Dutch Flower Group Kenya v Commissioner of Domestic Taxes (Income Tax Appeal E031 of 2023) [2025] KEHC 4498 (KLR) (Commercial and Tax) (8 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4498 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E031 OF 2023

BM MUSYOKI, J

APRIL 8, 2025

BETWEEN

DUTCH FLOWER GROUP KENYA ..... APPELLANT

AND

THE COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT

(Being an appeal against judgment of the Tax Appeals Tribunal in its appeal number 690 of 2022 dated 10-02-2023)

RULING

1. This matter was set for a judgment but I will instead deliver a ruling for reason stated hereafter.

2. The appellant filed this appeal challenging judgement of the tax appeals tribunal dated 10-02-2023. The appeal before the tribunal sought to set aside objection decision of the respondent dated 17th May 2022 in which the respondent upheld its decision to reject refund for VAT input claim made by the appellant in respect of services offered to Flower Retail Europe BV (hereinafter referred to as FRE) and Flower Connect Holdings BV (hereinafter referred to as 'FCH') between the period of October 2019 and January 2020.

3. The borne of contention before the tribunal was the nature of the relationship between the appellant and FRE and FCH. Whereas the appellant maintained that it was a service provider to the two companies, the respondent took position that the relationship was that of principal and agent with the appellant being the agent and the two companies principals. That difference in the definition of the

relationship is the whole cause of dispute. In its judgement the tribunal in the part I consider relevant to this ruling stated as follows;

> 'The tribunal has also taken note that the same issues were adjudicated on between the same parties in the High Court Income Tax Appeal No. E101 of 2020 Commissioner of Domestic Taxes -vs- Dutch Flowers Group Kenya Ltd arising out of an appeal from TAT No 9 of 2018- Dutch Flowers Group Kenya Ltd -vs- Commissioner of Domestic Taxes.....'

4. The Judge's finding effectively determines that the services provided by the appellant are not exported services by the very nature of the contracts entered into by the appellant.

5. The tribunal has had the benefit of perusing the two contracts annexed to appellant's statement of facts, entered into between the appellant and FRE BV and FCH BV, and find the clause referred in the High Court judgement above, bear the same terms and conditions as replicated.'

6. It is common ground that there is a judgement in Income Tax Appeal number E101 of 2020 involving the same parties and the same issue. The appellant has urged this court not to be bound by the decision of the said judgement while the respondent contends that the decision is solid and this court should follow the same. It is also common ground that the judgment in the said appeal was appealed to the Court of Appeal vide Civil Appeal number 673 of 2021. This position has led me to consider first whether the issue of the relationship is Res Judicata this courts income tax appeal number E101 of 2020 (hereinafter referred to as 'the former appeal'). Although none of the parties has addressed this court on or raised the issue, this being a court of law, I could not close my eyes to it.

7. Section 7 of the *Civil Procedure Act* Chapter 21 of the Laws of Kenya which covers the doctrine of Res Judicata states that;

> 'No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.'

8. With this in mind, I had to make comparison of this case with the former appeal to satisfy myself whether this matter or some issues in it is res judicata the former appeal. There is no doubt that the former appeal involved the same parties and was heard and determined by a court of competent jurisdiction safe that an appeal against the judgment in the appeal is pending in the Court of Appeal. However, the pendency of the appeal does not affect the application of the doctrine of res judicata as that is taken care of by explanation 2 of the said Section 7 of the *Civil Procedure Act* which provides that for the purposes of the Section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court. In that case, the only ingredient of the doctrine of res judicata which I have to determine is whether the two matters involved the same issues.

9. The memorandum of appeal in the former appeal had the following ten grounds;

    1. The honourable tribunal erred in law and fact by ignoring the service agreement between Flower Retail Europe BV and the respondent herein Dutch Flower Group Kenya Limited that clearly created an agent-principal relationship.

    2. the honourable tribunal erred in law and in fact by failing to recognise that the service agreement between Flower Retail Europe BV and the respondent herein Dutch Flower Group Ltd provided for compensation of services provided by the agent to the principal on a cost-

plus basis and on a 5% mark-up, meaning that the respondent herein could not claim input as the said input had already been recompensed by the principal in the terms of payment.

3. The honourable tribunal erred in law and fact in failing to appreciate that the terms of the service agreement especially on the clause of prices and payment, meant that the agent was unjustifiably trying to enrich itself by claiming input from the Revenue Authority yet the principal had already restituted it.

4. The honourable tribunal erred in law and fact in ignoring its earlier decision in TAT 74 of 2016 Coffea Agencies Ltd vs Commissioner of Domestic Taxes where the tribunal had held that an agent could not claim its principal's inputs.

5. The honourable tribunal erred in law and fact in misinterpreting the terms of service agreement between Flower Retails Europe BV and the respondent herein Dutch Flower Group Kenya Limited.

6. The honourable tribunal erred in law and fact in finding that all services, without exception, offered by the respondent herein could be considered exported services.

7. The honourable tribunal erred in law and in fact in its interpretation of what constituted horticultural services and finding that the appellant herein was not providing horticultural services, which are exempt services under Paragraph 5, Part II of the First Schedule to the VAT Act 2013 and not zero-rated.

8. The honourable tribunal erred in law and fact in failing to uphold the well-established principal that in looking at an exported service what is pertinent is the consumer of the services and actual consumption must be put into consideration.

9. The honourable tribunal erred in law and fact in failing to consider the evidence tendered by the appellant.

10. The honourable tribunal misapplied the law and facts therefore arrived at the wrong decision.

10. In his judgment, the Honourable Justice Alfred Mabeya collapsed the ten grounds of appeal to two issues viz;

a. That the tribunal erred in failing to recognize that the service agreement between Flower Retail Europe B.V and the respondent created an agent-principal relationship.

b. That the tribunal erred in finding that all services, without exception, offered by the respondent could be considered exported services; and that it was not providing horticultural services, which are exempt services under Paragraph 5, Part II of the First Schedule to the VAT Act 2013 and not zero-rated.

11. In answering the first issue, the Honourable Judge made reference and reproduced pertinent parts of the service agreement and after analysing their import, he held;

> 'The court's conclusion is that, notwithstanding the wording of the agreement, the net-effect is that the respondent is an agent of FRE. A clear agency relationship is created by the said agreement as FRE retains control over the respondent in the nature of the business the two are engaged on.....
>
> In view of the foregoing, I firmly hold that notwithstanding that the agreement does not expressly state that the respondent is a commission agent of FRE, the net effect of the

clauses, set out above, which spells the relationship between the two, the two are in an agency relationship.....'

12. And on the second issue he stated as follows;

> 'The services are consumed locally by the supplier of the subject flowers so that the end product is to the specification of the consumer. The value is consumed by the person in Netherlands but the supplier is locally.

13. In this regard, the complaint by the appellant cannot be said to be without basis. In this regard, not all the services offered by the respondent can be held to be wholly exported.'

14. In the appeal before me, the appellant has set forth the following grounds;

    i. That the honourable tribunal erred in fact and in law in holding that the appellant is an agent of Flower Retail Europe BV ('FRE') and Flower Connect Holding BV ('FCH') in accordance with the contracts between the appellant and FRE and FCH.

    ii. That the honourable tribunal erred in law in finding that the costs of the appellant are costs of FRE and FCH.

    iii. That the honorable tribunal erred in law in disallowing the appellant's imports on the ground that the appellant as agent of FRE and FCH cannot claim costs belonging to its principal.

    iv. That the honourable tribunal erred in fact and in law in holding that the services provided by the appellant are consumed in Kenya.

    v. That the honourable tribunal erred in fact and in law in holding that the services provided by the appellant are not exported services.

    vi. That the honourable tribunal erred in failing to decide the appeal in its merits but placing its reliance on the position adopted by the High Court in Income Tax Appeal No. E101 of 2020, Commissioner of Domestic Taxes -vs- Dutch Flower Group Kenya Limited in its determination that the services provided by the appellant are not exported services, and that the appellant is an agent of FRE and FCH, thus disallowing the VAT input and refund claim made by the appellant.

    vii. That the honourable tribunal erred in failing to exercise its discretion to stay the delivery of its decision pending the hearing and determination of *CA No. 673 of 2021*, Dutch Flowers Group Kenya Limited vs Commissioner of Domestic Taxes by the Court of Appeal of Kenya. The said appeal is an appeal against the judgement delivered in High Court Income Tax Appeal No. E101 of 2020, Commissioner of Domestic Taxes -vs- Dutch Flower Group Kenya Limited. The failure to stay the determination of the proceedings before the Tribunal was contrary to the principles of pendente lite and sub judice.

    viii. The honourable tribunal erred in fact and in law in upholding the respondent's objection decision dated 17th May 2022, finding that the appellant is not entitled to claim input VAT and rejecting the appellant's refund claims for October 2019 to December 2019 totaling to Kshs 943,092.

15. It is obvious to me that the issues raised in the memorandum appeal and the submissions of the parties in this matter are the same issues determined by Honourable Justice Mabeya in the former appeal. No change of words, twisting of terms or rearrangements of sentences can change the fact that the issues

for determination in both matters were the nature of the relationship between the appellant and FRE and FCH and whether the services in question were consumed locally.

16. The judgment of Justice Mabeya made reference to and analyzed the purport and implication of agreement dated 10-12-2011 in respect of the relationship between the appellant and FRE. I have seen the agreements in question in this matter which appear on pages 14 to 21 of the record of appeal. These agreements are dated 5th December 2011 for FCH and 10th December for FRE. Undoubtedly the agreement with FRE is the same agreement Justice Mabeya conclusively and exhaustively dealt with. Although the agreement between the appellant and FCH was not subject of discussion in the former appeal, the same is similar word for word with the agreement with FRE. The difference is the name of the principal. In my considered view, that difference that does not change the fact that the Honourable Judge made a decision on the relationship.

17. Based on the above, it is my conclusion that the issue in this appeal were the same issues prosecuted and determined on merits in the former appeal. The doctrine of res judicata ensures that there is finality to litigation. It prevents parties from relitigating issues which have been determined by a competent court between the same parties in order to avoid possibility of conflicting judgments, decrees and orders as in having such a situation would compromise fair administration of justice and put into disarray law and order. In William Koross (Legal personal Representative of Elijah C.A. Koross) v Hezekiah Kiptoo Komen & 4 others (2015) KECA 906 (KLR), the Court of Appeal held that;

> 'The philosophy behind the principle of res judicata is that there has to be finality; Litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.'

18. The pendency of an appeal does not give parties in that appeal right to institute similar proceedings and ask the court or tribunal to keep them pending until the appeal is determined. That would be a clear abuse of the court process and against the public policy of decongesting courts and dealing with the ever increasing case backlog in our courts. In any event, there was no application for stay of proceedings prosecuted before the tribunal. I therefore find that the tribunal did not err in failing to stay its judgement pending the appeal at the Court of Appeal.

19. The appellant has claimed that the doctrines of pendente lite and sub judice should have applied and this matter stayed. The appeal before the tribunal was filed by the appellant herein. It beats logic and to me, actually absurd for a party to institute proceedings in a court or tribunal then turn around to claim that the court should delay or stay it pending an appeal on the same issues which the same party has filed in a higher court. The doctrine of sub judice is enshrined in Section 6 of the *Civil Procedure Act* and governs and is concerned with matters which are pending in court and not matters which have been concluded and a decision rendered. An appeal does not fall under the said doctrine unless there is an express order for stay of proceedings. In any case, these two issues were not taken or argued before the tribunal and cannot therefore be raised in this appeal.

20. In the premises of the above, I decline to consider the appeal on its merits and that is why I have delivered a ruling instead of a judgment. The same is hereby struck out 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. Akhaabi for the respondent.