 and 2020. Earlier, the appellant had by a letter dated 4-11-2021 given notice of assessment to the respondent. The respondent did not respond to the notice until 28-02-2022 where it raised objection on the methodology used in arriving at the decision. By a communication dated 9-03-2022, the appellant granted the respondent leave to file a late objection under Section 51(7) of the [Tax procedures Act](#) following which the respondent filed the objection on 18-03-2022. Any assessment after



18th March 2022 does not appear to have been addressed in the parties' subsequent communication or covered in the decision dated 19th August 2022 which was the basis of the appeal before the tribunal as it talks of objection dated 28th February 2022.

3. There seems to have been silence on the objection until 1-07-2022 when the appellant wrote an email to the respondent asking for more information and documents in support of the objection which communication appears on page 151 of the record of appeal. In response thereto, the respondent resent its letter dated 28-02-2022 but the appellant replied that, the same was not an objection but a response to preliminary tax investigations report. The documents in support of the objection did not come and on 19-08-2022, the appellant wrote to the respondent under reference titled as 'confirmation of assessment'. This letter did not make any reference to the objection filed on 18-03-2022 but letter dated 28-02-2022 which it declared invalid. It is this letter which sparked the appeal before the tribunal which appeal was allowed as indicated in the opening paragraph of this judgment.
4. Dissatisfied with the above judgment, the appellant has approached this court with 9 grounds of appeal which can be summarised as follows;
 1. The tribunal failed to appreciate that it did not have jurisdiction under Section 52(2) of the [Tax Procedures Act](#). The basis of this ground is that there was no valid notice of appeal since the respondent did not pay the undisputed taxes relating to corporation tax for the year 2016.
 2. The tribunal erred in allowing the appeal and setting aside assessment relating to corporation tax which the respondent neither objected to nor disputed. According to the appellant, this was contrary to Section 51(1) of the [Tax Procedures Act](#).
 3. The tribunal did not have jurisdiction to set aside the assessment relating to income tax on Pay As You Earn not forming part of the appealed decision.
 4. The tribunal erred in adjudicating on the appellant's notice of confirmation of assessment dated 19th August 2022 which was not raised nor pleaded by the respondent.
 5. The tribunal erred in failing to give the appellant opportunity to respond to the issue of the objection having been allowed by operation of the law. This violated the appellant's right to fair hearing by framing and determining an issue which was not in the parties' pleadings.
 6. The tribunal erred by failing to find that the respondent's notice of objection dated 18th March 2022 were invalid for failure to state the grounds of objection, the reasons for amendments sought and not being accompanied by the supporting documents.
3. On perusal of the record, it is clear to me that although the letter dated 28-02-2022 was not the relevant objection, the assessments in issue were based on the facts stated in the appellant's letter dated 4-11-2021 and the two letters bespeak the same assessment in respect of which the appellant allowed the respondent to lodge a late objection. The two letters therefore had a bearing on the assessment which was the subject of the objection filed on 18-03-2022.
4. In its submissions, the appellant has majored on its position that the tribunal did not have jurisdiction to entertain the appeal and that it framed and determined the wrong issues which were not in the parties' pleadings. If I understand the appellant's submissions, it is arguing that the time for it to make decision on the objection as required under Section 51(11) of the [Tax Procedures Act](#) did not start running from 18-03-2022 since the respondent did not supply information and documents. It is not hard to understand what the tribunal said about this. The holding of the tribunal well interpreted means that, the fact that the appellant went silent for more than sixty (60) days after the objection



was filed, meant that the same stood allowed. That is the law and there is no twisting of words would change it.

5. The appellant has submitted that the respondent appealed against assessment dated 30th May 2022, 18th December 2019 and 15th November 2019 without going through the process provided in Section 51(1) of the [Tax Procedures Act](#). I have made all the efforts I could to understand this argument in vain. The memorandum of appeal before the tribunal was asking for setting aside of the assessment as per the respondent's statement of facts. In the statement of facts, the respondent made reference to assessment dated 18-12-2021 (which I believe should have been 19-01-2022) and subsequent objection and confirmation of assessment dated 19-08-2022 and that is what the tribunal dealt with. As far as I get from the issues raised in the appeal, the respondent was challenging the appellant's decision dated 19-08-2022 which was in respect of the respondent's letter dated 28-02-2022. The relevant part of the letter read;

‘Reference is made to your objection dated 28th February 2022, in response to the notice of assessment issued by the commissioner’.

6. I have not seen anywhere in the tribunal's judgment where reference is made to assessments dated 30th May 2022, 18th December 2019 and 15th November 2019. All that the tribunal said was that the appellant did not communicate its decision in respect of objection dated 28th February 2022 in time and it was therefore deemed allowed by operation of the law.
7. There was an argument put forward by the appellant that the letter dated 28th February 2022 was not an objection. There is no prescribed form of objection in the [Tax Procedures Act](#). The same may be in form of a letter or any other form of writing as long as there is clear communication of what the taxpayer is referring to and it complies with Section 51(3) of the said Act. I must admit that both parties did not make it clear to me as to which document between the letter dated 28-02-2022 and objection filed on 18-03-2022 formed the basis of the appeal before the tribunal but the appellant in its impugned objection decision confirmed the letter dated 28-02-2022 as its reference document. On perusal of the record, it is clear to me that although the letter dated 28-02-2022 may not have been the relevant objection, the assessment in issue was based on the facts stated in the appellant's letter dated 4-11-2021 and it is the same assessment in respect of which the appellant allowed the respondent to lodge a late objection. In this scenario, there are two possible relevant objections, that is, the letter dated 28-02-2022 and the objection filed on 18-03-2022. However, that does not make any difference because whichever of the two one picks as the correct objection, the time would still lapse against the appellant.
8. The appellant argues that the appeal before the tribunal was incompetent since it was based on an invalid notice of appeal and due to that, the tribunal had no jurisdiction to entertain the appeal. According to the appellant, the invalidity of the notice of appeal stemmed from two fronts. One is that the appellant had not complied with section 52(2) of the [Tax Procedures Act](#) as read together with Section 13 of the [Tax Appeals Tribunal Act](#). The other one is that the notice of appeal referred to decision dated 19th August 2022 and in that case any assessment which was not covered in that decision should have been excluded.
9. Section 52(2) provides as follows;

‘A notice of appeal to the Tribunal relating to an assessment shall be valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice.’



10. The appellant has claimed that the respondent should have first paid what it refers to undisputed corporate tax for 2016 and without that payment, the notice of appeal was invalid pursuant to the above Section. My understanding of the above Section is that a notice of appeal will not be valid if the undisputed amount under the assessment order and confirmation of the assessment or any decision on it is not paid or arrangements for its payment made. This would mean in my view, that the undisputed tax must be within the assessment in issue. The respondent in this case was objecting to assessment made on 19-01-2022 on VAT. That is what was before the tribunal and I have not seen admission of any part of that assessment. The appellant is mixing issues on this point and I find no valid argument on it.
11. I also find no merit in the second limb of invalidity of the notice of appeal. The respondent's letter dated 28-02-2022 was in response to the appellant's letter dated 4-11-2021. It is clear that the appellant's letter dated 4-11-2022 was the basis for the assessment. The objection was in respect of the same assessment and obviously the decision of 19-08-2022 was what the tribunal invalidated. The tribunal did not express itself to any specific assessment but to the decision of 19-08-2022 vis a vis the objection dated 28-02-2022 which was the basis of the formal objection filed on 18-03-2022.
12. There is also the argument put forth by the appellant that the tribunal framed issues related to corporate tax and PAYE which were not part of the appeal and pleadings before it. At paragraph 96 of the judgment, the tribunal stated;

‘The appeal is premised in three tax heads being corporation tax, PAYE and VAT. The tribunal however noted that the appealable decision before it is that of 19th August 2022, stemming from the assessment issued on 19th January 2022 relating to VAT. The tribunal shall therefore restrict its analysis to the issues appealed.’
13. I have looked at the analysis by the tribunal that followed the above statement and I have no doubt in confirming that the tribunal stuck and restricted itself to the decision of 19-08-2022 and objection dated 18-03-2022. The accusation that the tribunal framed issues outside what was pleaded is not true. The tribunal said nothing about corporate tax or PAYE. The letter dated 28-02-2022 speaks for itself on what taxes the respondent was objecting to.
14. Lastly, the appellant submits that the tribunal denied it the right to a fair hearing as it was not given an opportunity to address the tribunal on the issue of effluxion of time. The time limits given under Section 51(11) of the *Tax Procedures Act* is a requirement of the law and the tribunal had all the right and mandate to make reference to and interpret it. The parties appeared before the tribunal on 16-08-2023 when the appellant confirmed having filed submissions in response to the respondent's submissions. Again, the matter was mentioned on 27-09-2023 and 28-11-2023 where the issue of submissions was settled. It is not recorded that the appellant asked for time to submit on that issue. The appellant is in charge of enforcement of the tax laws inclusive of the *Tax Procedures Act* and is expected to be more knowledgeable and alert than anyone else on the provisions and timelines given by the said laws. In any case the appellant has not shown this court how its submissions on the issue would have changed the computation of time. The fact would have remained that it did not make a decision on the objection within the prescribed time and the objection was deemed allowed by operation of the law. A party who fails to adhere to the dictates of the law should not be expected to complain that the court applied the law against its position. The courts and tribunals are not expected to close their eyes and ears to the law simply because the parties did not address them on the law. Similarly, I see no merit in this argument.
15. The sum total of the above analysis is that, this appeal lacks merits and I do hereby dismiss it with costs to the respondent.



DATED SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF FEBRUARY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Ngetich for the appellant and Miss Muinde for Mr. Kioko for the respondent.

