Commissioner of Investigations and Enforcement v Cellnet Limited (Income Tax Appeal E072 of 2024) [2025] KEHC 6568 (KLR) (Commercial and Tax) (16 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6568 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E072 OF 2024

RC RUTTO, J

MAY 16, 2025

BETWEEN

COMMISSIONER OF INVESTIGATIONS AND ENFORCEMENT APPELLANT

AND

CELLNET LIMITED ..... RESPONDENT

(Being an Appeal and cross appeal against the judgment delivered on 2nd February 2024 at the Tax Appeals Tribunal in Tax Appeals Tribunal Case No. 1514 of 2022)

JUDGMENT

1. This judgment relates to an appeal and cross appeal arising from the judgment delivered by the Tax Appeals Tribunal in Appeal No. 1514 of 2022. For good order and ease of read, the cross-appellant shall throughout be referred to as the respondent while the appellant shall be referred to as the appellant. In the said matter, the Respondent being dissatisfied with the appellant's assessment of Value Added Tax (VAT) amounting to Kshs.12,982,500 lodged an appeal before the Tax Appeal Tribunal (the Tribunal). The assessment was based on a variance between sales declared in the Income Tax Returns (IT2C) and the VAT returns without considering exempt sales that were not declared in the VAT returns by the Respondent.

2. At the Tribunal, the Appellant urged for the dismissal of the appeal. It contended that the Respondent had not demonstrated that the Appellant's assessment, based on investigations and findings regarding revenue from the sale of airtime, Safaricom sales commissions, Mpesa commissions, discounts allowed but not utilised, consignments allowed, and sales recharge vouchers was incorrect. The Appellant argued that the Respondent's appeal was not supported by documentary evidence to show that the assessment and the objection decision were erroneous.

3. The Tribunal identified two issues for determination namely: whether the Respondent's assessment was validly issued, and whether the Respondent was justified in confirming the VAT assessment on adjusted vatable sales. The Tribunal held that the Appellant's VAT assessments for the year 2016 and up to June 2017 were time-barred under statute and accordingly expunged them. It also held that the Respondent had failed to prove its case and that the Appellant was justified in confirming the VAT assessment on adjusted vatable sales. In conclusion, the Tribunal ordered that the Appellant's objection decision issued on 1st November 2022 be varied to the extent that the VAT assessment in the sum of Kshs.7,892,779.00 relating to the year 2016 is set aside. Additionally, the Tribunal upheld the VAT assessment of Kshs.5,089,721.00 relating to the year 2019.

4. The Appellant, being aggrieved with the part of the judgment, lodged this appeal setting out the following grounds of appeal; that the Honourable Tribunal erred in law in adjudicating on an issue, relating to the Value Added Tax assessments for the year 2016 being contrary to Section 31 (4) (b) of the *Tax Procedures Act* 2015 which was neither raised nor pleaded by the Respondent; erred in law in determining issues and grounds which were not in the Respondent's Notice of Objection and the appeal documents, contrary to Section 56 (3) of the *Tax Procedures Act* 2015 and Section 13 (6) of the *Tax Appeals Tribunal Act* 2013; erred in law in failing to afford the Appellant a reasonable opportunity as required under Section 26 of the *Tax Appeals Tribunal Act* 2013 to present his case and respond to the issue of the validity of the Value Added Tax Assessment for the year 2016; erred in assuming the jurisdiction it did not have to consider issues or grounds not forming part of the objection decision (appealable decision) contrary to Sections 3 and 12 of the *Tax Appeals Tribunal Act* 2013; erred in finding that the validity of Value Added Tax Assessments for the year 2016 is purely a point of law.

5. The Appellant prayed that the appeal be allowed and the VAT assessments for the year 2016 as confirmed in Appellant's Objection Decision dated 1st November 2022 be upheld and that the judgment of the Tribunal be set aside and costs of the appeal before the Tribunal and this Court be awarded to it.

6. The Respondent's cross appeal dated 26th April 2024 is premised on the grounds that the Tribunal erred in law by failing to find that the commissions earned by it from the sale of airtime for the 2019 year of income are exempt from Value Added Tax pursuant to Paragraph 16 of Part II of the First Schedule to the *Value Added Tax Act* 2013; erred in law by failing to find that the m-pesa commissions earned by the Respondent for the 2019 year of income are exempt from VAT pursuant to Paragraph 1 (b) of part II of the First Schedule to the *Value Added Tax Act* 2013; finding that the Respondent did not adduce evidence to identify the commissions earned from Safaricom in respect of m-pesa transaction fees and dealer commissions for the 2019 year of income that it sought to be exempted from VAT.

7. The Appellant filed a Preliminary Objection dated 15th November 2024 on grounds that the court does not have jurisdiction to entertain the Respondent's cross appeal, the notice of cross appeal is incompetent and fatally defective and contrary to Section 32 (1) of the *Tax Appeals Tribunal Act* and finally, that the notice of cross appeal dated 26th April 2024 is bad in law, an abuse of the judicial process and should be struck out with costs.

8. The Respondent also filed a Statement of Facts dated 25th April 2024 in response to the Appeal. It stated that at no point did the Appellant deny issuing the assessment outside the five-year statutory timeline. In response to Ground 1 of the Appeal, the Respondent/ submitted that the Tribunal reviewed the pleadings and submissions by the parties and found that the assessment was issued outside the statutory five-year period. The Respondent further argued that matters of law do not necessarily have to be pleaded, and that a court of law is empowered to determine such matters on its own motion even where the parties have not expressly raised them.

9. In response to Ground 2 of the Appeal, the Respondent contended that the ground amounts to an unsubstantiated allegation, as the Appellant failed to identify specific issues or grounds that allegedly offend the law.

10. In response to Ground 3, the Respondent stated that the Tribunal duly considered its case and provided a summary of the same in the judgment (from pages 25 to 79). Regarding Ground 4, the Respondent maintained that Sections 3 and 12 of the *Tax Appeals Tribunal Act*, 2013, grant the Tribunal jurisdiction to hear and determine appeals against any tax decision made by the Appellant. That the Appellant failed to specify which issues the Tribunal is alleged to have considered that did not form part of the objection decision. In response to Ground 5, the Respondent asserted that the assessment for the period from 2016 to June 2017 was rightly found to be time-barred, having been issued beyond the five-year limitation period prescribed under Sections 29(5) and/or 31(4) of the *Tax Procedures Act*, 2015.

11. Both the Appeal and cross appeal were canvassed by written submissions. The Appellant's submissions are dated 17th September 2024 while the Respondent's/Cross appellant's submission are dated 15th November 2024.

Appellant's Submissions

12. The Appellant provided an introduction and set out the background. It identified four issues for determination, that is, whether the Tribunal erred in vacating the VAT assessments for the year 2016; whether VAT is chargeable on commissions earned from the agency services to Safaricom Limited; whether the Mpesa commissions are VAT exempt and whether the Respondent's Notice of Cross Appeal is competent.

13. On the first issue, it was submitted that the Tribunal erred in vacating the VAT assessments for the year 2016 on the grounds that they were time-barred under Sections 29(5) and 31(4) of the *Tax Procedures Act*. It argued that there was no dispute as to whether the assessments for 2016 were issued within the statutory timeline and that the Tribunal therefore descended into the realm of speculation when it framed and determined that the VAT assessments were time barred. Relying on the decision in David Sironga Ole Tukai v. Francis Arap Muge & 2 Others [2014] eKLR, the Appellant submitted that the Tribunal assumed jurisdiction it did not possess by raising, considering, and determining an issue that was neither in dispute nor properly before it. The Appellant contended that the issue was not raised in the Respondent's Notice of Objection dated 22nd August 2022.

14. The Appellant further cited Sections 13(6) and 56(3) of the *Tax Procedures Act*, as well as the case of Mars Logistics Limited v. Commissioner of Domestic Taxes [2021] eKLR, to reinforce the argument that the Tribunal lacked jurisdiction to consider an undisputed issue not placed before it. It was submitted that the question of whether the assessments for the year 2016 were issued within time was not a pure point of law since the computation of the statutory five-year limitation period is based on the date a self-assessment return is submitted by a taxpayer. Further that the appellant issued the respondent with the amended assessment under Section 31(4) of the *Tax Procedures Act*, and therefore section 29 of the *Tax Procedures Act* was not applicable.

15. Consequently, the Appellant contended that the Tribunal's findings were speculative and based on the assumption that the return was submitted before July 2017. It was the Appellant's position that the Tribunal ought to have relied on factual evidence before reaching its determination and that the issue involved a question of fact rather than a point of law.

16. The Appellant further submitted that, the Tribunal failed to afford it an opportunity to be heard and to respond to the issue, thereby violating it's right to fair administrative action. In support of this argument, the Appellant cited the case of Commissioner of Domestic Taxes v. Ibangua Investments Company Limited [2023] KEHC 26013 (KLR), to submit that the High Court has previously reviewed decisions of the Tribunal where it framed issues on its own motion.

17. On the second issue, whether VAT is chargeable on commissions earned from the agency services to the Safaricom Limited, the Appellant's submission was that, sales relating to the supply of airtime and recharge vouchers were excluded in computation of the VAT and therefore did not form part of the assessment confirmed in the objection decision. What was assessed was the commission paid to the Respondent by Safaricom Limited for the provision of agency services specifically, the sale of airtime to both prepaid and postpaid customers on behalf of Safaricom Limited and not the supply of airtime itself, which is classified as an exempt service under Paragraph 16 of Part II of the First Schedule to the *Value Added Tax Act*, Cap 476.

18. The Appellant submitted that, pursuant to a Dealership Agreement between the Respondent and Safaricom Limited, the Respondent provided a taxable service to Safaricom in the form of airtime sales, for which it earned a commission. In support of this position, the Appellant relied on National Bank of Kenya Limited v. Commissioner of Domestic Taxes [2022] KEHC 10549 (KLR) and Cape Brandy Syndicate v. Commissioner of Inland Revenue [1921] 2 KB 403, to submit that, by arguing for the exemption of commissions earned on airtime sales, the Respondent was improperly extending the provisions of the VAT Act beyond their legislative intent contrary to established principles of statutory interpretation in tax law.

19. The Appellant emphasized that while Paragraph 16 of Part II of the First Schedule to the VAT Act exempts the supply of airtime by persons other than service providers, it does not extend that exemption to commissions earned from such supply. Accordingly, the Appellant contended that the Tribunal correctly upheld the VAT assessment of Kshs. 5,089,721 for the year 2019 as due and payable, and urged that the Respondent's cross-appeal be dismissed.

20. On the third issue, the Appellant submitted that the M-pesa commissions relating to M-pesa agency services did not form part of the assessment confirmed in the Objection Decision dated 1st November 2022. The Appellant further stated that, even if the commissions earned by the Respondent from the provision of M-PESA services to Safaricom Limited were to be subjected to VAT, it would be legally justified in finding that such agency services constitute a taxable supply. However, the Appellant argued that the Respondent cannot litigate an issue that is not in controversy or properly before the court.

21. On the fourth issue, the Appellant submitted that the Notice of Cross Appeal is incompetent as it was filed out of time, contrary to Section 53 of the *Tax Procedures Act* and Section 32(1) of the *Tax Appeals Tribunal Act*. Additionally, the Appellant asserted that the Respondent neither filed a Notice of Appeal nor sought leave to do so, rendering the Notice of Cross Appeal both incompetent and fatally defective. Relying on the case of Coast Bus (Mombasa) Limited v. Kenya Revenue Authority & Another [2023] KEHC 155 (KLR), the Appellant submitted that the *Tax Appeals Tribunal Act* prescribes a specific and mandatory appellate procedure that must be followed. Consequently, the Appellant argued that the Respondent could not bypass this procedure by invoking the provisions of the Civil Procedure Rules, 2010. The Appellant therefore urged that the Cross Appeal be struck out.

22. The Appellant concluded its submissions by praying that the Memorandum of Appeal dated 26th March 2024 be allowed and the Respondent's Notice of Cross Appeal dated 26th April 2024 be dismissed or struck out, with costs awarded to the Appellant.

Respondent's Submissions

23. This appeal was strenuously opposed by the Respondent who equally raised four key issues for determination; first, whether the Tribunal correctly raised suo moto and determined the issue of the time barred nature of the appellant's tax assessment for the year 2016; second, whether the Respondent's notice of cross appeal is competent; third, whether commissions earned by the Respondent on account of supply of airtime under the dealership agreement with Safaricom Limited were exempt from VAT; and fourth, whether the Respondent adduced evidence identifying the commissions earned by the Respondent on Mpesa transaction fees in the 2019 year of income and therefore ought to be exempted from VAT.

24. On the first issue, specifically whether a tax assessment being time-barred is a matter of law that does not need to be pleaded, the Respondent referred to Section 29(5) and Section 31(4) of the *Tax Procedures Act*, as well as the cases of Lydia Njeri Karanja v. Janet Nyokabi Ndungu [2003] KEHC 237 (KLR) and Kenya Agricultural and Livestock Research Organisation & Another v Okoko & another (Civil Appeal 36A of 2021) [2022] KEHC 3302 (KLR). The Respondent's submission was that matters of law do not need to be specifically pleaded, and judicial bodies have the discretion to, in the interest of justice, raise such issues suo moto. The Respondent further argued that the issue of the Appellant's tax assessment for the year 2016 is based on documents filed at the Tribunal, including the notice of assessment dated 28th June 2022, the iTax based notice of objection, the Appellant's objection decision, and the statement of facts filed on 6th January 2023. The Respondent concluded that the Tribunal was correct in addressing the statutory timeline as a matter of law, since it was clearly evident from the pleadings, documents supplied, and evidence before it, and hence the court should not disturb the Tribunal's pronouncement.

25. On whether the provisions of the *Tax Procedures Act* regarding time limitations guiding the issuance of tax assessments are clear, and whether parties were disadvantaged by the Tribunal in raising and determining points of law arising therefrom, the Respondent submitted that a party need not be heard on a point of law framed by the court suo moto at the point of writing a judgment. In support of this argument, the Respondent referred to the case of County Council of Nyeri v. Board of Trustees, National Social Security Fund (2014) KECA 761 (KLR).

26. On the second issue, the Respondent submitted that the issue of the competency of the notice of cross-appeal was introduced by the Appellant in their written submissions. The Respondent cited the case of Republic v. Chairman, Public Procurement Administrative Review Board & Another ex parte Zapkass Consulting and Training Limited & Another [2014] eKLR and the case of *Commissioner of Domestic Taxes v. Ibangua Investments Company Limited (Tax Appeal E093 of 2023*) [2023] KEHC, arguing that the court should decline to consider issues that were not pleaded in the statement of facts but were introduced at the submissions stage.

27. Further, the Respondent, relying on Rule 20 of the Tax Appeals Tribunal (Appeals to the High Court) Rules 2015, submitted that in the absence of a relevant provision under the *Tax Appeals Tribunal Act* or the Tax Appeals Tribunal (Appeals to the High Court) Rules relating to the filing of cross-appeals, it is at liberty to rely on Order 42, Rule 32 of the Civil Procedure Rules. This position was acknowledged in the case of York Investments East Africa Limited v. Commissioner of Investigations and Enforcement [2021] KEHC 7 (KLR).

28. While citing the case of Bulsho Trading Company Limited v. Rosemary Likholo Mutakha & Bonventure Wiyema Imbayi [2020] eKLR, the Respondent submitted that the notice of cross-appeal was filed 30 days after service of the memorandum of appeal and record of appeal thus filed within a

reasonable time, making the cross-appeal competent. Additionally, the Respondent argued that there is no requirement for a notice of appeal to be filed first before filing a cross-appeal.

29. On the third issue, concerning whether the commissions earned by the Respondent on account of the supply of airtime under the dealership agreement with Safaricom Limited were exempt from VAT, the Respondent submitted that the VAT treatment for the income received from the sale of airtime by the Respondent on behalf of Safaricom is addressed under Paragraph 16 of Part II of the First Schedule to the VAT Act 2013, which classifies it as an exempt service. The Respondent has been relying on this provision, as well as a public ruling issued by the Appellant on 16th March 2005, which confirmed that the commissions earned from the sale of airtime to prepaid and postpaid customers are exempt from VAT.

30. The Respondent further submitted that, contrary to the Appellant's assertion that the ruling/directive dated 16th March 2005 became obsolete on 1st September 2013 when the VAT Act came into force, the ruling remains binding on the Appellant and is still in full effect. The VAT Act 2013 retained the directive without any modification. The provisions of Paragraph 22 of the Third Schedule to the repealed VAT Act mirrored the provisions of Paragraph 16 of Part II of the First Schedule of the VAT Act 2013, which has remained unchanged. The Respondent emphasized that the Appellant has not issued any new public ruling or directive inconsistent with the ruling of 16th March 2005, meaning the ruling continues to be applicable. The Respondent further submitted that the Appellant's attempt to distinguish between the supply of agency services and the supply of airtime is irrelevant, as the exemption for the sale of airtime by persons other than cellular mobile telephone service providers or wireless telephone service providers applies to income earned by the Respondent, whether in the form of commission or direct income received from customers.

31. On the fourth issue, the Respondent submitted that the Tribunal erred in upholding the assessment for 2019 since the nature of the services it provides to Safaricom Limited for which it earns a commission is exempt from VAT. The Respondent argued that the VAT treatment for commissions earned from MPESA transaction fees is similar to that for the sale of airtime, as provided in Paragraph 1(b) of Part II of the First Schedule to the VAT Act 2013.

32. Additionally, the Respondent contended that the Tribunal wrongly held that it had not discharged its burden of proof. That the Tribunal wrongly relied solely on its bank statements showing monies received from its customers but failed to identify the specific amounts of commission relating to MPESA transaction fees. The Respondent asserted that the Tribunal's decision did not take into account the extracts from the Respondent's ledgers, which clearly indicate the amounts claimed as commissions from the sale of airtime. That had the Tribunal considered these documents; it would have found that the Respondent had indeed discharged its burden of proof.

33. In conclusion, the Respondent prayed that the court; upholds the Tribunal's decision that set aside the VAT assessment of Kshs 7,892,779 relating to the year 2016; sets aside the part of the Tribunal's decision that upheld the assessment on VAT in the sum of Kshs.5,089,721 for 2019, relating to the year 2019 with respect commissions received by the Respondent from Safaricom Limited. The Respondent further prayed that the Appellant's appeal be dismissed with costs, and that the Cross Appeal be allowed with costs to the Respondent.

Analysis and Determination

34. This court acknowledges that by dint of Section 56(2) of the *Tax Procedures Act* (TPA), its jurisdiction is limited to matters of law. The section provides that "An appeal to the High Court or to the Court of Appeal shall be on a question of law only." For guidance on what constitutes an issue of law, I am

guided by the following cases; Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, Petition 2B of 2014 [2014] eKLR; Peter Gichuki King'ara v IEBC & 2 Others, Nyeri Civil Appeal No. 31 Of 2013, (Court of Appeal) (Visram, Koome & Odek, JJA) and John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others [2018] eKLR.

35. Having considered the record of appeal, the statement of facts; the notice of cross appeal, both written and oral submissions and authorities cited, this court discerns the following issues for determination;

    a. Whether the Tribunal erred in holding that the Appellant's VAT assessment for the year 2016 was time barred.

    b. Whether the Respondent's Cross Appeal is competent before the court.

    c. Whether commissions earned by the Respondent from the sale of airtime under a dealership agreement with Safaricom Limited are exempt from VAT.

    d. Whether the Tribunal erred in finding that the Respondent failed to prove that commissions from MPESA services for 2019 were VAT exempt.

Whether the Tribunal erred holding the Appellant's VAT assessment for the year 2016 was time barred

36. The Tribunal held that the VAT assessments for 2016 and up to June 2017 were time-barred under Sections 29(5) and 31(4) of the *Tax Procedures Act*, 2015 (TPA), which impose a 5-year limit for issuing tax assessments from the date of self-assessment returns unless fraud, gross or willful neglect is involved. The Tribunal held that;

> " 82. Whereas the Appellant has not raised this point of law, the Tribunal deemed it fit to raise the issue suo moto in the interest of justice.
>
> 86. In the instant case, the respondent issued an amended assessment for VAT on 28th June 2022 meaning that the five year period lies between July 2017 and June 2022. However, the assessment dates back to year 2016 and to June 2017 which are beyond the five years immediately before the last date of the assessment contrary to Section 29 (5) and or 31 (4) (b) of the *Tax Procedures Act*."

37. The Appellant argues that the issue of time-bar was not raised by the Respondent in its Notice of Objection or appeal. As such the appellant contends that the Tribunal acted without jurisdiction by entertaining and deciding the matter. The applicant contends that the tribunal assumed jurisdiction it did not possess by raising, considering, and determining an issue that was neither in dispute nor properly before it. Further, that such a determination was not a pure point of law since the computation of the statutory five-year limitation period is based on the date a self-assessment return is submitted by a taxpayer and subject to the provision of section 31(4)b of the *Tax Procedures Act*. In response, the Respondent's submission was that matters of law do not need to be specifically pleaded, and judicial bodies have the discretion to in the interest of justice raise such issues suo moto. Further, they asserted that it was clearly evident from the pleadings, documents supplied, and evidence before it, that time had lapsed and hence the court should not disturb the Tribunal's pronouncement.

38. It is well settled that points of law can be raised at any time during the proceedings and as such this court will not belabour on it. Statutory limitation is recognized as a matter of law that goes to the justiciability of a matter. If it turns out that the assessment by the appellant was made out of time, the Tribunal would lack jurisdiction to determine the issues on its merit and would proceed to make a

determination based on the time. In Megvel Cartons Limited v Diesel Care Limited & 2 others [2023] KESC 24 (KLR)

> " xiii. We take this course fully alive to the well-known principle that the question of jurisdiction can be raised at any point in the proceedings, on appeal and even suo moto. ..."

39. In this matter, it is recognized that statutory timelines exist, along with provisions that define exceptions to these timelines. The appellant's position is that Section 29(5) of the *Tax Procedures Act* sets a statutory limit on when an assessment can be made. However, before an assessment can be deemed time-barred, it must first be established that there was no violation of Section 31(4) of the *Tax Procedures Act*, which provides the exception to the limitation in Section 29(5).

40. The appellant argues that the finding that the assessment was time-barred was reached without considering the exception outlined in Section 31(4) of the *Tax Procedures Act*. Furthermore, the appellant contends that he was not given the opportunity to present evidence regarding this matter. According to the appellant, such a determination should not have been made outright without first examining whether Section 31(4) had been violated.

41. In this instance, I do agree with the appellant's position. The Tribunal, upon identifying that the assessment was time barred, ought to have invited the parties to be heard in view of the provisions of section 31(4) of the *Tax Procedures Act*. This required an assessment of evidence to determine whether there was a breach of section 31(4) of the Tax Procedure Act before concluding that it was time-barred. Therefore, while the Tribunal was justified in raising the statutory timeline issue suo moto, the error arose when it proceeded to make a determination without granting the parties an opportunity to be heard. This in my view, would have been permissible only when the facts are uncontested – incapable of more than one interpretation as it turns out in the present circumstances.

42. Although the statutory limitation is a matter of law, its application and determination required procedural fairness in light of Sections 29(c) and 31(4) of the *Tax Procedures Act*.

43. Noting that the respondent argued that there was sufficient evidence before the Tribunal that informed its finding that the assessment was time barred, that will require this Court to reprise itself of the evidence. If the court were to take that path, it would inevitably go beyond its set out jurisdiction that only limits it, as an appellate court, to points of law.

Whether the Respondent's Notice of Cross-Appeal was incompetent before the court.

44. The Appellant challenged the Cross Appeal as being time-barred and procedurally defective for not complying with Section 32(1) of the *Tax Appeals Tribunal Act* and Section 53 of the Tax Procedure Act. It submitted that no Notice of Appeal was filed and no leave was sought. The Respondent on the other hand relied on Rule 20 of the Tax Appeals Tribunal (Appeals to the High Court) Rules 2015 and Order 42 Rule 32 of the Civil Procedure Rules in arguing that in the absence of express cross-appeal provisions under tax statutes, the Civil Procedure framework applies.

45. I have considered the provisions cited by the parties herein and I note that neither the Tax Appeal Tribunal Act not the Rules provide for the filing of cross appeals in tax appeals. Consequently, pursuant to Rule 20 aforesaid, the provisions of Civil Procedure Rules are applicable. While

determining a similar issue, this court in York Investments East Africa Limited v Commissioner of Investigations and enforcement [2021]KEHC 7 KLR it was held that;

> " The aforesaid provision leads to the conclusion that although there is no express provision for filing a cross-appeal, the High Court exercising its appellate jurisdiction may entertain a cross-appeal as it required to consider and make judgment on objections to the judgment of the Tribunal or subordinate court even as to those portions that have not been appealed against by either party. This position has found favour in Twaher Abdukarim Mohamed v Independent Electoral and Boundaries Commission and 2 Others MSA CA Civil Appeal No. 154 of 2013 [2014] eKLR and Bulsho Trading Company Ltd v Rosemary Likholo Mutakha and Another Busia HCCA No. 1 of 2018 [2020] eKLR. Since the Civil Procedure Rules provide for the filing of cross-appeal, I do not find this position inconsistent with Rules. In my view, therefore the Applicant was entitled to file a notice of cross-appeal in response to the Appellant's appeal. This view is consistent with the constitutional edict under Article 159 of *the Constitution* which provides that the court should strive to do substantive justice unhindered by technicalities."

46. I fully agree with the above position regarding the application of the Civil Procedure Rules in the filing of a notice of cross-appeal. Further, I note that, notwithstanding the foregoing, the Civil Procedure Rules do not prescribe specific timelines within which a notice of cross-appeal should be filed. What remains undisputed is that a cross-appeal can only be filed by a respondent, in response to an appeal. In Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others, SC Petition No 14 of 2014; [2014] eKLR the Supreme Court had this to say regarding filing cross-appeals and cross-petitions;

> "...From the above definitions, there is a difference between a cross-appeal and a cross-petition. A cross-appeal is an action by a respondent, who intends to counter an appellant's cause in an appeal, with the view of obtaining certain relief(s) from the court. A cross-petition on the other hand, is an action by a defendant in first-instance claims, intending to counter the claim of a petitioner with the view of obtaining certain remedies. The applicant, therefore, does not bear the right to file a cross-petition or even a cross-appeal, as this is a preserve of a respondent who has a claim against another party already in the appeal (cross-appeal), or another party to the suit (cross-petition)....." (Emphasis ours).

47. In that regard, it is my view that a reasonable time period is an appropriate threshold for determining whether a notice of cross-appeal is competent before the court.

48. In the present case, the Respondent's cross-appeal was filed on 26th April 2024, whereas the Memorandum of Appeal was filed on 26th March 2024. A time difference of 30 days, I do consider and find this a reasonable period for filing a notice of cross-appeal. Further, drawing analogy from the provisions of Rule 95 of the Court of Appeal Rules 2022, which requires that a notice of cross-appeal be filed within 30 days upon service of a memorandum and record of appeal, I find that the Respondent's notice of cross-appeal was properly filed within a reasonable time frame and is therefore competent and properly before the court.

Whether commissions earned by the Respondent from the sale of airtime under a dealership agreement with Safaricom Limited are exempt from VAT.

49. The Respondent claimed that under Paragraph 16 of Part II of the First Schedule to the VAT Act, 2013, such commissions are VAT-exempt, arguing that its services whether as agent of Safaricom Limited or

directly to the pre and postpaid customers, amount to the sale of airtime, an exempt activity. It relied on a public ruling issued by the Appellant on 16th March 2005, which it claimed remains valid since no contradictory ruling has been issued. The Appellant on the other hand argued that what is taxed is not the sale of airtime but commissions earned for agency services, which constitutes a taxable supply under the VAT regime.

50. The Tribunal in determining this issue held that;

> "101. The Tribunal has observed that the Appellant has provided documents including bank statements showing monies received from its customers, however, there is nothing provided identifying the various amounts of commissions earned from Safaricom in respect of Mpesa transactions fees and dealer commissions that it sought to be exempted in arriving at the vatable amount that the Respondent was bringing to charge in the year 2019."
>
> 103. Consequently, the Tribunal finds and holds that the Appellant having failed to prove its case the Respondent was justified in confirming the VAT assessment on adjusted vatable sales."

51. It is not in contention that the Respondent is an agent of Safaricom Limited pursuant to the Dealership Agreement for purposes of supplying airtime to Safaricom customers and in return, a commission is paid to the Respondent from Safaricom. The question therefore is whether the commission paid to the Respondent is subject to VAT.

52. Part II of the first schedule to of the *Value Added Tax Act* deals with exempt services. Paragraph 16 of Part II of the said Schedule provides that;

> "The supply of the following services shall be exempt supplies—the supply of airtime by any person other than by a provider of cellular mobile telephone services or wireless telephone services."

54. A plain reading of Paragraph 16 of Part II of the First Schedule to the VAT Act indicates that the supply of airtime by any person other than a provider of cellular mobile telephone services or wireless telephone services is exempt from VAT. It is not in dispute that the Appellant is not a provider of telephone services. It is also not contested that the Appellant was engaged in the supply of airtime whether directly or as an agent/ dealer of Safaricom Limited for which he would be entitled to commission. I am satisfied that the Respondent demonstrated that he was engaged in the sale of airtime and earned income out of it in the same manner as he earned commissions as an agent / dealer of Safaricom Limited. I believe that the provision above emphasized that the VAT exemption extended to a "provider of cellular mobile telephone services or wireless telephone services" such as the appellant. Consequently, I find and hold that the Respondent erred in subjecting the Appellant's supply of airtime to VAT.

55. Notwithstanding the foregoing finding, it is important to address the public ruling issued by the Appellant on 16th March 2005. In that ruling/Directive, the Appellant advised that VAT on commissions earned by dealers from the sale of mobile airtime would cease to be levied effective 1st April 2005. This position is not contested. The rationale was that VAT would be charged once at the point of sale by the service providers, who would account for VAT on the full taxable value of the scratch cards before applying any discounts. As a result, commissions earned by dealers were treated as additional discounts on the scratch cards and were therefore not subject to VAT.

56. The enactment of the VAT *Act, No. 35 of 2013*, which came into effect on 1st September 2013, repealed the previous VAT Act (Cap. 476). This new legislation introduced a revised framework for VAT, including definitions and provisions that superseded earlier guidelines and directives. Section 64 of the *Tax Procedures Act*, 2015 provides the legal framework for the withdrawal of public rulings issued by the Commissioner of the Kenya Revenue Authority (KRA).

57. It outlines the circumstances under which a public ruling may cease to apply, and how such a withdrawal affects taxpayers. The section allows for two modes of withdrawal. First, the Commissioner may withdraw a public ruling, either wholly or in part, by issuing a formal notice of withdrawal. This notice must be published in at least two newspapers of national circulation, to ensure that the public is adequately informed. The withdrawal in such a case takes effect on the date specified in the notice or the date of publication, whichever comes later. Secondly, a public ruling can be withdrawn automatically by operation of law. This happens when a new law is enacted or when the Commissioner issues another public ruling that contradicts or is inconsistent with the existing one. In such cases, the inconsistent part of the old ruling is deemed withdrawn without the need for a formal notice. The effective date of such an automatic withdrawal is the date on which the new law or the new public ruling comes into effect.

58. Importantly, the law protects transactions that were initiated before the withdrawal of a public ruling. Even after withdrawal, the public ruling continues to apply only to those past transactions. In practical terms, this means that if a taxpayer relied on a public ruling for a transaction that began before the ruling was withdrawn, they should not be penalized. However, they cannot rely on that ruling for future transactions once it has been withdrawn, whether the withdrawal was formal or automatic due to a change in the law or issuance of a new ruling.

59. Applying the foregoing to the directive dated 16th March 2005 on VAT exemption for commissions earned from the sale of airtime, the directive cannot be said to have been automatically withdrawn when the VAT Act, 2013 came into force on 1st September, 2013 noting that there is no inconsistency with the provision of VAT Act 2013.

60. It is also not in dispute that the directive is similar to the provisions of Paragraph 16 of Part II of the First Schedule. Thus, if the Appellant herein was to conclusively state that the directive ceased to have any legal effect, then a notice of withdrawal would have been issued as per Section 64 of the *Tax Procedures Act*. Consequently, in the present case, the 2005 directive remained applicable, as it was not inconsistent with the law.

61. The Respondent acted on the legitimate belief that the directive remained in force. The pertinent question, therefore, is whether it is fair and justified for the Appellant to abruptly demand tax payments based on statutory provisions, while disregarding a directive it had previously issued, and without giving express and adequate notice of its withdrawal. In my view, the answer must be in the negative. For businesses to operate and thrive, there must be a reasonable degree of certainty and predictability within a well-regulated tax environment. To that extent, I am inclined to concur with the sentiments expressed in Ecobank Kenya Ltd v The Commissioner of Domestic Taxes [2012] eKLR that:

> " the Appellant and other business people have a right of certainty and predictability in the applicability of conduct, rules, policies and procedures which underlie proper regulation of economic activities and that right necessarily militates against policies, regulation and procedures haphazardly resorted to by public regulatory bodies without adequate notice to those whose conduct or behavior is to be regulated."

54. This court therefore finds that the demand of additional taxes on VAT without the withdrawal of the directive was inconsistent to the principle of legitimate expectation. Besides, the law is clear as I have held above that anyone supplying airtime other than by a provider of cellular mobile telephone services or wireless telephone services should not be subjected to VAT for supplying the airtime.

Whether the Tribunal erred in finding that the Respondent failed to prove that commissions from MPESA services for 2019 were VAT-exempt.

54. The Respondent argued that Paragraph 1(b) of Part II of the First Schedule to the VAT Act exempts financial services, and that the commissions from M-PESA transactions fall within this category. The Respondent claimed that it provided ledgers showing the relevant income and that the Tribunal erred in ignoring this evidence, focusing only on the bank statements.

55. The Appellant, on the other hand, maintained that the Tribunal correctly found that the evidence did not clearly segregate M-PESA commissions from other income streams and thus the Respondent had not discharged its burden of proof under Section 56(1) of the TPA, which places the burden on the taxpayer.

56. While the VAT Act may exempt some financial services, the burden of proof lies with the taxpayer to demonstrate that the income qualifies for exemption. The Tribunal found the ledgers insufficient and preferred documentary evidence clearly linking the commissions to M-PESA services. In the absence of conclusive evidence, the Tribunal did not err in upholding the 2019 assessment. The Respondent failed to meet the evidentiary burden.

57. Based on the above, this court therefore finds as follows: -

    a. The Appellant's appeal partly succeeds, to the extent that the Tribunal erred in procedure by determining the time-bar issue suo moto without affording the Appellant an opportunity to be heard.

    b. The Respondent's cross-appeal partly succeeds to the extent that commissions from the sale of airtime under the dealership agreement are exempt from VAT, but fails in relation to the M-PESA commissions for the year 2019, which remain taxable.

58. The court therefore makes the following orders;

    a. The VAT assessment for the year of income 2019 in respect of airtime commissions is set aside.

    b. The VAT assessment for the year of income 2019 in respect of MPESA commissions is upheld.

    c. The finding that the VAT assessment for 2016 is time barred is set aside.

    d. The appeal is remitted back to the Tribunal for determination on validity of the VAT assessment for the year 2016;

    e. Each party shall bear its own costs of the appeal and cross appeal.

    Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 16TH DAY OF MAY, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....Appellant

.....Respondent

Sam Court Assistant