Commissioner of Investigation and Enforcement v Kensionery Marketing & Systems Limited (Income Tax Appeal E066 of 2023) [2025] KEHC 2991 (KLR) (Commercial and Tax) (10 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2991 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E066 OF 2023

PJO OTIENO, J

MARCH 10, 2025

BETWEEN

COMMISSIONER OF INVESTIGATION AND ENFORCEMENT .. APPELLANT

AND

KENSIONERY MARKETING & SYSTEMS LIMITED ..... RESPONDENT

(Being an Appeal from the judgement of the honourable Tribunal delivered on 17th March 2023 IN THE TAX APPEAL TRIBUNAL AT NAIROBI)

JUDGMENT

1. The Appellant, the Commissioner of Investigations and Enforcement, is an arm of creature of Section 3 of the *Kenya Revenue Authority Act* (Cap 469) with the core mandate to assess, collect and account for all government revenues in accordance with the identified tax laws. Among these laws are the *Value Added Tax Act* Cap 35 Laws of Kenya, *Income Tax Act* Cap 470 Laws of Kenya and the *Tax Procedures Act* 2015.

2. On the other hand, the Respondent, Kensionery Marketing & Systems Limited, is a Limited Liability Company, duly incorporated in Kenya pursuant to the provisions of the *Companies Act* 2015 and engages in the business of supply of various goods and services including those that are taxable and those exempted from taxes. It is a registered taxpayer and domiciled in Kenya.

Background of the Dispute

3. The Appellant carried out investigations and analysis of the Respondent's business records for the years 2015-2019 respecting Value Added Tax and Corporation Tax. Investigations into the Respondent's affairs commenced in 2021. By document titled Notice of Assessment dated 8th February 2021, the

Appellant communicated its findings which assessed the respondent's Corporation Tax and VAT in the aggregate sum of Kshs 15, 156, 766.00 for the period between 2015-2019. The Respondent then answered to the Notice of Assessment vide a letter dated 19th February 2021 assuring its commitment to cooperate with the Appellant.

4. Pursuant to section 51 of the *Tax Procedures Act*, 2015, the Respondent raised a Notice of Objection of Tax Assessment dated 14th July 2021 which was considered after which review, the Appellant issued its Objection Decision on 10th September 2021 confirming the assessment.

5. The respondent felt dissatisfied with the Appellant's assessment and filed an appeal at the Tax Appeals Tribunal in Tax Appeal No. 643 of 2021. The Tribunal in its judgment delivered on 17th March 2023, vacated and set aside the Appellant's assessments for the years 2015 and 2017 but upheld those for 2016, 2018 and 2019.

The Appeal

6. The appellant was dissatisfied with the decision of the Tax Appeals Tribunal and lodged the instant Appellant vide the Memorandum of Appeal dated 15th May 2023, seeking orders to partially set aside the Tribunal's judgment. It prayed for a finding be made by this court that the additional assessment for the years 2015 and 2017 as demanded in the Appellant's Objection Decision dated 10th September 2021 are due and payable together with the costs of the appeal. The appeal sets out only two grounds as follows: -

    a. That the Honourable Tribunal erred in law and fact by finding that the Appellant pleaded the five-year limitation period under section 31(4)(6) in its Objection notice dated 13th July, 2021 whilst the same was not pleaded in the Memorandum of Appeal dated 13th October, 2021 which is the proper and binding pleading before the Tribunal.

    b. That the Honourable Tribunal erred in law and fact by holding that there was no clarity in the tax computation for 2017 as per the Respondent's submissions contrary to the express averments in its Statement of Facts and the documents before the Tribunal on tax computations for the year 2017.

7. The wording of the Memorandum of appeal suggests that only the upset of the 2017 assessment is challenged. That hence leaves the decision on the 2015 assessment intact.

The Appeal

8. From the Statement of Facts dated 8th November 2021, the Appellant's case was simply put to be that it carried out investigations on the tax compliance status of the Respondent and the investigations revealed that the respondent was evading tax and committing acts of fraud against the tax authority by under-declaring its income thus failing to pay the correct taxes. The appellant averred that by the power vested in them under Section 31(4) of Tax Procedure Act, it accurately reassessed the tax obligations of the respondent.

9. The Appellant gave a brief narration of the Respondent's tax evasion activities by stating that in the year 2015, the respondent made supplies to the Ministry of Health for smoker's body poster under tariff 49.11.99.10 which were not VAT exempt and that bank deposits of Kshs 53,782,373.00 by the Respondent were traceable to specific entities such as Nairobi Pentecostal Church, CITAM, and ministry of health and KEMSA.

10. The Appellant disputed the respondent's claims of double taxation as regards income from CITAM because the Appellant had only declared in 2015 for Kshs 2, 008, 739.00/= under income tax but

not VAT. equally disputed was the income of Kshs 4, 433, 511. 00/= for the year 2017 which was duly declared in the sales ledger but was not declared in the IT2C. The Appellant contended that the Respondent did not provide any evidence of any extra costs incurred in the generation of the income to claim any input tax as a requirement under Section 30 of TAT Act as read with Section 56 of the TPA.

The Response

11. In response and opposition to the Appellant's grounds of Appeal, the Respondent asserts that the Tribunal's ruling was justified and legally sound on the determination that taxes cannot be raised beyond five years. The Respondent submits that as a taxpayer, pursuant to Section 23(1) of the *Tax Procedures Act*, it is not obliged to keep records beyond the five-year limit period and that tritely, in line with Section 31(4) of the TPA, the Commissioner could not amend its assessment except in cases where fraud, wilful neglect and/or evasion which were not proved.

12. In response to ground 2 of the Memorandum of Appeal faulting the Tribunal's finding that there was no clarity in the tax computation for the year2017, it is the Respondent's case that the Appellant used banking and withholding certificates to ascertain the Respondent's tax liability instead of relying on one document out of the said documents to determine the same and this resulted in double taxation.

Appellant's Submissions

13. The Appellant has identified three issues for determination by the court. The first issue is whether the Tribunal erred in finding that the Appellant pleaded the five-year limitation under section 31 (4) (6) in its Objection notice dated 13th July 2021 given that the same was not pleaded in the memorandum of appeal. To this issue, the Appellant submits that contrary to the provisions of rule 5 and rule 56(3) of the Tax Appeal Tribunal (Procedure) Rules 2015, mandating that a statement of facts to set out precisely all the facts on which the appeal is based and that the tax payer to rely on the grounds stated in the objection, the assessment of tax outside the five year period is not one of the grounds raised by the respondent on the face of the memorandum of appeal.

14. The Appellant submits that the Memorandum of Appeal and statement of facts are two distinct documents that serve different purposes and that the only grounds for consideration ought to be those set out in the Memorandum of Appeal. In this regard, the Appellant cites the decision in Independence Electoral and Boundaries Commissioner & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR where the Court of Appeal cited with approval the Nigerian case of Adetoum Oladeji (NIG) Ltd v Nigerian Breweries PLC S.C.91/2002 where it was held as follows;

> "It is a very trite principle of Law that parties are bound by their pleadings and that any evidence by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

15. The second issue is whether the Appellant was justified to assess and demand tax beyond the five-year statutory period. It is submitted that Section 52B (1) of the *Income Tax Act* as read with Section 24 (1) of the *Tax Procedures Act* creates a legal obligation on all persons chargeable to pay tax in Kenya to fill a return of income, including a self-assessment of tax and that Section 24(2) of the TPA empowers the Appellant to assess any taxpayer using information available to it. It further submits that Section 31(4) of the *Tax Procedures Act* empowers the Appellant to amend self-assessment returns at any time in cases of gross or wilful neglect, evasion, or fraud by, or on behalf of the taxpayer.

16. Based on the cited provisions of the law, the Appellant submits that it conducted a tax compliance check of the tax returns and documents of the Respondent and established that there were variances between income in the sales ledger and income declared in the tax return and that the Respondent failed to account and declare income from CITAM and NPC for which failure the Respondent proffered no reason or justification.

17. The Appellant argues that the absence of any reason to justify the variances, mean that the Respondent was wilfully negligent in performing its legal obligation and that such negligence permits the Appellant to make additional assessment at any time and the statutory limitation of five (5) is not applicable.

18. The third issue is whether the Tribunal erred in holding that there was no clarity in tax computation for the year 2017. To this issue, the Appellant submits in the affirmative and directs this court to page 1 of the objection decision, where it is stated that;

> "...with regard to the year 2017, we note that Kshs 4.433.511 was captured in the sales ledger but no corresponding declaration was made in the IT2C declaration. The only income declared that year was from the state Dept. of Interior therefore no adjustments have been made.....with regard to income of Kshs 1,620,601/= from KEMSA for the supply of catheters and condom catheters in 2017 we note that the same was adjusted as an exempt supply for VAT purposes during our computation as the assessment stage."

19. The appellant thus maintains that its objection decision was clear and unambiguous on why there was an upward reassessment which ought to have been evident to the tribunal.

Respondent's Submissions

20. It is the submission of the Respondent that the Tribunal made the correct finding in arriving at its decision to vacate additional assessment for the year 2015 as the same was contrary to Section 23 of the *Tax Procedures Act* and Section 43 (1) of the *Value Added Tax Act*, 2013 which provisions do not require a taxpayer to keep records beyond the five (5) year limit and as such, the Appellant is restricted to making assessments only within that statutory period save for situations where the commissioner can prove gross or wilful neglect, evasion, or fraud on the part of the Respondent and in this particular case, the Appellant has not tendered any evidence whatsoever to demonstrate tax evasion or tax fraud by the Respondent.

21. As to the Appellant's complaint that the Respondent did not plead the issue of the assessments beyond the five (5)) year statutory period in its Memorandum of Appeal dated 13th October 2021 hence the Tribunal misapplied itself and the law by making a determination on an issue not raised, the Respondent submits that pursuant to Section 56(3) of the *Tax Procedures Act* 2015, it pleaded and relied on the issue of record keeping and the statutory period of five (5) years as raised in its Notice of Objection to additional assessments dated 13th July 2021. The Respondent submits that the same issue was further raised under paragraph 7 of its Statement of Facts dated 13th October 2021.

22. On the Appellant's contention that the Statement of Facts is not the suitable pleading in which the respondent should have raised its issues for consideration and determination by the tribunal, the Respondent submits that the statement of Facts is a proper pleading under Rule 5 of the Tax Appeals Tribunal (Procedure) Rules, 2015. In support thereof, the Respondent cites the case of Daniel Otieno

Migore v South Nyanza Sugar Co. Ltd [2018] eKLR and the case of Raila Amolo Odinga & Another v IEBCL & 2 Others [2017] eKLR where the Supreme Court held as follows;

> " In absence of pleadings, evidence if any, produced by the parties cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...."

23. The Respondent further submits that the Tribunal arrived at a correct finding in holding that the basis of computation of tax for the year 2017 by the Appellant was not clear. It is the Respondent's case that the Appellant relied on a number of bases to arrive at the expected revenue for the periods between 2015-2019 such as banking, declarations on value added tax, sales ledgers provided and withholding certificates which amounted to double taxation. The Respondent submits that the Appellant's computations in its Objection Decision reveals that different revenues were used in the computations for the year 2017. The Respondent contends that for the year 2017, the income analysis of Kshs. 13, 718, 263 even from the Appellant's workings which agree with the Appellant's reconciled sales ledger, is different from the amount indicated in the Appellant's Objection Decision which was Kshs. 14,241,022.

24. The Respondent further asserts that the production of records for the purposes of obtaining information in respect to tax liability is clearly provided for under Section 59 of the *Tax Procedures Act*, 2015 and was emphasized in the case of Commissioner of Domestic Taxes v Structural International Kenya Ltd [2021] KEHC152 (KLR) to be that it is the taxpayer to produce the documents to be used in computation of tax by the authority. It is thus Appellant's contention that it settled on using banking and withholding certificates to arrive at computation of the expected income and not banking and ledger provided by the Respondent in violation of the said Section 59 of TPA. It adds that the respondent did not consider tax paid under the withholding system and ignored all the withholding tax certificates for the periods between 2015 and 2018 and particularly the sales ledger for 2017 which were willingly provided by the Respondent.

25. The Respondent accordingly cites the case of Commissioner of Domestic Services v Computech Limited [2021] eKLR where the court held that:

> " The Court finds no fault with the Tribunal on its finding on the said evidence. Having produced the said documents which were prima facie evidence of trading, the evidentiary burden of proof sifted to the appellant. The appellate did not impeach any of the said documents. Neither did he challenge them. That being the ones, the respondent had discharged its burden of proof and the Tribunal's decision thereon cannot be faulted."

26. The Respondent concludes by urging this Court to uphold the Judgment of the Tax Appeals Tribunal delivered on 17th March 2023 and urges that the Appeal be dismissed for want of merit with costs to the Respondent.

Issues

27. The Court upon consideration of the pleadings and documents filed by the respective parties thereto in line with the Tribunal's decision dated 17th March 2023 is of the view that the Appeal raises two issues pertinent for determination by the court. The issues are;

    a. Whether the Tribunal erred in finding that the Appellant pleaded the five-year limitation period

    b. Whether the Tribunal erred in holding that there was no clarity in tax computation for the year 2017?

Analysis And Determination

28. It is not disputed that the assessment and inquiry of the tax affairs of the Respondent by the Appellant exceeded the five-year statutory period provided by law. The dispute appears to be whether this objection was pleaded by the Respondent before the Tribunal to avail the tribunal the right to even address its mind on the issue. The Respondent has argued that it pleaded the issue of record keeping and the assessments beyond the five (5) year statutory period in its Notice of Objection to additional assessments dated 13th July 2021 as well as its Statement of Facts dated 13th October 2021 under paragraph *7* pursuant to Section 56(3) of the *Tax Procedures Act* 2015. The Appellant's contention on the other hand is that a Statement of Facts is not a pleading.

29. The Tanzanian Court of Appeal in the case of Salim Said Mtomekela v Mohamed Abdallah Mohamed, Dar-Es-Salaam Court of Appeal Civil Appeal No. 149 Of 2019(Mugasha. J.A. Kihwelq. J.A. Rumanyika. J.A addressed what amounts to a pleading and observed as follows;

> " Pleading in law means, written presentation by a litigant in a law suit setting forth the facts upon which he/she claims legal relief or challenges the claims of his opponent. It includes claims and counterclaim but not the evidence by which the litigant intends to prove his case ... since the pleading is a basis upon which the claim is found, it is settled law that, parties are bound by their own pleadings and that any evidence produced by any of the parties which is not supportive or is at variance with what is stated in the pleadings must be ignored...."

30. Rule 5 of the Tax Appeals Tribunal (Procedure) Rules, 2015, establishes a Statement of Facts as a pleading by providing as follows;

> "(1) Statement of fact signed by the appellant shall set out precisely all the facts on which the appeal is based and shall refer specifically to documentary evidence or other evidence which it is proposed to adduce at the hearing of the appeal.
>
> (2) The documentary evidence referred to in paragraph (1) shall be annexed to the statement of fact."

31. The Respondent under Paragraph 7 of its Statement of Facts dated 13th October 2021 specifically stated that the authority 'erred in fact and law my raising additional assessment beyond the statutory period of five years contrary to section 31(4)b) of *Tax Procedures Act* 2013.'

32. On the face of such pleading, the Appellant has faulted the Tribunal for proceeding to make a determination on an issue that had not been pleaded by the Respondent yet when served with the Statement of Facts, it responded to the same allegations at Paragraph 12 of the Statement of Facts and

submitted on the same at Pages 3 & 4 of its submissions both dated 8th November 2021 and filed before the Tribunal. The said Paragraph 12 of the Appellant's Statement of Facts indicates as follows:

> " 12. On the Appellant's allegation that the additional assessment contravenes the provisions of Section 31(4)(b) of the *Tax Procedures Act* 2015. It is the Respondent's case that the amended assessment issued to the Appellant was governed within the provisions of Section 31(4) (a). That the investigation against the Appellant had revealed acts of tax evasion and fraud on the part of the Appellant in failing to account or under-declaration of income it had received and therefore failing to pay the correct taxes. That Section 31(4)(a) allows the commissioner to amend an assessment in the case of gross or wilful neglect, evasion, or fraud by, or on behalf of, the taxpayer, at any time."

33. With such a response, it cannot be true that the question of limitation was never pleaded. The same was pleaded and responded to very robustly and it was thus a matter in issue in the dispute which the tribunal had no otherwise but to determine. The court thus finds that the Statement of Facts is indeed a pleading which in this matter expressly pleaded the issue of five-year limitation period.

34. On the second limb of the appeal by which the Appellant's faults the judgment for upsetting the objection decision for lack of clarity, it is asserted by the appellant that the Objection decision and the tax assessment of the respondent's tax obligation stated the grounds upon which the VAT and Corporation tax assessment for the year 2017 was made. The Appellant therefore invites the court to interrogate the income and sales ledger of the Respondent vis a vis the figures it submitted to the Kenya Revenue Authority for the year 2017 and make a determination on the tax liability arising therefrom.

35. The respondent on his part supports the finding of the tribunal and asserts that the Appellant relied on a number of bases to arrive at the expected revenue for the periods between 2015-2019 such as banking, declarations on value added tax, sales ledgers provided and withholding certificates which amounted to double taxation.

36. This being a second appeal and the jurisdiction of the court set out in Section 56(2) of the Tax Procedure Act 2015 and restricts same to the determination of questions of law only. The Appellant appears to be asking this court to address its mind on factual issues by, examination of bank statements, sales ledgers etc and make a comparison with what was declared by the Respondent. That amounts to interrogation of facts which is outside the mandate of this court. The court views that invitation as one intended to craft a jurisdiction for itself beyond the law in the statute.

37. It was the decision of the court in Charles Kipkoech Leting v Express (K) & Another [2018] eKLR that where a right of appeal is confined to questions of law only, an appellate court is duty bound to accept the findings of fact of the lower court. The court held as follows;

> " This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina v Mugirai [1983] eKLR, Kenya Breweries Ltd v Godfrey Odongo, Civil Appeal No. 127 of 2007, and Stanley N. Muriithii & Another v Benard Munene Ithiga [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of Martin v Glywed Distributors Ltd (t/a MBS Fastening [1983] ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and

law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

38. That is now a well settled and trite position of the law the court need not keep reiterating. The court just can't concern itself with re-evaluation and re-examination of the facts and hope to come to own conclusion as if it was a first appeal proceeding by way of a retrial. The end result is that the Appeal is adjudged to lack merits and hereby dismissed with costs.

39. The Tribunal judgement dated 19th February 2021 is hereby upheld and sanctioned for due compliance.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10TH DAY MARCH, 2025

PATRICK J O OTIENO

JUDGE