



**Commissioner Legal Services & Board Coordination v Agrochemical & Food Company Limited (Tax Appeal E115 of 2024) [2025] KEHC 10242 (KLR) (Commercial & Admiralty) (16 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10242 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND ADMIRALTY  
TAX APPEAL E115 OF 2024  
JK NG'ARNG'AR, J  
JULY 16, 2025**

**BETWEEN**

**THE COMMISSIONER LEGAL SERVICES & BOARD  
COORDINATION ..... APPELLANT**

**AND**

**AGROCHEMICAL & FOOD COMPANY LIMITED ..... RESPONDENT**

*(Being an Appeal from the Judgment of the Tax Appeals Tribunal  
delivered on 22nd March 2024 in TAT No. E016 of 2023)*

**JUDGMENT**

1. A brief abridgement of the facts giving rise to this appeal are that vide its letter dated 3<sup>rd</sup> February 2022, the appellant notified the respondent of its intention to conduct an audit covering the period January 2017 to December 2021 on the Appellant's Value Added Tax (VAT), excise duty, Pay as You Earn (PAYE) and withholding tax (WHT) obligations.
2. The audit exercise took place. Its findings were embedded in a notice of assessment in a letter dated 15<sup>th</sup> September 2022 served upon the respondent. In it, the appellant demanded taxes amounting to Kshs. 1,268,054,221.00 comprising Excise duty, Pay as You Earn (PAYE), Value Added Tax (VAT) and withholding tax (WHT) principal, interest and penalties, and reducing Corporate tax losses by Kshs. 356,002,279.00.
3. Aggrieved by that decision, the respondent filed a notice of objection vide a letter dated 14<sup>th</sup> October 2022. The appellant considered the objection and, in its decision, dated 13<sup>th</sup> December 2022, the respondent was found to have partially succeeded. The appellant confirmed additional assessments



amounting to Kshs. 1,243,986,739.00 comprising Excise duty, VAT and WHT principal, interest and penalties, and reducing Corporate tax losses by Kshs. 355,306,851.00.

4. Unhappy with the decision, the respondent filed its notice of appeal on 12<sup>th</sup> January 2023 before the Tax Appeals Tribunal in TAT No. E016 of 2023. In its decision dated 22<sup>nd</sup> March 2024, the appeal was partially successful with each party bearing its own costs. The tribunal ordered:

“b) The Respondent’s objection decision dated 13<sup>th</sup> December 2022 be and is hereby varied as follows:

- i. The WHT assessment of Kshs. 634,644,435.00 relating to the assessment referred to in the notice of assessment dated 27<sup>th</sup> November 2008 be and is hereby set aside.
- ii. The WHT assessment of principal taxes, plus interest and penalties for June 2016, June 2017, June 2018 and June 2019 be and are hereby set aside.
- iii. The WHT assessment of principal tax plus interest and penalty for June 2020 be and is hereby upheld.
- iv. The additional Excise duty of Kshs. 192,610,618.00 plus interest and penalties cumulatively assessed for the periods June 2018, June 2019 and June 2020 arising from the Respondent’s ENA production variances be and is hereby set aside.
- v. The additional VAT of Kshs. 42,121,200.00 plus interest and penalties cumulatively assessed for the periods June 2018, June 2019 and June 2020 arising from the Respondent’s ENA production variances be and is hereby set aside.
- vi. The cumulative reduction of the deficit carried forward under the *Income Tax Act* (Corporate tax losses) of Kshs. 80,698.904.00 for the years June 2018, 2019 and 2020 arising from the Respondent’s ENA production variances be and is hereby set aside.”

5. The appellant has now appealed before this court. It filed its notice of appeal dated 19<sup>th</sup> April 2024. It also filed its memorandum of appeal dated 18<sup>th</sup> May 2024 that raised a prolix 20 grounds disputing the findings of the tribunal. Those grounds are summarized as follows: the tribunal denied parties an opportunity to be heard since they were not heard orally or through written submissions; that parties had attempted to mediate out of court and were therefore unable to file their submissions; the assessment issued on 27<sup>th</sup> November 2008, for the period prior to 2008, was within the time limit applicable at the material time; and the current assessment clearly separated the earlier demands and only issued new assessments for the period 2017 to 2021 and therefore there were no fresh assessments for the period prior 2008 to be determined to be beyond five years.

6. The appellant continued that the tribunal erred in law and fact in having separated the earlier period to proceed to set aside the WHT assessment relating to the assessment referred to in the notice of assessment dated 27<sup>th</sup> November 2008, contradicting the final orders; since there was no objection to the assessment of 27<sup>th</sup> November 2008, it lacked jurisdiction to make a finding on it; withholding tax was collectable between June 2016 to June 2019; interest was deemed to have accrued on the



government guaranteed loans; and the stock movement schedules and stock reconciliations without any supporting documents or evidence supporting the reconciliation were sufficient for the respondent to discharge the burden of proof that the appellant's variance was erroneous.

7. The appellant added that the tribunal erred in not finding that the burden of proof could only be discharged by provision of primary documents and actual production data and mere reconciliations are not evidence to discharge that burden; the appellant had in the output-input analysis on ENA production found that the stock reconciliation to be unsatisfactory as no single evidence of the production of dry and wet yeast, which was the basis for the assessment, was ever produced; and the appellant provided the source of its data.
8. It added that the tribunal failed to appreciate that the assessment and objection decision stated that the variance had been arrived at by adjusting the molasses computation in the respondent's financial statements and records by adding back the component relating to the production of dry and wet yeast, which no evidence of production was ever availed; the tribunal erroneously shifted the burden of proof to the appellant against the dictates of section 56 (1) of the *Tax Procedures Act*; the tribunal did not formulate a basis of its finding on the issue of loss carried forward and simply proceeded to set aside the assessment.
9. The appellant complained that the tribunal failed to appreciate that sections 15 and 16 of the *Income Tax Act* prohibit the utilization of loss accumulated beyond 10 years; and the tribunal erroneously set aside additional excise duty of Kshs. 192,610,618 together with interest and penalties cumulatively assessed for the periods June 2018, June 2019 and June 2020 arising from the Appellant's ENA production variances, additional VAT assessments of Kshs. 42,121,200 plus interest and penalties cumulatively assessed for the periods June 2018, June 2019 and June 2020 arising from the Appellant's ENA production variances and cumulative reduction of the deficit carried forward under the *Income Tax Act* of Kshs. 80,698,904 for the years June 2018, 2019 and 2020 arising from the Appellant's ENA production.
10. In view of the foregoing, the appellant sought the following reliefs: that the appeal be allowed by setting aside the decision of the Tax Appeal Tribunal dated 22<sup>nd</sup> March 2024; the WHT assessment referred to in the notice of assessment dated 27<sup>th</sup> November 2008 were proper and the same was not within the jurisdiction of the Tribunal; concerning the ENA Production, no evidence of production of wet and dry yeast was produced as such the Respondent did not discharge its burden; and costs of this appeal.
11. The appeal was directed to be heard on the basis of the parties' written submissions. However, as at the time of writing this judgment, none of the parties had filed their respective submissions. I have considered the memorandum of appeal, examined the record of appeal and analyzed the law. This is a second appeal. As a second appellate court, I am duty bound to determine matters of law only unless it is shown that the courts below considered matters that they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. [See *Ogwari vs. Hersi* [2023] KEHC 20111 (KLR).]
12. In this case, the main issue for determination is whether the tribunal arrived at an incorrect finding in its analysis of the issues. On the WHT assessment initially issued by the appellant per its notice of assessment dated 27<sup>th</sup> November 2008, it was not disputed that the WHT totaling Kshs. 634,644.435.00 was accrued before the date of the notice of assessment. The assessment concerned periods beyond five years before the notice of assessment dated 15<sup>th</sup> September 2022. The tribunal further observed that both parties were in agreement that the amount should be excluded from the total assessed tax. As rightly concluded by the tribunal, the inclusion of that sum by the appellant in its objection decision thus fell into error.



13. The next issue that was determined was the WHT assessment issued by the appellant for the periods June 2016, June 2017, June 2018, June 2019 and June 2020 as per the notice of assessment dated 15<sup>th</sup> September 2022. The tribunal considered the provisions of section 29 (5) of the *Tax Procedures Act* which couched in mandatory terms, states that an assessment shall not be made after five years immediately following the last date of the reporting period to which the assessment relates. Accordingly, the tribunal found that assessments for June 2016 and June 2017 was unlawful since the appellant failed to establish gross or willful neglect, evasion or fraud by the respondent.
14. Turning to the periods June 2018, June 2019 and June 2020, the tribunal observed the respondent's opposition and attached documents supporting its opposition to the assessment for these periods. In its wisdom, the tribunal found that the interest expense was not exempt as set out in section 14 of the *Income Tax Act*. The respondent failed to adduce the loan agreement, that the loan was charged on the Consolidated Fund or any other relevant documentation to justify that the loan in question was classifiable under the securities on which interest is exempt from tax under this provision of the law.
15. Furthermore, the respondent had not been granted exemption under section 37(2) of the *Tax Procedures Act*. Rightfully so, the respondent failed to discharge its burden of proof on this issue. It is for this reason that it was found that the appellant was justified in issuing the WHT additional assessments for June 2018, June 2019 and June 2020. The tribunal then held:

“The Tribunal, however, finds that despite the WHT on interest being applicable for the tax periods from 9<sup>th</sup> June 2016 to 6<sup>th</sup> November 2019, the Respondent lacks the powers to collect and recover the WHT principal, penalties and interest from the Appellant in these tax periods, following the deletion of Section 35(6) of the ITA by Section 9 of the Finance Act of 2016 effective from 9<sup>th</sup> June 2016.”

16. The tribunal then said that the appellant lacked any legal foundational basis to collect and recover the WHT which it failed to deduct from interest on the loan for June 2018 and June 2019 and the resultant penalties and interest as tax due and payable by the respondent. Accordingly, the tribunal found that the appellant was certainly justified in assessing and demanding WHT for June 2020. I find that the said decision was sound, just and founded upon the parameters of the law. I therefore see no reason why I should disturb that finding.
17. On whether the appellant was justified in finding a positive variance in ENA production, issuing additional excise duty and VAT assessments, and reducing the respondent's deficit carried forward under the Income Tax Act (corporate tax losses). The tribunal set forth to determining this issue by determining the root cause of the appellant amending the respondent's self-assessments and whether the respondent sufficiently proved that the appellant's assessments were wrong.
18. The respondent adduced documentation in support of its position to conclude that the assessments were wrong. The assertions and justifications were not countermanded by the appellant. In its view, the tribunal found that its silence on this issue was contention that the appellant had failed to produce sufficient evidence. That evidence was unchallengeable. In finding that the appellate was unjustified in its assessment, the tribunal held as follows and which this court concurs:

“The Tribunal observes that the Appellant, during pre-assessment, the objection review and proceedings before the Tribunal, clearly stated that the Respondent's numbers were incorrect. In addition, through providing stock movement schedules and stock reconciliations, the Appellant established that the Respondent's figures were erroneous. Accordingly, the Tribunal finds that the Appellant discharged its burden of proof in



establishing that the stock movement figures it used to determine the variances were correct, as required under Section 56(1) of the TPA and Section 30 of the TAT Act. After the Appellant discharged its burden of proof, the Respondent was obligated to dismantle the Appellant's evidence in explanation and evidence. However, the Respondent failed to do so in its response to the Appeal.”

19. This court notes that the tribunal considered the facts of the matter and the submissions made by the parties. The appeal on this issue must fail because expressly stated, the tribunal considered the facts and submissions made by the parties respectively. Indeed, the tribunal properly analyzed the issues having applied the proper provisions of the law and arrived at a just decision. Ultimately, I find that the present appeal herein lacks merit. It is dismissed but with each party bearing its own costs since they did not file their respective written submissions.

It is so ordered.

**JudGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16<sup>TH</sup> DAY OF JULY, 2025  
IN THE PRESENCE OF:-**

.....

**J. NG'ARNG'AR.**

**JUDGE**

Ng'ang'a holding brief for Ochieng for the Appellant

N/A for the Respondent

Mark/Siele (Court Assistants)

