Commissioner of Domestic Taxes v Odanga (Income Tax Appeal E041 of 2022) [2025] KEHC 4413 (KLR) (Commercial and Tax) (8 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4413 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E041 OF 2022

BM MUSYOKI, J

APRIL 8, 2025

BETWEEN

COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT

AND

SEBASTIEN VITALIS ODANGA ..... RESPONDENT

(Being an appeal from the ruling of the Tax Appeals Tribunal delivered on the 4th March 2022 in Tax Appeals Tribunal appeal No. 332 of 2018.)

JUDGMENT

1. The appellant was dissatisfied with the decision of the Tax Appeals Tribunal dated 4th March 2022 in its appeal number 332 of 2018 which decision dismissed the appellant's application dated 12th October 2021 which sought to review judgement of the tribunal dated 10th September 2021. The appellant had sought to review the said judgement on the ground that there was a mistake apparent on the face of the record. In the memorandum of appeal dated the 26th of April 2022 the appellant contends that;

    a. The tribunal erred in law and fact by failing to consider the appellant's submissions on income tax with regard to its application for review.

    b. The tribunal erred in law and fact by failing to consider the appellant's statement of facts and the supporting documents thereto which were all on income tax.

    c. The tribunal erred in law and fact by failing to note that the taxes in dispute related to income tax although the appellant had erroneously stated in some paragraphs that the tax in issue was VAT.

d. The tribunal erred in law and fact by failing to consider the arguments of the appellant made in both the statement of facts and submissions and thereby reaching at an erroneous judgment.

e. The tribunal erred in both fact and law by failing to consider the relevant material evidence placed before it and thus arriving at a wrong conclusion.

f. The tribunal erred when it framed wrong issues for determination thus asked itself the wrong questions and in so doing arrived at a wrong conclusion.

2. The respondent filed the appeal before the tribunal after being being dissatisfied with the appellant's decision issued on 14th September 2018 which confirmed additional assessment for Kshs 1,488,148.00 for the period 2015 and 2016. In its judgement the appellant sought to review, the tribunal held that the appellant had failed to submit and prosecute its defence on income tax and concentrated on VAT instead. It proceeded to allow the appeal after finding that the appellant had not sufficiently rebutted the respondent's case.

3. It is the appellant's case that the honourable tribunal in its ruling on the appellant's application for review failed to address the main issue in dispute being the validity of the assessment and the fact that there was an error apparent on the face of its judgement issued on 10th September 2021. It is its further submissions that the honourable tribunal's ruling of 4th March 2022 failed to acknowledge that there was a mistake and error in the judgement issued on 10th September 2021 considering that the main issue for determination in the respondent's appeal was not considered or decided. The appellant admits that some of its paragraphs made reference to VAT instead of income tax but in its submissions and the big part of its pleadings, it was clear that the appellant made reference to income tax and that reference to VAT was an error on its part. This is the error the appellant sought the tribunal to address and consider in reviewing its judgment.

4. A big part of the appellant's submissions relates to the main appeal before the tribunal. The appeal before me is against the tribunal's ruling dated 4th March 2022 and I will not therefore go into the facts or matters that were decided or were supposed to be decided in the tribunal's judgment dated 10-09-2021. Where a party is aggrieved by a decision which is appealable and reviewable at the same time, it can only choose one path and not both. The appellant having chosen to go for review cannot now invite this court to relook into the arguments placed before the tribunal and dealt with in the judgment or ruling it sought to review.

5. I will isolate and avoid consideration of submissions of the parties that are centered or relate to substantive issues in the judgement of the tribunal instead of the ruling on review. In drawing such submissions, the parties especially the appellant are clearly in a mission to have this court re-consider the appeal before the tribunal on its merits. The ruling to which this appeal relates was on application for review and I believe that the tribunal lacked jurisdiction to re-evaluate the evidence as it became functus officio after delivery of its judgment. The principle of functus officio is a firm and sound legal position that prevents parties from reopening cases where the courts have delivered final judgments. The court in the case of Telkom Kenya Limited vs John Ochanda (2014) eKLR held that;

> 'Functus officio is an enduring principle of law that prevents the reopening of a matter before a court that rendered the final decision thereon..."

6. The only ground I should consider in this appeal is whether the appellant established an error apparent on the face of the record in the tribunal's judgement dated 10-09-2021 and whether that error if any justified orders for review of the tribunal's judgment.

7. The respondent opposed the appeal through its submissions dated the 21st November 2024. It submits that, the obvious error apparent on the face of the record was that the tribunal in its judgment had erroneously held that the appellant in its pleadings together with its submissions had ventured into the arena of VAT assessment, which assessment was not subject of the appeal arising from its objection decision dated 14th September 2018. The respondent takes position that this did not qualify to be an error apparent on the face of the record justifying review of the judgment because it is an error by the appellant and not the tribunal. He adds that for an error to qualify as apparent on the face of the record, it must be self-evident and not require an extensive debate or analysis. He submits that the appellant is the one who mischaracterized the taxes and issues and that alone cannot meet the threshold of an error apparent on the face of record.

8. What is an error apparent on the face of the record has been defined in many judicial authorities one of them being National Bank of Kenya Limited v Ndungu Njau [1997] KECA 71 (KLR) where the Court of Appeal explained what constitutes an error apparent on the face of the record and the scope of review as follows;

> 'A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.'

9. Another opportunity for definition of what constitutes an error apparent on the face of the recorded presented itself in the case of Nyamogo and Nyamogo Advocates v Kogo [2001] 1 EA 173 where the Court of Appeal had the following to say;

> 'An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.'

10. The error as put forward in this matter by the appellant can be perceived in twofold. That is, error on the part of the appellant and error on the part of the tribunal. The appellant admits that it in some parts of its pleadings and submissions made reference to VAT rather than income tax. In my view, that would not even have been a big issue since the analysis would have mattered more than the reference in the wider interest of justice. But the errors that can be corrected through review are those made by the court or tribunal and not by the parties. If the courts were to entertain correction of errors made by the parties, it would mean allowing parties to litigate in installments and through trial-and-error method.

11. The other approach by the appellant is that there was an error on the part of the tribunal when it failed to appreciate and consider its submissions and statement of facts in reference to income tax. That may have been so but I do not think that it can be categorized as an error apparent on the face of the record. Where a party feels or thinks that some of its evidence was not considered by the trial court or tribunal or that the evidence was improperly considered or even deliberately ignored, the party cannot go back to the same court for review citing an error apparent on the face of the record. In the National Bank of Kenya case (supra), the court stated that misconstruing a statue or other provision of the law cannot be a ground for review and I would add that misconstruing of evidence or submissions produced before the court cannot form a ground for review. The remedy thereof lies in an appeal as attempting to make a review will amount to asking the court to revisit the same evidence tendered before it and come to a different conclusion. If that were to be allowed, we will not see finality of court decision as losing parties would want to have a second bite at the cherry even where the court clearly is functus officio on the issues before it.

12. On the basis of the above analysis, this appeal is found unmeritorious and it is hereby dismissed with costs to the respondent.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF APRIL 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Onyango for the appellant and Mr. Kipkoech holding brief for Mr. Kamotho for the respondent.