Commissioner of Domestic Taxes v Royal Floraholland Kenya Limited (Income Tax Appeal E218 of 2024) [2025] KEHC 10031 (KLR) (Commercial and Tax) (11 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10031 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E218 OF 2024

RC RUTTO, J

JULY 11, 2025

BETWEEN

COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT

AND

ROYAL FLORAHOLLAND KENYA LIMITED ..... RESPONDENT

(Being an Appeal against the Judgment delivered on 28th June 2024 at the Tax Appeals Tribunal in Tax Appeal Tribunal Case No. E207 of 2023)

JUDGMENT

1. This appeal arises from the judgment delivered by the Tax Appeals Tribunal in Tax Appeal No. E207 of 2023. In that case, the Respondent was dissatisfied with the Appellant's objection decision dated 29th March 2023, which upheld the rejection of the Respondent's VAT refund applications. The refund claims arose from services rendered by the Respondent to FloraHolland NL under an intercompany agreement for the provision of marketing, logistics, and customer support services. The Respondent contended that these services constituted exported services within the meaning of the *Value Added Tax Act* (VAT Act), and were therefore zero rated.

2. The Appellant, on the other hand, asserted that the Respondent's parent entity is engaged in the business of sourcing and exporting flowers from Kenya to various overseas buyers. According to the Appellant, the activity of sourcing and exporting flowers constitutes an agricultural service, which is classified as exempt under the First Schedule, Part III, Paragraph 5 of the *Value Added Tax Act*, 2013. As such, the Appellant argued that the services offered by the Respondent to FloraHolland NL were agricultural in nature and, being exempt, could not acquire a new status as zero-rated merely by virtue of being exported. The Appellant further submitted that the principal activities outlined in the case of Royal FloraHolland Kenya Limited (formerly F.H. Services Kenya Limited) v Commissioner of

Domestic Taxes (2012) differ from those described in the current objection letter, and thus, the earlier ruling could not be relied upon due to changes in the applicable law and the factual context.

3. In addition, the Appellant contended that the costs incurred and inputs claimed by the Respondent belonged to FloraHolland NL, regardless of the services rendered. It was also stated that the Appellant had requested a specific breakdown of invoices from the Respondent; however, the Respondent indicated that it does not maintain such a breakdown of sales to FloraHolland NL. As a result, the Appellant argued that it was unable to verify the nature of the services rendered and their invoiced amounts, which affected the assessment of the refund application. Consequently, the Appellant submitted that the Respondent failed to discharge the burden of proof and maintained that the objection decision dated 29th March 2023, rejecting the refund claim of Kshs.649, 963/=, was properly issued.

4. Upon hearing the appeal, the Tax Appeals Tribunal framed two issues for determination: first, whether the Respondent's refund applications were deemed allowed by operation of law; and second, whether the Appellant's objection decision to reject the refund claim was justified. The Tribunal proceeded to allow the appeal and set aside the Appellant's objection decision dated 29th March 2023. It held that the refund applications were within the statutory timelines in accordance with section 47 of TPA The Tribunal further found that it is clear from the agreement that the services performed by the Respondent are for use and consumption by Bloemen FloraHolland U.A outside Kenya as required by Section 2 of the VAT Act and should therefore be subject to VAT at zero rate (0%).

5. Aggrieved by the Tribunal's judgment, the appellant lodged this appeal vide the Memorandum of Appeal dated 23rd August 2024 setting out the following grounds of appeal; that the Tribunal erred in law and in fact in finding that the Appellant's decision to reject the refund claims was not justified, by failing to consider the evidence adduced by the Appellant herein; misapplied the law and facts and therefore arrived at the wrong decision in setting aside the Appellant's decision; erred in law and fact in failing to consider the Respondent's response and submissions in its finding.

6. The Appellant prayed that the appeal be allowed with costs, and the consequential findings and orders of the Tribunal subject to this appeal be set aside in entirety.

7. In response to the Memorandum of Appeal, the Respondent filed its Statement of Facts dated 17th October 2024. On the issue of whether the refund applications were deemed allowed by operation of law, the Respondent submitted that it had lodged various refund applications on 11th July 2019, 10th March 2020 and 18th May 2020 for June 2019, February 2020 and April 2020. The Respondent noted that the Appellant rendered its refund decisions well beyond the 90-day statutory period prescribed for the ascertainment and determination of refund claims. The Respondent agreed with the Tribunal's finding that the refund applications stood allowed by operation of law pursuant to Section 47(3) of the *Tax Procedures Act*.

8. With respect to the second issue, whether the Appellant's objection decision was proper in law, the Respondent contended that despite having submitted all requisite documents and explanations, the Appellant disregarded this evidence and proceeded to reject the applications. The Respondent further argued that the Appellant acted inconsistently by initially acknowledging that it was dealing with exported services, only to later change its position and reject the refund applications. This, the Respondent maintained, amounted to a violation of its right to legitimate expectation and fair administrative action.

9. Additionally, the Respondent contested the admissibility of grounds 2 to 4 of the appeal for lack of specificity. It argued that ground 2 failed to identify the specific legal provision allegedly misapplied

or the particular legal error made in setting aside the Appellant's objection decision. Similarly, that ground 4 did not disclose which specific submissions by the Appellant were purportedly ignored by the Tribunal. The Respondent also submitted that grounds 2 to 4 improperly sought to introduce factual matters for review, contrary to Section 56(2) of the *Tax Procedures Act*, which limits appeals to the High Court from the Tax Appeals Tribunal to questions of law only.

10. The appeal was canvassed by written submissions. The Appellant's submissions are dated 31st October 2024 and the Respondent's submissions are dated 17th October 2024.

Appellant's Submissions

11. Counsel for the Appellant commenced their submissions by outlining a brief background of the matter, as already summarized above. The Appellant's case was condensed to a single substantive ground of appeal that is, whether the Respondent can claim input taxes incurred on behalf of its principal company FloraHolland NL.

12. The Appellant submitted that upon review of the Intercompany Services Agreement, it was evident that the Respondent acted as an agent of FloraHolland NL, and that all services rendered were solely to and on behalf of the said principal. It was therefore contended that, pursuant to Section 13(5) of the *Value Added Tax Act*, 2013, only a principal may deduct input VAT incurred by an agent acting on the principal's behalf.

13. According to the Appellant, the services provided by the Respondent including coordination, marketing, sourcing of flowers, and logistical support were performed in Kenya and amounted to agricultural services, which are exempt from VAT under Part II, Paragraph 5 of the First Schedule to the Act. As such, any input tax related to these services was not deductible.

14. The Appellant further submitted that the costs and input VAT in question belonged to FloraHolland N,L, and not the Respondent, irrespective of the nature of the services offered. Reference was made to Clause 5.2 of the Intercompany Services Agreement, which provides that the service fee payable by FloraHolland N.L. is calculated on a cost-plus basis that is, reimbursement of the Respondent's costs plus a 10% markup.

15. The Appellant argued that this pricing model evidenced the lack of an arm's-length relationship between the parties and underscored the existence of a principal–agent relationship, wherein all costs incurred and inputs claimed rightfully belonged to FloraHolland NL. Accordingly, the Appellant submitted that the Respondent lacked the legal basis to claim input VAT refunds on such costs.

16. In support of its position, the Appellant relied on the decision in Nairobi High Court Income Tax Appeal No. E101 of 2020 – Commissioner of Domestic Taxes v Dutch Flowers Group Kenya Limited, wherein the Court held that a taxpayer is not entitled to claim input VAT incurred on behalf of a principal. The Appellant argued that, consistent with that ruling, an agent cannot claim costs belonging to its principal, and therefore the Respondent's claim for input VAT should be disallowed. Counsel further submitted that the issue before this Court bears substantial similarity to the facts and legal reasoning in the Dutch Flowers case. In the absence of a contrary appellate decision, the Appellant urged this Court to be guided by the doctrine of stare decisis, and to adopt a consistent interpretation of the law when dealing with materially similar facts.

17. The Appellant also cited Geoffrey M. Asanyo & 3 Others v Attorney General [2020] eKLR, underscoring the importance of consistency and predictability in judicial decision-making. In the Appellant's view, the Tribunal erred in law in determining that the Respondent was entitled to claim

input VAT refunds on behalf of its principal, FloraHolland NL, notwithstanding the nature of the relationship between the parties.

18. In conclusion, the Appellant submitted that the Respondent lacked the legal capacity to claim a VAT refund in respect of services rendered on behalf of its principal, and that the Tribunal erred in awarding such a refund. The Appellant therefore urged this Court to be guided by the applicable provisions of law and persuasive judicial precedents, to allow the appeal, set aside the entire decision of the Tax Appeals Tribunal dated 28th June 2024, and reinstate the objection decision issued on 19th March 2023.

Respondent's Submissions

19. Counsel for the Respondent commenced submissions by setting out the background of the matter and outlining the applicable legal framework regarding the Court's jurisdiction in appeals arising from the Tax Appeals Tribunal. In doing so, counsel cited Section 56 of the *Tax Procedures Act*, and relied on the authorities of Oceanfreight (E.A.) Limited v Commissioner of Domestic Taxes [2018] eKLR, and June Munuve Mati v Returning Officer, Mwingi North Constituency & 2 Others [2018] eKLR, to underscore that appeals to the High Court from the Tribunal lie only on matters of law.

20. The Respondent submitted that in the present appeal, the Appellant's Grounds 2 to 4 improperly invite the Court to re-evaluate factual findings of the Tribunal, without demonstrating that such findings were so perverse or unreasonable as to amount to errors of law. The Respondent further argued that the Appellant failed to particularize the alleged misapplication of the law, identify any specific evidence that was not considered by the Tribunal, or indicate which of its submissions were ignored. On that basis, the Respondent contended that the Appellant had failed to meet the threshold for appellate intervention under Section 56(2) of the *Tax Procedures Act* and that the Tribunal's conclusion that the refund applications were deemed to have been allowed by operation of law due to the Appellant's delayed decision ought to stand.

21. The Respondent addressed one principal issue for determination: whether the Tribunal erred in law and fact in finding that the Appellant's decision to reject the Respondent's VAT refund claims was not justified.

22. The Respondent submitted that the processing of refund applications under Section 47 of the *Tax Procedures Act* is a time-bound statutory obligation. It was argued that the law imposes a duty upon the Appellant to ascertain, audit, and make a determination on refund claims within a prescribed period. The Respondent contended that in the present case, the Appellant issued the rejection notices beyond the 90-day timeline stipulated under Section 47(2) of the Act, and that by operation of Section 47(3), where the Commissioner fails to make a decision within the specified period, the refund application is deemed to have been allowed.

23. The Respondent supported the Tribunal's conclusion by citing the High Court's decision in Equity Group Holdings Limited v Commissioner of Domestic Taxes [2021] eKLR, which affirmed that failure by the tax authority to make a timely decision on a refund application results in the application being deemed ascertained and approved by law. Accordingly, the Respondent submitted that the Tribunal properly applied the law in finding that the refund applications stood allowed by operation of law due to the Appellant's delay in rendering a decision.

24. On the second issue, whether the Appellant's objection decision dated 29th March 2023 was proper in law, the Respondent submitted that, notwithstanding the Tribunal's finding that the refund applications were deemed to have been ascertained and approved by operation of law, the Tribunal nonetheless proceeded to consider the substantive merits of the Respondent's appeal. The Respondent argued that it had provided the Appellant with detailed explanations and documentation outlining the

nature of its operations, including the specific services rendered, the amounts invoiced for each service, and the relevance of these services to the refund claims.

25. Despite these disclosures, the Appellant rejected the refund applications on the basis that the services provided by the Respondent were of a horticultural or agricultural nature, and therefore exempt from VAT. The Respondent contended that the Appellant failed to identify or specify which of the services it deemed to fall within the exempt category, and thus its decision lacked evidentiary and legal justification.

26. The Respondent submitted that this Court ought to adopt the reasoning employed by the Tribunal, which relied on and cited with approval the decision in Republic v Kenya Revenue Authority & the Attorney General ex parte Fontana Limited, JR Misc. Civil Application No. 442 of 2013. In that case, the Court held that services involving the identification and sourcing of flowers from growers when provided on behalf of an overseas entity do not constitute "agricultural services" for purposes of VAT exemption. The Respondent argued that, similarly, the services it provided to FloraHolland NL under the intercompany agreement were incorrectly classified by the Appellant as exempt agricultural services.

27. The Respondent further submitted that the Appellant had, in a letter dated 25th March 2022, acknowledged that the Respondent was engaged in the export of services, which are zero-rated under the VAT Act and therefore not chargeable to VAT. The subsequent rejection of the refund claim on grounds that the services were exempt constituted, in the Respondent's view, a violation of the doctrine of legitimate expectation and fair administrative action, protected under Article 47 of *the Constitution*. The Respondent also contended that the Appellant erred in disregarding binding precedent from the Tribunal itself, namely in Royal FloraHolland Kenya Limited (formerly F.H. Services Kenya Limited) v Commissioner of Domestic Taxes, TAT Appeal No. 6 of 2012, where the Tribunal affirmed that the Respondent's services were in fact exported services.

28. It was its submission that the Tribunal in its judgment, correctly held that the Respondent had discharged its burden of proof under Section 30 of the *Tax Appeals Tribunal Act* by demonstrating that the services it supplied to FloraHolland NL during the relevant periods were zero-rated and not agricultural in nature, as alleged by the Appellant. In support of this position, the Respondent relied on Section 2 of the VAT Act, which defines "exported services" as services provided for use or consumption outside Kenya. The Respondent emphasized that under this definition, the place of performance is irrelevant; rather, the test lies in where the service is consumed. To reinforce this view, the Respondent cited the decision in Commissioner of Domestic Taxes v Total Touch Cargo Holland [2018] eKLR, where the Court held that services performed in Kenya but consumed abroad are properly treated as exported and therefore zero-rated. The Respondent submitted that the Tribunal had correctly interpreted the agreement between the parties and properly classified the services as exported, not agricultural.

29. In conclusion, the Respondent submitted that it sufficiently discharged its burden of proof pursuant to Section 30 of the *Tax Appeals Tribunal Act* and Section 56 of the *Tax Procedures Act* and that the Tribunal' s judgment is beyond reproach.

Analysis and Determination

30. This court acknowledges that its jurisdiction is limited by Section 56(2) of the *Tax Procedures Act* (TPA), which provides that "An appeal to the High Court or to the Court of Appeal shall be on a question of law only." Therefore, the court is not permitted to substitute its own conclusions for those of the Tribunal based on its own analysis of the facts. However, the court must ensure that the

conclusions reached by the Tribunal are supported by the evidence on record and are not perverse as was held in the case of John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others [2018] eKLR. Also see the Court of Appeal case of Peter Gichuki King'ara Vs IEBC & 2 Others, Nyeri Civil Appeal No. 31 Of 2013, (Court of Appeal) (Visram, Koome & Odek, JJA) on what constitutes points of law.

31. Based on the above authorities, and having considered the record of appeal, the parties' written submissions and authorities cited, the issues arising for determination are;

    a. Whether the Respondent's VAT refund applications were deemed allowed by operation of law under Section 47 of the *Tax Procedures Act*.

    b. Whether the Respondent was entitled to claim input VAT in respect of services provided to its parent company, FloraHolland NL and whether such services qualified as exported services or exempt agricultural services under the VAT Act.

Whether the Respondent's VAT refund applications were deemed allowed by operation of law under Section 47 of the *Tax Procedures Act*.

32. At the time the VAT refund applications were made, the applicable law was the now-repealed Section 47 of the *Tax Procedures Act*, which provided that;

> " 47. Refund of overpaid tax
>
> (1) When a taxpayer has overpaid a tax under a tax law the taxpayer may apply to the Commissioner, in the approved form, for a refund of the overpaid tax within five years of the date on which the tax was paid.
>
> Provided that for value added tax the period of refund shall be as provided for under the *Value Added Tax Act*, 2013 (No. 35 of 2013).
>
> (2) The Commissioner may, for purposes of ascertaining the validity of the refund claimed, subject the claim to an audit.
>
> (3) The Commissioner shall notify in writing an applicant under subsection (1) of the decision in relation to the application within ninety days of receiving the application for a refund."

33. The relevant provision of VAT Act is Section 17 (5) which provided as follows:

"(5) Where the amount of input tax that may be deducted by a registered person under subsection (1) in respect of a tax period exceeds the amount of output tax due for the period, the amount of the excess shall be carried forward as input tax deductible in the next tax period:

Provided that any such excess shall be paid to the registered person by the Commissioner where;

(a) The Commissioner is satisfied that such excess arises from making zero rated supplies; and

(b) The registered person lodges the claim for the refund of the excess tax within twelve months from the date the tax becomes due and payable."

34. The statutory intent behind Section 47 was to protect taxpayers from administrative inactivity by compelling the Commissioner to act within a defined timeframe, in this case 90 days. The provision was couched in mandatory terms, and failure to comply with the 90-day deadline had legal consequences.

35. In this instance, the VAT refund applications were filed on 11th July 2019 for the tax period of June 2019, 10th March 2020 for the tax period of February 2020 and 18th May 2020 for the tax period of April 2020. I have perused the documents on record and it is clear from the record that the parties herein were corresponding on the applications filed up until 26nd September 2022. The Applications were rejected when the Appellant rendered its rejection notice dated 19th January 2023 and issued on 26th January 2023The Respondent then filed an objection of the rejection of the refund application dated 24th February 2023 and the Respondent issued an objection decision dated 29th March 2023.

36. The Tribunal, in determining this issue observed at paragraph 121 that;

> " 121. The Tribunal observes that the Respondent consistently communicated with the Appellant on the progress of the refund process and upon its conclusion on 25th October, 2022, the Respondent issued its refund decision.
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> 122. The Refund decision was made on 25th October 2022 after the review of the documents provided by the Appellant on 26th September 2022 which was less than 30 days and therefore within the statutory timelines.
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> 123. The Tribunal therefore finds that the Respondent issued the refund decision within the statutory timelines according to Section 47 of TPA and it therefore follows that the refund application was allowed by operation of the law."

37. Section 47(3) of the *Tax Procedures Act*, applicable at the time of the dispute, clearly provided that a refund decision was to be rendered within ninety (90) days. The claims were made in 2019 and 2020 while the rejection notice was issued on 26th January 2023 which is 3-4 years since the applications were lodged. The respondent on 24th February 2023, filed an objection pursuant to section 51(2) of the *Tax Procedures Act* and on 29th March 2023 an objection decision was issued by the appellant.

38. As indicated by the Tribunal, it is evident that the Tribunal focused on the time period between when respondent, filed an objection pursuant to section 51(2) of the *Tax Procedures Act* and when the objection decision was issued by the appellant and not when the application for the refund was made.

39. The Section 47(2) & (3) of the Tax Procedure Act provides for ninety days as the timelines in which the appellant is required to ascertain and determine the application for refund. In this instance the refund decisions were made outside the prescribed 90-day period. Although the repealed Section 47(3) did not contain a deeming provision, it was couched in mandatory terms and expressly set out specific timelines. The current provision simply clarifies what was already implicit; as it stood then.

40. This position was affirmed by the court in Commissioner of Domestic Taxes v Sony Holdings Limited [2021] KEHC 7071 (KLR), in which the court rightly anticipated the amendment to Section 47(3) of the *Tax Procedures Act*. The court held that where a taxpayer has lodged a refund claim and the Appellant fails to refund or make a decision within ninety (90) days, such taxpayer is entitled to a refund. The court held that;

> " 36. The law concerning refund of overpaid tax is to be found in section 47 of the TPA which underpins the taxpayers statutory right to apply to the Commissioner for a refund. It imposes on the Commissioner the duty to

consider the application, audit the claim if necessary, and thereafter make a decision on it within 90 days of application as provided by section 47(3) which states:

> '47. Refund of overpaid tax
>
> (3) The Commissioner shall notify in writing an applicant under subsection (1) of the decision in relation to the application within ninety days of receiving the application for a refund."

41. I agree with the holding of the court in the authority above and find that the Tribunal's finding that the refund decisions were filed within time is erroneous. It is therefore, my finding that the determination of the respondent application was done outside the 90 day period and the refund applications were deemed ascertained and approved.

42. This issue essentially settles the claim. However, noting that the second issue is relevant to settle the issues raised by parties, I will proceed to make a determination on the same.

Whether the Respondent was entitled to claim input VAT in respect of services provided to its parent company, FloraHolland NL and whether such services qualified as exported services or exempt agricultural services under the VAT Act.

43. Section 2 of the VAT Act defines "service exported out of Kenya" as a service provided for use or consumption outside Kenya;

44. Section 13 (5) of the VAT Act provides that;

> " 13. Taxable value of supply
>
> (5) In calculating the value of any services for the purposes of subsection (1) there shall be included any incidental costs incurred by the supplier of the services in the course of making the supply to the client:
>
> Provided that, if the Commissioner is satisfied that the supplier has merely made a disbursement to a third party as an agent of his client, then such disbursement shall be excluded from the taxable value.

45. Part II, Paragraph 5 of the First Schedule lists "agricultural services" as exempt from VAT.

46. The Appellant contends that the Respondent acts merely as an agent of FloraHolland NL whose principal activity was sourcing and exportation of flowers from Kenya to various overseas buyers, in line with the Respondent's principal activity where it identifies and sources flowers from growers on behalf of Bloemen VFH Group. That the costs and inputs belong to the principal FloraHolland NL and not the Respondent herein hence input VAT claims are invalid. The Appellant summarily contends that the activity of sourcing and exporting flowers is an entirely agricultural service which is exempt.

47. The Respondent on the other hand asserts that the services rendered are marketing, logistical and customer support performed under an Intercompany Agreement and consumed by FloraHolland NL. The Respondent contends that these services are exported services and thus zero rated and that the Appellant had previously acknowledged the zero-rated nature of the services. That in the case of Republic versus Kenya Revenue Authority & the Attorney General ex parte Fontana Limited JR Misc Civil Application No. 442 of 2013 the court, in holding that the strictest interpretation of the services

it provided on behalf of FloraHolland NL, in identifying and sourcing flowers from growers were not agricultural services.

48. The Tribunal, in making a determination on whether the Appellant's decision to reject the refund claim was justified, held that;

> " 134. In the present case the Appellant has described in detail the purpose of its services and demonstrated that the consumer of its services is Bloemenveiling Floraholland U.A group who is based in Netherlands. The services rendered by the Appellant cannot be conceivably deemed to be in the nature of agricultural services.
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> 135. The Tribunal notes that if services are provided in Kenya, it places the burden on the place of consumption even though the payment may have been made by a non-resident. The Tribunal observes that in the instant case the consumption of services is by Bloemen FloraHolland U.A Group which is in Netherlands.
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> 136. The Tribunal notes that it is clear from the agreement that the services performed by the Appellant are for use and consumption by Bloemen FloraHolland U.A outside Kenya as required by Section 2 of the VAT Act and should therefore be subject to VAT at the zero rate (0%)
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> 137. Consequently, the Tribunal finds that the Respondent was not justified in rejecting the Appellant's VAT refund claim."

49. The VAT system in Kenya is destination-based, meaning that exports are zero-rated, while locally consumed services may be taxed or exempt, depending on their classification. To determine whether a service qualifies as exported, courts have consistently applied a "consumption test" that is, identifying where the service is ultimately used or enjoyed. In this case, the services were contracted by FloraHolland NL in Netherlands, invoiced and paid for by the foreign entity and designed to benefit FloraHolland NL's business overseas. The court in the case of Commissioner of Domestic Taxes v Total Touch Cargo Holland [2018] eKLR relied also by the Tribunal provide that "the fact that the services are performed in Kenya does not negate their classification as exported, provided they are consumed outside Kenya"

50. Following the above, the services fall within the meaning of "exported services" under Section 2 and qualify for zero-rating. As a result, the input VAT incurred in delivering such services is recoverable. This court therefore finds that the Respondent was not merely an agent of FloraHolland NL but a service provider operating under a structured intercompany agreement with clear value attribution. Consequently, the Respondent was entitled to claim input VAT refunds associated with the provision of such services.

51. Based on the above, I therefore order as follows;

    a. The appeal is dismissed.

    b. The judgment and orders of the Tax Appeals Tribunal delivered on 28th June 2024 is hereby affirmed.

    c. Each party to bear its own costs of the appeal.

52. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 11TH DAY OF JULY, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....For Appellant

.....For Respondent