



**Commissioner of Domestic Taxes v Neema Livestock & Slaughtering  
Investments Limited (Income Tax Appeal E136 of 2023)  
[2024] KEHC 9392 (KLR) (Commercial and Tax) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9392 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E136 OF 2023**

**WA OKWANY, J**

**JULY 11, 2024**

**BETWEEN**

**COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT**

**AND**

**NEEMA LIVESTOCK & SLAUGHTERING INVESTMENTS  
LIMITED ..... RESPONDENT**

*(Being an Appeal from the Judgment of the Tax Appeals Tribunal at  
Nairobi delivered on 14th July, 2023 in the Nairobi TAT No. 749 of 2022)*

**JUDGMENT**

**Introduction**

1. The Appellant is an officer of the Kenya Revenue Authority, a public body established under the [Kenya Revenue Authority Act](#), 1995 whose primary mandate is the assessment and collection of revenue, together with the administration and enforcement of tax legislation on behalf of the Government of Kenya.
2. The Respondent is a company incorporated in Kenya under the repealed [Companies Act](#), Chapter 486 of the Laws of Kenya. The Respondent's principal activity is the provision of abattoir services.

**Background**

3. Pursuant to its statutory mandate under Section 5 of the [Kenya Revenue Authority Act](#) (KRA Act) and in exercise of its authority under Section 59 of the [Tax Procedures Act](#) (TPA), the Appellant requested for information concerning clearing agents purportedly engaged by the Respondent. The Appellant



also conducted an in-depth examination of the Respondent's tax records with respect to the period between 2015 to 2021 ("the Audit Period").

4. The Respondent acknowledged the Appellant's letter and informed the Appellant that it did not engage the clearing agents listed by the Appellant, save for one DHL Global Forwarding Kenya Limited. In response to the Appellant's request, the Respondent furnished the Appellant with all the materials and documents in its possession.
5. The Respondent further informed the Appellant that it had suspected that there were illegal and unauthorized use of its PIN by unscrupulous clearing agents.
6. At the conclusion of the examination and verification exercise and upon identifying instances of alleged non-compliance with the provisions of the *Income Tax Act*, the Commissioner of Domestic Taxes assessed the principal Corporation Income Tax against the Respondent to the tune of Kshs. 347,471,722/= together with attendant interest and penalties of Kshs. 56,172,365/= and Kshs. 17,373,586/= respectively. Following the said assessment, the Appellant issued the Respondent with a notice of assessment letter dated 24<sup>th</sup> December 2021.
7. Aggrieved by the Appellant's findings and assessments, the Respondent invoked the provisions of Section 51 (1) of the Tax Procedure Act and objected to the assessment vide letter dated 19<sup>th</sup> January 2022. In its objection letter, the Respondent stated, that the Appellant was misled by the export turnover generated by fraudulent transactions carried out by unscrupulous clearing agents.
8. In a further effort to clarify the misunderstanding that arose from the assessment, the Respondent severally sought the intervention of the Appellant's Investigations and Enforcement Department with the view of assisting the Appellant direct the assessments to the liable parties. In this regard, the Respondent cooperated with the Appellant's Independent Review of Objections team and engaged them with a view to seeking the truth so as to justly lay the tax liability on the liable parties.
9. The Respondent's engagements with the Appellant's respective departments culminated in multiple meetings between the parties where at one instant the Respondent invited the Independent Review of Objections team to inspect and review documents at its premises. The Respondent's invitation was however not accepted or taken up by the Appellant who proceeded to confirm the assessment through its objection decision dated 25<sup>th</sup> May 2022.
10. Aggrieved by the Appellant's said objection decision, the Respondent filed an appeal before the Tax Appeals Tribunal (TAT) in accordance with Section 52 (1) of the *Tax Procedures Act* as read together with Sections 12 and 13 of the *Tax Appeals Tribunal Act*, 2013.
11. The Tax Appeals Tribunal heard the appeal and, in a judgment rendered on 14<sup>th</sup> July 2023, found in favour of the Respondent herein thus triggering the filing of the instant appeal in which the Appellant listed the following grounds of appeal: -
  1. That the Tax Appeals Tribunal erred in law by imposing an investigative responsibility on the Appellant contrary to express provisions of the *Tax Procedures Act* which places the burden of proof on the Respondent in challenging the correctness of an objection decision.
  2. That the Tax Appeals Tribunal erred in law by finding that the objection decision issued by the Appellant was premature on account that the Appellant was yet to conclude the investigations pertaining the fraudulent transactions undertaken by third parties.



3. That the Tax Appeals Tribunal erred in finding that the Appellant had created a legitimate expectation by requesting for documents from the Respondent vide a letter dated 4<sup>th</sup> November 2022.
  4. That the Tax Appeals Tribunal erred in law in failing to put the Respondent to task to explain how the third parties were in possession of the Respondent's log in details in order to transact Kshs. 1,156,947,206/= with the Appellant's PIN for a period of five years without the Respondent's knowledge or consent.
  5. That the Tax Appeals Tribunal erred in law by arriving at a conclusion which contravenes the provisions of Section 13 (2) & (3) of the *Tax Procedures Act* which stipulates that one PIN shall be issued to one person and it shall not be used by a person other than the person to whom it was issued.
12. The Appellant seeks the following orders in the appeal: -
- a. That this Appeal be allowed and the judgment of the Tax Appeals Tribunal delivered on 14<sup>th</sup> July 2023 be set aside.
  - b. That the Appellant's objection decision dated 20<sup>th</sup> May 2022 and subsequent demand for Kshs. 421,017,673.00 be upheld.
  - c. That the costs of this appeal be borne by the Respondent.
13. The Respondent opposed the appeal through the statement of facts dated 23<sup>rd</sup> October 2023 wherein they reiterated the background of the dispute, the appeal before the Tax Appeals Tribunal and the outcome thereof that resulted in the filing of this appeal.
14. The Respondent averred that the instant appeal is not merited and urged this court to dismiss it.
15. The appeal was canvassed by way of written submissions which I have considered.

### **Appellant's Submissions**

16. The Appellant submitted that it discovered a variance of approximately 3.4 billion in the Respondent's tax returns upon conducting an audit of its tax returns and export data after which it issued the Respondent with additional tax. The Appellant stated that it treated the variance as undeclared sales which it then charged to the corporation tax.
17. It was submitted that the taxpayers claim that some unscrupulous clearing agents used their Personal Identification Numbers (PIN) fraudulently without their consent was not plausible.
18. According to the Appellant, it was not possible for the PIN to be used by a third party without authorization as every PIN has a password that is only known to the taxpayer.
19. The Appellant however conceded that the PIN password can at times be yielded by the taxpayer to authorized agents and that in such a scenario, the Appellant cannot be blamed for the misuse of the password.
20. The Appellant also conceded that the Respondent provided it with a list of 29 clearing agents out of which only one (1) (DHL) was contracted by the Respondent.
21. It was submitted that under Section 56 of the *Tax Procedures Act* (TPA) and Section 30 of the Tax Appeals Tribunals Act, (TAT Act), the burden of proof primarily lies with the taxpayer to prove that its PIN was fraudulently used by third parties. It was further submitted that under Section 13 of the



TPA one PIN is issued to one taxpayer and shall not be used by a person other than the party to which it is issued.

22. The Appellant faulted the Respondent for failing to notice or report the alleged misuse of its PIN for the entire 5 years audit period only to raise it after the assessment.
23. Reference was made to the decision in *Macharia Mwangi Maina & 87 others vs. Davidson Mwangi Kagiri* [2014] eKLR for the argument that no man shall benefit from his own wrong-doing.
24. It was submitted that the Respondent could not blame the Appellant for failing to investigate the misuse of its PIN.
25. The Appellant argued that the Tax Appeals Tribunal's Judgment will create a bad precedent of taxpayers yielding their PINs to third parties for huge transactions and to later claim that there was misuse. The Appellant urged this court to set aside the judgment of the Tax Appeals Tribunal. The Appellant further implored this court to grant it 90 days to investigate the alleged fraudulent use of PIN and issue an amended assessment.

### **Respondent's Submissions**

26. The Respondent submitted that it is not engaged in any export business whatsoever as its business is only concerned with slaughter. The Respondent maintained that it could not have done the exports in question and that it notified the Appellant of the anomaly or fraudulent transactions immediately it discovered the misuse of its PIN.
27. The Respondent noted that even though the Appellant launched investigations into the illegal use of its PIN, the Appellant rushed to issue the impugned tax assessment before it concluded the investigations.
28. The Respondent emphasized that the 29 agencies/exporters that fraudulently used its PIN are clearly listed in the Record of Appeal and that the Appellant had powers to investigate them and compel them to pay the taxes due.
29. It was submitted that having reported the fraudulent transactions, the Respondent could not be expected to conduct any investigations and that the burden of proof cannot be imposed beyond what the Respondent was required to do. For this argument, the Respondent cited the decision in.....
30. The Respondent's case was that the Tax Appeals Tribunal's judgment should be upheld and the appeal dismissed as the tax in question should be paid by the third parties.

### **Analysis & Determination**

31. I have carefully considered the instant appeal and the parties' respective submissions. I find that the main issue for determination is whether the Respondent should be held responsible for the unpaid taxes arising out of the alleged misuse of its PIN.
32. The Appellant argued that since the Respondent was indolent and did not report the alleged misuse of its PIN for the entire audit period of 5 years, and further, that since the Respondent did not adequately explain how its PIN fell in the hands of third parties, who did not remit taxes, the Respondent should be held liable for the unpaid taxes.
33. The Respondent, on its part, argued that not only was it not engaged in the export business, but that it had already submitted the names and details of the 29 entities that illegally used its PIN to export goods and that it was upon the Appellant to investigate those entities in order to recover the taxes due.



34. The Tax Appeals Tribunal held as follows on the issue of the third parties that had been identified as having misused the Respondent's PIN: -

“70. Additionally, the Tribunal noted that with regard to the issue of the use of the Appellant's PIN by third parties, that the Appellant requested the Respondent to undertake an investigation vide a letter dated 29<sup>th</sup> December 2021 and the Respondent in its email dated 31<sup>st</sup> March 2022 requested for a meeting to discuss, inter alia, matters relating to investigations. Notably no further mention of this investigation is made other than in the objection decision by the Respondent, dated 20<sup>th</sup> May 2022, stating that the Respondent had not found concrete evidence confirming the Appellant's allegation that its PIN was illegally used by unscrupulous agents and exporters to export its meat products.

71. The Tribunal having reviewed the International Veterinary Health Certificates submitted in pleadings, is convinced that the Appellant's core business is as producer/slaughterhouse while there is a range of third parties that are the exporters of the meat products. Specifically, the Tribunal noted that some of the entries highlighted in the Respondent's schedule of Customs export data that was used to raise the assessment are supported by Veterinary Health Certificates that indicate the exporters as third parties. Examples are of the same include: -

Entry Number Date of Entry Quantum (Kgs) Exporter

JKA3000118 04/05/2016 1392 Blue Jay Enterprises

JKA4116405 18/10/2018 1173 Sustainable

***Development Solutions Ltd***

***JKA4124985 22/10/2018 1657 Sustainable***

***Development Solutions Ltd***

***JKA4149420 10/11/2018 3825 Sustainable***

***Development Solutions Ltd***

***JKA4145539 10/11/2018 1417 Sustainable***

***Development Solutions Ltd***

***JKA4180217 29/11/2018 1616 Zyke Limited***

35. Sections 56 of the [Tax Procedures Act](#) and 30 of the [Tax Appeals Tribunal Act](#) stipulate as follows: -

56. General provisions relating to objections and appeals

(1) In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.

(2) An appeal to the High Court or to the Court of Appeal shall be on a question of law only.



(3) In an appeal by a taxpayer to the Tribunal, High Court or Court of Appeal in relation to an appealable decision, the taxpayer shall rely only on the grounds stated in the objection to which the decision relates unless the Tribunal or Court

allows the person to add new grounds.

30. Burden of proof

In a proceeding before the Tribunal, the appellant has the burden of proving—

(a) where an appeal relates to an assessment, that the assessment is excessive; or

(b) in any other case, that the tax decision should not have been made or should have been made differently.

36. My finding is that having established that it was not engaged in export business and having submitted the names/details of the 29 third parties that misused its PIN in the export business without paying taxes, the Respondent fully discharged its burden of proof in as far as the issue of misuse of its PIN certificate is concerned.

37. It was not disputed that the Respondent was not engaged in export business yet the variance in the tax returns that the Appellant discovered during its audit of the Respondent's books was in respect to export data. I find that the Respondent discharged its burden of proof when it supplied the Appellant with the details of the 29 third parties that used its PIN for the Appellant's investigations.

38. This court notes that the nature of the investigations to be conducted on the 29 entities is such that it is only the Appellant who is, under the law, capable of doing as mandated by the law.

39. It is instructive to note that, at the tail end of its submissions before this court, the Appellant's Counsel urged this court to set aside the judgment by the Tax Appeals Tribunal and to grant it 90 days to investigate the fraudulent use of the Respondent's PIN and issue an amended assessment. My finding is that the Appellant cannot blow hot and cold over this matter or go back and forth in the performance of its functions. My take is that the Appellant should have, in the first place, completed its investigations on the 29 entities before issuing the Respondent with the tax assessment. I note that the Appellant chose to literally put the cart before the horse by issuing the Respondent with a questionable assessment, holding out and defending the said assessment all the way to the Tax Appeals Tribunal up to this court only to turn back and, at the end of this appeal, ask for a chance to retrace its footsteps and carry out an investigation.

40. My take is that having allowed this case to run its full course, there is no provision, under the law, which entitles or allows this court to grant the Appellant 90 days to carry out its investigations. The duty of this court, at this point, is to determine the merits of the appeal.

41. Consequently, and having regard to the observations and findings that I have made in this judgment, I find that this appeal is not merited and I therefore dismiss it with costs to the Respondent.

42. Orders accordingly.

**Judgment signed, dated and delivered virtually via Microsoft Teams this 11th day of July 2024.**

**W. A. OKWANY**

**JUDGE**

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