Dutch Flower Group Kenya Limited v Commissioner of Domestic Taxes (Income Tax Appeal E095 of 2022) [2025] KEHC 12581 (KLR) (Commercial and Tax) (16 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12581 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E095 OF 2022

H NAMISI, J

SEPTEMBER 16, 2025

BETWEEN

DUTCH FLOWER GROUP KENYA LIMITED ..... APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT

JUDGMENT

1. The Appellant is a company incorporated in Kenya. Its business involves providing logistical and quality assurance services to Flower Retail Europe BV (FRE) and Flower Connect Holdings BV (FCH), which are flower importing companies domiciled in the Netherlands. The services rendered include assisting in flower sourcing prior to shipment, and maintaining relations with the growers on behalf of FRE and FCH.

2. The Respondent is a principal officer appointed under section 13 of the *Kenya Revenue Authority Act*, Cap 469 and the Kenya Revenue Authority, mandated to collect and receive all Government revenue in accordance with the various tax statutes.

3. In its VAT returns for the period between January 2019 and June 2021, the Appellant treated its services as exported services and consequently applied a zero rate VAT. This accounting treatment resulted in an excess of input tax paid over output tax collected, forming the basis of the refund claim lodged with the Respondent. The Respondent, through a series of Credit Adjustment Vouchers and subsequent Objection Decision dated 2 December 2021, rejected the refund claims in their entirety. The basis of the rejection was two-fold: first, that the services were consumed in Kenya and thus did not qualify as exported services; and second, that the Appellant was acting as an agent for FRE and FCH and could not, therefore, claim input tax on costs incurred on behalf of its principals.

4. Aggrieved by this decision, the Appellant appealed to the Tribunal, which upheld the Respondent's position. The Tribunal noted that the same issues were adjudicated on between the same parties in High Court Income Tax Appeal No. E101 of 2020 Commissioner of Domestic Taxes -vs- Dutch Flowers Group Kenya Ltd, which arose out of TAT Nos. 9 and 18 of 2018 Dutch Flowers Group Kenya Ltd -vs- Commissioner of Domestic Taxes. In the appeal, this Court's finding effectively determined that the services provided by the Appellant are not exported services by the very nature of the contracts entered into by the Appellant. In noting that the matter is now on appeal before the Court of Appeal, the Tribunal observed that it is legally bound to adhere to the decision of the High Court and uphold the principle of stare decisis.

5. Being aggrieved by the judgement and order of the Tribunal, the Appellant lodged this appeal on the following grounds:

   i. That the Tribunal erred in fact and in law in upholding the Respondent's Objection Decision dated 2 December 2021 appealed against at the Tribunal and finding that the Appellant is not entitled to claim input VAT, and this disallowing the refund claimed by the Appellant;

   ii. That the Tribunal fell into error and misdirected itself in fact and in law in holding that the services provided by the Appellant are not exported services;

   iii. That the Tribunal fell into error and misdirected itself in fact and in law in holding that the said services provided by the Appellant are consumed in Kenya;

   iv. That the Tribunal erred in law and in fact by finding that since the Appellant is an agent of its contracting principals, Flower Retail Europe BV and Flower Connect Holdings BV and it cannot in the circumstances claim costs belonging to its principals;

   v. That considering the fact that the Appellant's overseas contractors are based and domiciled in the Netherlands making the Appellant's supplies to the overseas contractors 'exported services', the Tribunal fell into error in adopting a flawed premise in determining what comprises exported services in relation to the Appellant under the VAT Act, No 35 of 2013;

   vi. That the Tribunal was wrong in placing reliance on the position adopted by the High Court in Income Tax Appeal No. E101 of 2020, Commissioner of Domestic Taxes -vs- Dutch Flowers Group Kenya Ltd, in its determination that the services provided by the Appellant herein are not exported services, and that the Appellant is an agent of its contracting principals, thus disallowing the VAT input claim made by the Appellant;

   vii. That the Tribunal further fell into error in failing to exercise its discretion to stay the delivery of its decision pending the hearing and determination of CA No. 673 of 2021, Dutch Flowers Group Kenya Ltd-vs- Commissioner of Domestic Taxes by the Court of Appeal of Kenya. The said Appeal is an appeal against the judgment delivered in High Court in Income Tax Appeal No E101 of 2020, Commissioner of Domestic Taxes -vs- Dutch Flowers Group Kenya Ltd and the failure to stay the determination of the proceedings before the Tribunal was, therefore, contrary to the principles of pendente lite and sub judice;

   viii. That in overall regard to the foregoing grounds, the Tribunal erred in dismissing the Appellant's appeal and thereby rejecting the Appellant's input VAT refund claims for Kshs 4,612,354/- for the period of January 2019 to September 2019; Kshs 2,850,195/= for the period of November 2020 to February 2021 and Kshs 5,587,292 for the period of March 2021 to June 2021, respectively, totalling Kshs 13,049,841/=.

6. The appeal was canvassed by way of written submissions.

7. The Appellant argued that its services are, by their very nature and purpose, exported service within the meaning of the VAT Act. It contended that the ultimate use and consumption of the services occur outside Kenya. The direct beneficiaries and consumers are FRE and FCH, who are located in the Netherlands and who rely on these services to ensure the flowers they import meet the stringent quality standards of the European market. The Appellant submitted that this position is in alignment with the internationally recognised destination principle of VAT, which dictates that tax should be levied in the jurisdiction of consumption.

8. The Appellant vehemently contested the Tribunal's finding that a principal-agent relationship exists between it and its clients. It argued that the Tribunal misinterpreted the cost-plus 5% remuneration model stipulated in the Service Agreement. The Appellant posited that this is a standard commercial pricing mechanism designed to ensure fair compensation for an independent contractor and does not signify the level of control necessary to establish an agency relationship.

9. Further, the Appellant submitted that the Tribunal fell into error by placing undue reliance on the decision in Income Tax Appeal No E101 of 2020, Commissioner of Domestic Taxes -vs- Dutch Flowers Group Kenya Ltd, since the decision was reached per incuriam. It failed to consider a consistent line of persuasive and binding High Court authorities on the proper interpretation of exported services. The Appellant pointed out that the said decision is itself the subject of a pending appeal before the Court of Appeal.

10. In response, the Respondent contended that the appeal is abuse of the court process since the core issues have already been heard and determined by a court of competent and concurrent jurisdiction in HC ITA No. E101 of 2020. The Respondent argued that the matter is, therefore, res judicata, or in the alternative, that the Tribunal is bound by the doctrine of stare decisis.

11. The Respondent maintained that the High Court in the prior case correctly interpretated the Service Agreement as creating a principal-agent relationship. The cost-plus remuneration model, the annual budgeting process and the right of the principals to inspect the Appellant's books were all cited as evidence of the control exercised by FRE and FCH over the Appellant. The Respondent argued that the Appellant, as an agent, cannot claim input tax credits for costs that properly belong to its principals. The Respondent asserted that the services are consumed in Kenya, since they are performed on products sourced in Kenya and are directed at local suppliers to ensure that the product meets export specifications. It was the Respondent's argument that the benefit is realised by the local suppliers who are enabled to sell their produce, therefore, consumption occurs within Kenya.

Analysis & Determination

12. Having keenly considered the Record of Appeal, Statement of Facts, and the respective submissions, the following are the issues for determination:

    i. Whether the appeal is barred by the doctrines of res judicata or stare decisis in light of this Court's judgement in Income Tax Appeal No. E101 of 2020;

    ii. Whether this Court should depart from the judgement in ITA No. E101 of 2020;

    iii. Whether the Appellant is entitled to the VAT refund of Kshs 13,049,841/=.

13. Since the Respondent raised a procedural issue, this ought to be determined first. The doctrines of res judicata and stare decisis, while related in their goal of promoting legal certainty, are distinct. Res judicata prevents re-litigation of a claim that has already been finally adjudicated upon between the same parties, or their privies, over the same issues. The principle is codified in section 7 of the *Civil*

Procedure Act. In the instant case, while the parties and the general subject matter (VAT on exported services) are similar to those in HC ITA NO. E101 of 2020, the cause of action is different. Each tax period and each corresponding refund application constitutes a distinct set of transactional facts, giving rise to a separate cause of action. Therefore, the plea of res judicata cannot be sustained.

14. The doctrine of stare decisis is, however, applicable. It is a constitutional imperative under Article 163(7) that all courts are bound by the decisions of the Supreme Court. By extension, lower courts are bound by the decisions of the higher courts (vertical stare decisis) and courts of concurrent jurisdiction are expected, as a matter of judicial comity and for the sake of legal certainty, to follow each other's decisions (horizontal stare decisis) unless there is a compelling reason to depart.

15. William M. Lileet al., in Brief Making and the Use of Law Books, 321 (3rd edition 1914)on the doctrine of stare decisis states that –

> " The rule of adherence to judicial precedents finds its expression in the doctrine of stare decisis. This doctrine is simply that, when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases."

16. The Appellant invites this Court to depart from the decision in HC ITA No. E101 of 2020 on the ground that it was decided per incuriam. An examination of the judgement in the said case reveals that the learned Judge's reasoning was heavily focussed on the interpretation of the Service Agreements to find an agency relationship and on the physical location where the services were performed. The judgement did not, however, engage with, analyse or distinguish a growing and consistent body of decisions by the High Court that have established the destination principle as the primary test for determining the place of consumption for exported services. In Commissioner of Domestic Taxes v Total Touch Cargo Holland [2018] KEHC 859 (KLR), and Panalpina Airflo Limited v Commissioner of Domestic Taxes [2019] KEHC 12289 (KLR), the Court established that the location of the economic beneficiary who commissions the service is the true place of consumption. The failure to consider this persuasive line of authority, therefore, means that this Court is not bound to follow the decision in HC ITA E101 of 2020 and is at liberty to re-examine the substantive issues afresh.

17. The Respondent's entire case rests on the premise that the Appellant is an agent of FRE and FCH. This characterisation is derived from an interpretation of the 'prices and payment' clause in the Service Agreements, which provides for a cost-plus remuneration model. The clause provides that the service fee shall be determined on a cost-plus basis, being the service provider's cost plus a 5% mark-up, with provisional invoicing based on a yearly forecast and a final reconciliation against actual costs. The Respondent argued that this demonstrates control by the principals over the agent's income and costs.

18. This interpretation is a misapprehension of both law of agency and common commercial practice. An important feature of an agency relationship is the agent's authority to create, modify, or terminate legal relations between the principal and third parties. A plain reading of the Service Agreements reveals no such authority for the Appellant to bind FRE and FCH in legal relations with third parties. The Appellant is appointed as a contract service provider, to deliver specified services to its client.

19. The cost-plus 5% model is a pricing mechanism, and not a mechanism of control over the Appellant's operational methods. It ensures transparency in billing but does not grant FRE and FCH the power to dictate how the Appellant should hire staff, schedule its quality inspections or manage its daily operations. Although the right to inspect the Appellant's books is a standard audit clause in such

contracts, it is not an instrument of overarching control. As such, the relationship between the Appellant and FRE and FCH is one of an independent contractor providing services to a client.

20. The next question that arises is whether the services provided by the Appellant are for use or consumption outside Kenya, as defined at Section 2 of the VAT Act. The Respondent's submissions are that consumption occurs in Kenya because the services are physically performed here. This interpretation has been consistently rejected by the Court. In the Total Touch Cargo Holland case (supra), the Court held:

> " The location where the service is provided does not determine the question of whether the service is exported or not. The test is the location (or place) of use or consumption of that service. Therefore the relevant factor is the location of the consumer of the service and not the place where the service is performed."

21. In the Panalpina Airflo Limited case (supra), the Court held:

> " In the present case, it was not disputed that the services offered by the appellant's agents was to facilitate the export of flowers for consumption and use by persons outside Kenya. These eventual buyers were the appellant's customers in Europe and specifically Netherlands. It was also not in dispute that the purpose of the services provided by Airflow BV was to ensure that the flowers are delivered to the appellant's customers in Europe a fresh state. The appellant, on whose behalf the services were being performed, was also based outside Kenya. It is therefore crystal clear that the services in question were ultimately used by the buyers/ consumers of flowers who were also outside of Kenya and were performed on behalf of the appellant, a company based outside Kenya."

22. In Commissioner of Domestic Taxes v Coca Cola Central East and West Africa Ltd [2023] KEHC 1407 (KLR), it was stated thus:

> " All the decisions referred to above are consistent in one theme, that the consumer of the service is not necessarily where the marketing is done but the party who benefits from the marketing and promotion services. That is, the consumer or user of the service is the party who commissioned the contract and who directly benefited from the service provided."

23. In Commissioner of Domestic Taxes v WEC Lines (K) Limited [2022] KEHC 57 (KLR), the Court stated thus:

> " 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."

24. A similar finding was made by this Court in Commissioner of Domestic Taxes v WEC Lines (K) Limited [2024].

25. Applying this established legal principle to the facts of the instant case, it is evident that the services rendered by the Appellant are for the use and consumption of FRE and FCH based in the Netherlands. The argument that the local growers consume these services is untenable since the growers are the subject of the quality control and logistical coordination, not its consumers. The consumer is the party who procures and benefits from the service.

26. Therefore, since the services rendered by the Appellant are consumed outside Kenya, they qualify as exported services under section 2 of the VAT Act and are correctly zero-rated under the Second Schedule. It follows that the Appellant is entitled to claim a refund for the excess input tax that arose from making these zero-rated supplies, pursuant to section 17(5) of the VAT Act.

27. Accordingly, I make the following orders:

    i. The appeal is hereby allowed;

    ii. The judgement of the Tax Appeals Tribunal dated 18 November 2022 is hereby set aside;

    iii. A declaration is hereby made that the services offered by the Appellant to Flower Retail Europe BV and Flower Connect Holdings BV are exported services which are zero-rated under the *Value Added Tax Act*, 2013;

    iv. A declaration is hereby issued that the Appellant is entitled to the VAT refunds claimed for the period January to September 2019, November 2020 to February 2021 and March to June 2021, amounting to Kshs 13,049,841/=;

    v. The Respondent is hereby ordered to process and pay to the Appellant the aforesaid VAT refund claim within sixty days of the date of this judgement;

    vi. The costs of the appeal and the proceedings before the Tax Appeals Tribunal are awarded to the Appellant.

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:

For Appellant: N/A

For Respondent: Ms. Kamau h/b Ms. Mwongera

Court Assistant: Lucy Mwangi