Commissioner of Domestic Taxes v WEC Lines Limited (Income Tax Appeal E156 of 2023) [2025] KEHC 12589 (KLR) (Commercial and Tax) (16 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12589 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E156 OF 2023

H NAMISI, J

SEPTEMBER 16, 2025

BETWEEN

COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT

AND

WEC LINES LIMITED ..... RESPONDENT

(Being an appeal against the whole judgement delivered at the Tax Appeals Tribunal on 14 July 2023 in Tax Appeal No. 414 of 2022)

JUDGMENT

1. The Appellant is a principal officer appointed under section 13 of the *Kenya Revenue Authority Act*, charged with the responsibility, inter alia, of assessment, collecting, accounting and the general administration of tax revenue on behalf of the Government of Kenya.

2. The Respondent is a private limited liability company that operates as a shipping agent for WEC Lines BV (WEC BV), which is registered and operates from the Netherlands. The Respondent operates in Nairobi and Mombasa.

Brief Background

3. Pursuant to its operations, the Respondent applied for VAT refunds amounting to Kshs 1,120.336 for the period January to March 2020. The basis of the claim was that the agency services it provides to WEC BV are zero-rated supplies under the *Value Added Tax Act*, 2013. On 15 December 2021, the Appellant rejected the refund claim vide an email, indicating that the rejection was because the taxpayer sales are erroneously classified as zero-rated. In response thereto, the Respondent lodged a Notice of Objection dated 12 January 2022, challenging the decision.

4. It wasn't until 8 March 2022 that the Appellant issued its objection decision, maintaining the rejection of the refund claim. The Appellant indicated the reason for rejection to be that the services rendered by the Respondent did not qualify for zero-rating under the provisions of paragraph 1 and/or 6 of the Second Schedule to the VAT Act. Dissatisfied with the outcome, the Respondent lodged an appeal at the Tax Appeals Tribunal. It was during these proceedings that the Appellant introduced a new and different justification for its decision, which is that the Respondent had failed to submit the requisite documents to support its claim.

5. In its judgement dated 14 July 2023, the Tribunal found in favour of the Respondent. The Tribunal held that the Appellant had contravened the mandatory provisions of section 51(4) of the *Tax Procedures Act* by failing to immediately notify the Respondent in writing that its objection was considered invalid for want of documentation. Secondly, the Tribunal found that the Appellant's argument regarding lack of documentation was a mere afterthought since the formal objection decision of 8 March 2022 was explicitly based on substantive legal grounds concerning the interpretation of the VAT Act.

6. Aggrieved by the decision of the Tribunal, the Appellant lodged this appeal on the following grounds:

    i. That the Honourable Tribunal erred in law and in fact in setting aside the Appellant's objection decision dated 8 March 2022;

    ii. That the Honourable Tribunal erred in law and in fact in holding that the Appellant was in contravention of the provisions of section 51(4) of the *Tax Procedures Act*;

    iii. That the Honourable Tribunal erred in law and in fact in holding that the Appellant was to undertake a process of the refund of the Respondent's VAT claim;

    iv. That the Honourable Tribunal erred in law and in fact in holding that the Appellant was to issue a decision on merits of any process undertaken within six months from the date of the judgement;

    v. That the Honourable Tribunal erred in law and in fact by failing to consider the evidence tendered by the Appellant herein thereby arriving at an erroneous decision;

    vi. That the Honourable Tribunal misapplied the law and facts and therefore arrived at the wrong decision.

7. The appeal was canvassed by way of written submissions, which I have read and carefully considered. The Appellant has narrowed down the issues for determination as follows:

    i. Whether the Honourable Tribunal erred in law and in fact in setting aside the Appellant's objection decision dated 8th March 2022;

    ii. Whether the Honourable Tribunal erred in law and in fact by failing to consider the evidence tendered by the Appellant herein thereby arriving at an erroneous decision.

Analysis & Determination

8. The appellate jurisdiction of this Court is provided in section 56(2) of the *Tax Procedures Act*, which states that an appeal to the High Court or to the Court of Appeal shall be on a question of law only. What constitutes a question of law is a matter of established judicial interpretation. The Court of Appeal in John Munuve Mati vs. Returning Officer Mwingi North Constituency & 2 others [2018] eKLR, clarified that matters of law include the interpretation or construction of *the Constitution*, statutes or regulations, and their application to a set of facts as established by the trial court. The

engagement of an appellate court with the facts is limited to providing background and context, and to satisfying itself, where the issue is raised, that the conclusions of the lower tribunal are based on the evidence on record and not so perverse that no reasonable tribunal could have arrived at them. The interpretation of section 51 of the *Tax Procedures Act* and section 2 of the VAT Act, which are central to this appeal, are quintessential questions of law falling squarely within the jurisdiction of this Court.

9. In the present case, the facts are not in dispute. The Respondent lodged its objection on 12 January 2022. The Appellant issued its objection decision on 8 March 2022. At no point during the intervening period did the Appellant notify the Respondent in writing that its objection was invalid for want of documentation. The objection decision itself was silent on any procedural invalidity. It was based entirely on the substantive ground that the Respondent's services were not zero-rated under the VAT Act.

10. The Appellant's case is primarily grounded on the assertion that the Tribunal erred in law and in fact in setting aside its objection decision. The gist of the Appellant's argument was that the Respondent failed to discharge its burden of proof as mandated by section 56(1) of the *Tax Procedures Act* and section 30 of the *Tax Appeals Tribunal Act*. The Appellant submitted that a claim for input VAT is contingent upon the provision of valid documentation as stipulated under section 17(3) of the VAT Act. It is the Appellant's contention that since the Respondent failed to provide such documentation, the claim was rightly disallowed. The Appellant relied on the Tribunal's earlier decision in W.E.C Lines Kenya Limited vs Commissioner of Domestic Taxes, Tax Appeal No. 747 of 2021, arguing that this demonstrates a pattern of non-compliance by the Respondent in furnishing necessary documents.

11. On its part, the Respondent argued that the Tribunal correctly identified the Appellant's violation of section 51(4) of the *Tax Procedures Act*. The Respondent highlighted what it termed as the Appellant's inconsistent approach and shifting of goal posts. It pointed out that the formal objection decision was based on a substantive interpretation of the VAT Act, whereas the argument about missing documents was an afterthought, introduced for the first time in pleadings before the Tribunal. The Respondent suggested that this was a tactical manoeuvre to align the facts of this case with those of the earlier case, W.E.C Lines Kenya Limited vs Commissioner of Domestic Taxes, Tax Appeal No. 747 of 2021.

12. On the issue of the whether the services are zero-rated, the Respondent submitted that this is settled law. The Respondent cited Tax Appeal No E084 of 2020, between the same parties, where Hon. D. Majanja, J held that the Respondent's services are indeed, exported services consumed outside Kenya by its principal and are, therefore, zero-rated.

13. Section 51(4) of the *Tax Procedures Act*, as worded at the material time, provided as follows:

> Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall immediately notify the taxpayer in writing that the objection has not been validly lodged

14. The language of this provision is plain and peremptory. It imposes a strict temporal requirement on the Appellant. In Commissioner of Domestic Taxes v Sketchers Limited [2024] KEHC 5569 (KLR), in interpretating the same provision, Hon. D. Majanja, J held that the use of the word 'shall' demonstrates that the provision is couched in mandatory terms. The Appellant's failure to comply with this mandatory statutory directive is not a mere procedural technicality that can be overlooked.

15. The importance of adhering to statutory timelines and procedures was eloquently stated by the Court of Appeal in

> Nicholas Kiptoo Arap Korir Salat v Independent Electoral And Boundaries Commission & 6 others [2013] KECA 113 (KLR):
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> "This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules."

16. The Appellant's conduct herein demonstrates a scant respect for the clear procedure laid down in section 51(4) of the *Tax Procedures Act*. Furthermore, this conduct offends the principles of fair administrative action enshrined in Article 47 of *The Constitution*. An administrative body must be consistent, predictable and transparent in its decision-making. By issuing an objection decision on substantive grounds and then attempting to introduce a different, procedural reason at the appeal stage, the Appellant shifted the goal posts in a manner that is procedurally unfair and prejudicial to the taxpayer. This practice ambushes the taxpayer and undermines the integrity of the tax dispute resolution mechanism.

17. On the issue of whether the Respondent's services are zero-rated, section 2 of the VAT Act defines a service exported out of Kenya as a service provided for use or consumption outside Kenya. The challenge, particularly with intangible services, lies in determining the place of use or consumption.

18. The Respondent provides agency services to WEC BV, which in turn provides shipping services to importers. The VAT refund claim related to the inputs incurred by the Respondent in the course of providing its agency services. The consumer of these agency services is, without a doubt, the principal, WEC BV, which is located in the Netherlands. In Commissioner of Domestic Taxes v WEC Lines (K) Limited [2022] KEHC 57 (KLR), Hon D. Majanja, J held thus:

> " It is not in dispute that the respondent was an agent of WEC BV and that their relationship was governed by the Agency Agreement. As an agent, it follows that any contract or contact made by the respondent to a third party is essentially a contractual relationship between the principal and the third party and that all actions by agents are deemed to be those of the principal. This is a settled principle of law and as the respondent submits, the learned authors of Bowstead & Reynolds on Agency define agency as '.....the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party.' They further define a general agent to be '....an agent who has authority to act for his principal in all matters concerning a particular trade or business, or of a particular nature; or to do some act in the ordinary course of his trade, profession or business as an agent, on behalf of his principal.' In this respect therefore, there is no privity of contract between the respondent and the importers of cargo who contract with the Principal (see Libert Forwarders (K) Ltd v Kenya Ports Authority MSA HCCC No 607 of 2001[2002] eKLR).....

> Section 2 of the VAT Act, 2013 defines "services exported out of Kenya" as 'a service provided for use or consumption outside Kenya' and as the court in Commissioner of Domestic Taxes v Total Touch Cargo Holland HC ML ITA No. 17 of 2013 [2018] eKLR held, for a service to be deemed an "exported service", it matters not whether that service was performed in Kenya or outside Kenya. The determining factor is the location where that service is to be finally used or consumed. WEC BV, a company incorporated in the Netherlands stands to benefit from the services offered by the respondent as stated above and it follows that the services offered by the respondent to them were exported services that were not consumed in Kenya and thus were zero-rated for purposes of VAT."

19. The Appellant has offered no compelling reason for this Court to depart from the clear and well reasoned finding of Hon. Majanja, J.

20. In the premise, I find that the appeal herein is unmeritorious and the same is dismissed. The judgement and resultant orders of the Tax Appeal Tribunal delivered on 14 July 2023 in TAT Appeal No. 414 of 2022 are hereby upheld. Costs are awarded to the Respondent assessed at Kshs 50,000/=.

DATED AND DELIVERED AT NAIROBI THIS 16 DAY OF SEPTEMBER 2025.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Appellant: Ms. Mulinge h/b Ms. Kithinji

Respondent: Mr. Kipkoech h/b Kamotho

Court Assistant: Lucy Mwangi