



**Commissioner of Domestic Taxes v Crescent-Tech Limited (Tax Appeal E040 of 2023)
[2024] KEHC 4818 (KLR) (Commercial and Tax) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4818 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
TAX APPEAL E040 OF 2023**

DAS MAJANJA, J

MAY 8, 2024

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

CRESCENT-TECH LIMITED RESPONDENT

*(Being an appeal against the judgment of the Tax Appeals Tribunal
at Nairobi dated 10th February 2023 in Tax Appeal No. 699 of 2021)*

JUDGMENT

Introduction and Background

1. Before the court is an appeal by the Appellant (“the Commissioner”) challenging the whole decision of the Tax Appeals Tribunal (“the Tribunal”) dated 10.02.2023 based on the following grounds contained in its Memorandum of Appeal dated 05.04.2023:
 1. That the Honourable Tribunal erred in entertaining an appeal filed contrary to section 51(12) of the [Tax Procedures Act](#), 2015 and section 13(1) of the [Tax Appeals Tribunal Act](#), 2013 which grants it the jurisdiction to only hear appeals filed on time.
 2. That the Honourable Tribunal erred in law and in fact by failing to consider that the Respondent’s Notice of Objection did not state the grounds of objection as per section 51(3)(a) of the [Tax Procedures Act](#), 2015 before finding that the Appellant’s Objection Decision of 24th September 2021 did not disclose any finding on the material facts



3. That the Honourable Tribunal erred in law and in fact in not appreciating that the Respondent failed to provide all the relevant documents requested, as per section 59(1) of the *Tax Procedures Act*, 2015, to enable the Appellant establish if the alleged Respondent's transactions ever took place and make an Objection Decision.
 4. That the Honourable Tribunal erred in finding that the Appellant inferred fraud on the part of the Respondent whereas the dispute before the Tribunal was whether the Appellant supported the claims for input Valued Added Tax which remained unsupported to date.
 5. That the Honourable Tribunal erred in failing to appreciate the provisions of section 13(2)(c) of the *Tax Appeals Tribunal Act*, 2013.
 6. That the Honourable Tribunal erred by not considering all the evidence placed before it relating to the un-responded Appellant's request for documentations from the Respondent and therefore came to the incorrect decision.
2. The Commissioner thus urges the court to allow the appeal, set aside the judgment of the Tribunal and in the alternative and without prejudice, that the case be referred back to the Tribunal for redetermination. Apart from its memorandum of appeal and the record of appeal, the Commissioner also relies on its written submissions. The Respondent opposes the appeal through its Statement of Facts dated 20.06.2023 and written submissions.
 3. The facts giving rise to this appeal are largely common ground and can be gleaned from the record. The Respondent is a company in the business of trading in computers and related accessories. The Commissioner investigated the Respondent to confirm whether the input VAT it had claimed between October 2014 and January 2018 was merited. The Commissioner rejected these VAT claims and raised an assessment of Kshs 9,311,027.00 as evidenced by the assessment orders issued to the Respondent on 07.05.2018.
 4. On 10.06.2020, the Respondent sought to object to this assessment, albeit late. In its response through an email of 19.06.2020, the Commissioner advised the Respondent that it had not indicated the amount being objected to and that it ought to file its objection through iTax. Secondly, that it had indicated the reason for applying late was that the director was sick and as such, the Commissioner requested the Respondent to provide supporting documents that barred company to put in an objection and it thus sought this information by close of business on 26.06.2020. Since these documents were not forthcoming, the Commissioner sent the Respondent reminders on email on 13.07.2020 and 03.08.2020 where in the latter reminder, the Commissioner stated that should the supporting documents sought not be availed by close of business on 07.08.2020, then the application would be rejected.
 5. It appears the parties were able to communicate as per the email of the Commissioner dated 10.08.2020 which confirmed that the parties spoke through their representatives and that the Respondent was to revert by close of business on 05.08.2020 in regards to the late objection application. The Commissioner sought for the said supporting documents by close of business on 17.08.2020 failure to which, the Commissioner stated it would reject the late application. True to its word, the Commissioner, in a letter dated 01.10.2020 rejected the Respondent's late objection application and reiterated that the assessed sum of Kshs 9,311,028.00 together with the resultant penalty and interest remained due and payable.



6. On 18.06.2021, the Respondent lodged a late objection on iTax. It appears the parties then met on 21.06.2021 as per the email of the Commissioner of the same date. In the said email, the Commissioner stated that in order for it to validate the objection application, it required the following; the physical location of the supplier and contact person, all invoices and evidence of payment, 100% verification relating to the supplies in question, evidence of sales, stock records, cash book, trial balance and particular supplier's ledger. On 24.09.2021, the Commissioner then issued an objection decision ("the Objection Decision") to the objection and based on the documents availed to it by the Respondent as at 30.08.2021. The Commissioner stated that notwithstanding the Respondent's assertion that it had maintained full records for the purchases disallowed, it was established that there was no supply of taxable goods made by the suppliers "highlighted in the table attached" to the Objection Decision. In this regard, the Commissioner confirmed the earlier assessment.
7. The Objection Decision precipitated the filing of an appeal at the Tribunal which framed the following issues for determination; Whether the Objection Decision was made within the statutory timelines, whether the Respondent supplied all documents required by the Commissioner and whether the Objection Decision was proper in law. The Tribunal found that the Objection Decision was made within the 60-day statutory timeline as the last batch of documents was delivered to the Commissioner on 30.08.2021 and the Objection Decision was made 23 days later. The Tribunal found that the Respondent discharged its burden by providing the documents that were agreed upon with the Commissioner and requested for in writing. That the Commissioner did not at any time indicate that the documents provided were inadequate or ask for any other additional documents. The Tribunal further found that since the Commissioner did not provide the results of the investigations or indicate to the Respondent on how it was, "established that there was no supply of taxable goods made by the suppliers," the Tribunal held that the Objection Decision did not comply with section 51(10) of the [Tax Procedures Act](#) (Chapter 469B of the Laws of Kenya) ("the TPA").
8. The Tribunal therefore allowed the Respondent's appeal and set aside the Objection Decision, hence the present appeal which has been canvassed by way of written submissions. Since the parties have regurgitated the same positions I have already summarized above, I do not find it necessary to thus summarize the same but I will make relevant references in my analysis and determination below

Analysis and Determination

9. As I determine this appeal, I am cognizant of the fact that the jurisdiction of this court is circumscribed by section 56(2) of the [TPA](#) which provides that "An appeal to the High Court or to the Court of Appeal shall be on a question of law only". The duty of the court is thus to make a determination as to whether the Tribunal's conclusions were correct as per the law and evidence before it. In its submissions, the Commissioner has framed three issues for determination as follows:
 - a. Whether the Tribunal had Jurisdiction to entertain the Respondent's Appeal
 - b. Whether the Respondent discharged the Burden of Proof at the Tribunal
 - c. Whether the Tribunal erred in finding that the Commissioner inferred fraud on the part of the Respondent Whether the Tribunal had Jurisdiction to entertain the Respondent's Appeal
10. The Commissioner submits that the Tribunal did not have the jurisdiction to hear and determine the Respondent's appeal on grounds that the Respondent filed a late appeal. That the Commissioner issued the Objection Decision on 29.09.2021 and thus the Respondent ought to have filed the Notice of Appeal within thirty (30) days, that is on or before 29.10.2021. However, the Commissioner submits that the Respondent filed its Notice of Appeal on 03.11.2021, a period which was outside



the statutory timeline. On its part, the Respondent submits that the Tribunal had the necessary jurisdiction to entertain the appeal and that the Commissioner is trying to steal a match on it as it never raised the issue in its pleadings at the Tribunal. That the same was only raised in its submissions and after the submissions of the Respondent had already been adopted. Thus, the Respondent submits that the Commissioner was barred from raising the jurisdictional issue in its submissions without according the Respondent an opportunity to respond. Thus, the Respondent submits that the Tribunal did not err in holding that it had the necessary jurisdiction to determine the matter.

11. The primacy of the jurisdiction of a court to determine a dispute is not in dispute and is now settled. Nyarangi JA., in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited* [1989] KLR 1 simply but memorably put it that "jurisdiction is everything". The Supreme Court in *Samuel Kamau Macharia v Kenya Commercial Bank and others* SCK Application No 2 of 2011 [2012] eKLR explained that:

A court's jurisdiction flows from either the *Constitution* or Legislation or both. Thus a court can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law the Court must operate within the constitutional limits. It cannot expand jurisdiction craft or innovation.

12. The Commissioner does not deny that it never raised the same with the Tribunal and argues that the Supreme Court in *Dina Management Limited v County Government of Mombasa & 5 others* [2023] KESC 30 (KLR) has since held that the issue of jurisdiction can be raised at any stage of the proceedings in any court including this court at the appellate stage. I agree. Indeed, the Supreme Court went further and stated that an appellate court has inherent jurisdiction to right jurisdictional wrongs and that this court can assume jurisdiction and interrogate those alleged wrongs. I therefore find that in as much as the question of the Tribunal's jurisdiction was never raised by either party or the Tribunal itself, this court has the requisite jurisdiction to determine whether the Tribunal had jurisdiction to entertain the Respondent's appeal before it.
13. It is common ground that under section 13(1) (b) of the *Tax Appeals Tribunal Act* "A notice of appeal to the Tribunal shall... be submitted to the Tribunal within thirty days upon receipt of the decision of the Commissioner." It is not in dispute that the Respondent received the Objection Decision on 29.09.2021 via email and thus, it ought to have filed or submitted the Notice of Appeal to the Tribunal by 29.10.2021 latest. It is not in dispute that the Respondent's notice of appeal was received by the Tribunal on 03.11.2021, and therefore it was received 5 days late. The Supreme Court, in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*, SC Application No 16 of 2014; [2014] eKLR and *Bookpoint Limited v Guardian Bank Limited & another* SC Application No 4(E006) of 2021 [2021] eKLR held that a Notice of Appeal is a jurisdictional prerequisite signifying the intention to appeal, and purported late filing without leave cannot be sanctified by the Court. It therefore follows that the Respondent ought to have lodged its Notice of Appeal on or before 29.10.2021. It did not, and neither did it seek extension of time to file the same out of time. Consequently, there was no valid Notice of Appeal on record and given the jurisdictional importance of a Notice of Appeal there was no foundation, that is, the Notice of Appeal upon which such an appeal would have been premised before the Tribunal. As the Court of Appeal in *Patrick Kiruja Kitbinji v Victor Mugira Marete* NYR CA Civil Appeal (Application) No 48 of 2014 [2015] eKLR held, "...an appeal filed out of time is not curable under Article 159" and therefore this court cannot state that the Tribunal could still hear and determine the appeal under the auspices of Article 159 of the *Constitution*. Filing an appeal out of time and without the leave of the Tribunal as stipulated



by section 13(3) of the *Tax Appeals Tribunal Act* was fatal and divested the Tribunal of jurisdiction to hear and determine the appeal.

Disposition

14. I allow the appeal. The Tribunal's decision is set aside for want of jurisdiction. There shall be no order as to costs.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MAY 2024.

A. MABEYA

JUDGE

