



**Commissioner of Domestic Taxes v Thuo (Income Tax Appeal E026 of 2022)
[2024] KEHC 9395 (KLR) (Commercial and Tax) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9395 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E026 OF 2022**

WA OKWANY, J

JULY 11, 2024

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

JOSEPH RUHIO THUO RESPONDENT

*(Being an Appeal against the judgment of the Tax Appeals Tribunal
in Tax Appeal No. 220 of 2021 delivered on 28th January 2022)*

JUDGMENT

The Parties

1. The Appellant is the Commissioner of Domestic Taxes created under Section 3 of the [Kenya Revenue Authority Act](#) (Cap. 469). The Appellant's core mandate is to assess, collect and account for all tax revenues in accordance with the applicable tax laws.
2. The Respondent is an adult male of sound mind and a Director of Mahiga Homes Limited, (hereinafter "the Company") a company engaged in the business of construction and development of residential properties within the Republic of Kenya.

Introduction

3. The Appellant issued the Respondent with a Notice of Assessment of Tax dated 10th February 2020 for the sum of Kshs. 10, 177,344.58
4. The Respondent objected to the assessment on the basis that the estimated tax was excessive. The Respondent contended that he was a director of a Company (Mahiga Homes Limited) which was also under the Appellant's investigations wherein one of the issues under consideration were the



- withdrawals he had made on which Pay As You Earn (PAYE) had allegedly not been paid. The Respondent contended that the PAYE that would eventually be charged on the said withdrawals would lead to an accurate assessment of the incomes for the year 2018.
5. The Appellant issued an objection decision on 5th May 2020 wherein it confirmed its earlier assessment thereby precipitating the Respondent's decision to file an appeal before the Tax Appeals Tribunal (TAT).
 6. The gist of the Respondent's appeal before the TAT was that he was issued with an assessment as a Director of the Company when the said company also received a separate assessment. The Respondent explained that the Company also lodged an appeal against the Appellant's objection decision being TAT No. 198 of 2020 Mahiga Homes Limited vs Commissioner of Domestic Taxes in which an alternative dispute resolution mechanism (ADR) approach was adopted and an agreement reached between the Appellant herein and the Company's directors including the Respondent.
 7. The Appellant, on its part, filed a notice of preliminary objection in which it challenged the TAT's jurisdiction to entertain the appeal while arguing that the Respondent's objection to the assessment was fatally defective as it contravened the provisions of section 51 (3) of the *Tax Procedures Act* (TPA). According to the Appellant, the Respondent's objection fell short of the requirements of Section 51 (3) of the TPA as he did not provide evidence to support the objection or state the precise grounds of objection or the amendments required in order to correct the decision the reasons for the amendments.
 8. The TAT considered the appeal and rendered a verdict on 28th January, 2022 in which it found that that the appeal is spent as matter in the appeal had been directly and substantially dealt with in the Tax Appeal Tribunal Case No. 198 of 2020 (Mahiga Homes Limited Case).
 9. In the said judgment, the Tribunal allowed Respondent's Appeal and set aside the Appellant's Objection decision dated 5th May, 2020 and the Income Tax assessment arising therefrom on the basis that the Appellant could not demand tax from the Company and the Respondent based on the same income.
 10. Dissatisfied with the decision by the TAT, the Appellant filed the instant appeal vide the Memorandum of Appeal dated 22nd February, 2022 in which it enumerated the following Grounds of Appeal: -
 - i. That the Honourable Tribunal erred in law and in fact in failing to address the Appellant's Preliminary Objection dated 12th May, 2021 in its finds (sic) therefore proceeding to make a determination when no valid objection was ever made hence the Tribunal lacked jurisdiction to proceed with the hearing.
 - ii. That the Honourable Tribunal erred in law and in fact by finding that the tax dispute herein was effectively dealt with in the ADR agreement dated 12th April, 2021 in Tax Appeal Tribunal case 198 of 2020; Mahiga homes Limited v Commissioner Investigations & Enforcements just because the figures in question were the same.
 - iii. That the Honourable Tribunal erred in law and in fact by failing to appreciate that the two disputes (Mahiga Homes and Joseph Thuo) had been subjected to Alternative Dispute Resolution. However, the discussions with regard to the Appeal herein collapsed due to lack of documents while the Appeal No. 198 of 2020 was settled as supporting documentation was availed.
 - iv. That the Honourable Tribunal erred in law by finding that the ADR in Appeal No. 198 of 2020 dealt with issues under consideration in the Appeal No. 220 of 2020 without



appreciating the expenses though allowable to the Company they are not allowable in the Director's Personal Return.

- v. That the Honourable Tribunal erred in law and in fact in failing to appreciate the Director and the Company are distinct and the expenses for the Company are not allowable on the director's personal return.
 - vi. That the Honourable Tribunal erred in law and in fact in failing to appreciate that the ADR Agreement in TAT No. 198 of 2020 as far as the Directors were concerned only dealt with their PAYE of directors and while the Appeal in 220 of 2020 related to unsupported expenses in their personal returns.
 - vii. That the Honourable Tribunal erred in law and in fact in failing to appreciate that the expenses in question were admitted to have been incurred by Mahiga Homes Limited and were allowable for it but not for self-assessment for the directors as they were not the directors' personal expenses.
 - viii. That the Honourable Tribunal erred in law and in fact in failing to appreciate that even at the Appeal, no document was availed to support the expenses on the personal returns.
 - ix. That the Honourable Tribunal erred in law and in fact in failing to consider the ADR Agreement in full while it clearly showed that it was limited to the dispute relating to Mahiga Homes Limited and not the Respondent herein.
11. The Appeal was canvassed by way of written submissions which I have considered.

Appellant's Submissions

12. The Appellant faulted the TAT for failing to determine the pertinent issue regarding its jurisdiction that was raised in the preliminary objection and captured the arguments made before it. The Appellant noted that the Respondent objected to the Commissioner's decision to disallow the expenses of Kshs. 28,900,000/= in the self-declared return by merely stating "N/A" without providing the ground for objection or the amendments required or reasons as to why the assessment is not proper contrary to Section 51(3) of the TPA. Reference was made to the decision in TAT No. 163 of 2017: Rongai Tiles & Sanitary Ware Ltd v Commissioner of Domestic Taxes and in Nairobi TAT No. 125 of 2017 Ngurumani Traders Ltd Vs. Commissioner of Investigation & Enforcement where TAT found a similar objection defective for non-compliance with section 51(3) of the TPA.
13. It was submitted that a court of law must first have jurisdiction before it can proceed to hear a matter presented before it and must exercise that jurisdiction in accordance with the law as was held in the case of Samuel Kamau Macharia & Another vs. Kenva Commercial Bank Limited & 2 others [2012] eKLR.
14. On whether the company's expenses could be allowed against the director's personal accounts, the Appellant submitted that a company is a judicial person that is separate from its directors. The Appellant argued that the law expressly permits the incorporation of a business for the very purpose of enabling its shareholders and directors to avoid personal liability and to ensure that its affairs are distinct from that of the members as was stated in Salomon vs. Salomon & Co (1897) AC22 where Lord Macnaghten affirmed the separation between the corporation and its members.
15. Counsel acknowledged that this matter and the Mahiga case were discussed at the ADR but argued that since the Respondent did not tender documents to support of the claimed expenses, parties were only able to settle the issue of PAYE which was the subject of the TAT Appeal No. 198 of 2020 where a consent was recorded following the parties' agreement. The Appellant maintained that it could



not allow the expenses claimed since the Respondent did not provide the documents to support the expenditure.

Respondent's Submissions

16. The Respondent submitted that the Tribunal correctly determined the issues before it and that dealing with the issue of the Preliminary Objection, at this stage, will not change the fact that the Respondent demonstrated that he paid the tax arising from the assessment of Kshs. 28,000,000/= through the company as PAYE.
17. The Respondent argued that the Appellant could not raise a Preliminary Objection on a matter that it acceded to and that the Objection was only brought before the Tribunal as an afterthought. The Respondent noted that as a quasi-judicial body, the Appellant was required to determine the validity of the objection before giving an objection decision and that in this regard, the Appellant was, under Section 51 (4) of the TPA, required to immediately notify the tax payer that the objection was not validly lodged. The Respondent noted that at no point in the entire objection decision did the Appellant raise the issue of the validity of his objection. According to the Respondent, the issue of the validity of his objection is a non-issue that does not require belaboring based on the facts of the case.
18. On the issue of whether a director is liable to pay income tax even after paying PAYE through the company, the Respondent submitted that this is a factual issue that the TAT considered under Section 56 (2) of the TPA and further argued that the court does not have jurisdiction to consider matters of fact. The Respondent however explained that he received Kshs. 28.9 Million in his personal account as a director in the Company and that the Company also received an assessment over the same amount. He noted that the ADR agreement shows that the income he received was considered as a withdrawal and ultimately subjected to PAYE of Kshs. 4,997,562 while in the same agreement the Appellant conceded to freight and transport expenses and M-pesa statements for the expenses that he incurred on behalf of the Company.
19. The Appellant maintained that having paid the sums agreed upon during the ADR, through the Company, he had a legitimate expectation that he would not be required to once again pay the same amount as an individual as that would amount to double taxation. For this argument, reference was made to the decision in *R vs Kenya Revenue Authority & 2 Others Ex parte Kungu Gatabaki & 4 Others; Jacaranda Hotel Limited (Interested Party)* [2020] eKLR where the court cited the case of *Keroche Industries Limited vs Kenya Revenue Authority & 5 Others Nairobi* [2007] eKLR where it was held that: -

“...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way... Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised.”



Analysis & Determination

20. have carefully considered the Appeal, the statement of facts and the submissions by counsel. I note that the issues for determination are: -
 - a. Whether the Tribunal had the jurisdiction to hear and determine the appeal.
 - b. Whether the appeal is merited.
 - c. Who should bear the costs of the Appeal?

Jurisdiction

21. The Appellant faulted the TAT for failing to determine the preliminary objection it raised on its jurisdiction to hear and determine the appeal. It was the Appellant's case that the TAT lacked the jurisdiction to entertain the appeal since the Respondent's objection to its assessment was fatally defective for contravening the provisions of Section 51 (3) of the *Tax Procedures Act* (TPA) which required him to provide evidence to support the objection and state the precise grounds of objection or the amendments required.
22. In a rejoinder, the Respondent submitted that the Appellant raised the Preliminary Objection, on jurisdiction before the Tribunal, as an afterthought and after submissions had already been filed when it had already acceded to the Tribunal's jurisdiction. The Respondent argued that if indeed its objection to the assessment was not valid, as alleged by the Appellant, then the Appellant was under Section 51 (4) of the TPA required to immediately notify him that the objection is not validly lodged. According to the Respondent, the Appellant was required to determine the validity of the objection before giving an objection decision. The Respondent also noted that at no point, in the entire objection decision, did the Appellant raise the issue of the validity of his objection.
23. It is trite that jurisdiction is everything without which a court or a tribunal does not have the power, authority or legitimacy to entertain any matter before it. This is the position that was expressed in the oft cited case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989) where the court stated that: -

"Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

24. Section 51 (1) to (4) of the *Tax Procedures Act* stipulates as follows:-
 51. Objection to tax decision.
 - (1) A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.
 - (2) A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.
 - (3) A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if—



- (a) the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments;
- (b) in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute or has applied for an extension of time to pay the tax not in dispute under section 33(1); and
- (c) all the relevant documents relating to the objection have been submitted.
- (4) Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall within a period of fourteen days notify the taxpayer in writing that the objection has not been validly lodged and request the taxpayer to submit the information specified in the notice within seven days after the date of the notice. [Emphasis added].

25. Applying the procedure for lodging objections to taxation as stated in the above provision to the instant case, I find that if indeed the Appellant found that the objection lodged by the Respondent was defective, then the proper approach should have been for it to invoke Section 51 (4) of the TPA and notify the Respondent of the same in writing within the stipulated period. It however turns out that the Appellant did not raise the invalidity of the objection within the given period, or at all, and only raised it at the tail end of the proceedings before the Tribunal, after the filing of submissions. I find that this late attack on the validity of the Respondent's objection lends credence to the Respondent's argument that the preliminary objection was an afterthought.
26. My finding is that having failed to notify the Respondent of the alleged invalidity of his objection within the specified period, and having rendered its verdict on the objection decision, the Respondent was within his rights to lodge the appeal before the TAT which, in turn, had the jurisdiction to hear and determine the appeal.
27. Turning to the issue of whether the company's expenses could be allowed as against the director's personal accounts, the Appellant contended that a company is a judicial person that is separate from its directors. The Appellant maintained that the Respondent/Director could not escape personal liability for his own taxes as his tax obligations were distinct and separate from those of the Company.
28. The Respondent, on his part, argued that the issue of his tax liability was discussed and resolved through the ADR that was conducted in the Mahiga case. The Respondent's case was that since the Tribunal found that the issue of the taxes due had been directly and substantially dealt with in the Mahiga case, the Appellant could not demand tax from both the Company and the Respondent based on the same income.
29. I note that even though the Appellant acknowledged that this matter was discussed at the ADR alongside the Mahiga case, it insisted that the Respondent did not tender documents to support his claimed expenses thereby resulting in settlement on the issue of PAYE only.
30. My finding is that the issue of whether the Respondent presented documents to support its claim on expenses before the Tribunal is an issue of fact that does not fall within the purview of this court's appellate jurisdiction by dint of the provisions of Section 56 (2) of the TPA which stipulates that: -

“An appeal to the High Court or to the Court of Appeal shall be on a question of law only”.



31. It is to be noted that the above provision is couched in mandatory terms which means that the court does not have the latitude to operate outside its limits. My understanding of the above provision is that an appeal to this court, from a decision by the TAT, is limited to matters of law only and that the provision does not permit an appellate court to substitute the Tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts. (See *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR).
32. For the above reasons, I find that the Appellant's claim that the Respondent did not furnish documents to support the expenses is an issue of fact that this court cannot entertain in this appeal.
33. My above finding notwithstanding, and even assuming, for arguments sake, that this court is wrong on its finding that the issue of the expenses incurred by the Respondent is a matter that this court can entertain, on appeal, a perusal of the ADR settlement agreement made in the Mahiga case shows that the parties agreed on all the issues that were the subject of the appeals before the TAT. The settlement terms were as follows: -

“J. The Settlement Terms

32. The parties have reached a mutually agreeable position on the issues in dispute at TAT Appeal No. 198 of 2020 shall be marked as settled under the following terms:
33. That the income tax, PAYE and Withholding Tax assessments for the year 2018 amounting to Kshs. 21,076,721 have been revised to Kshs. 14,735,468 comprising of principle tax of Kshs. 11,011,666 penalty of Kshs. 2,072,052 and interest of Kshs. 1,651,750.
34. The taxpayer undertakes to pay the principle tax liability of Kshs. 11,011,666 in 6 instalments as shown below, which shall be the full and final settlement of the tax dispute.
 - a) Kshs. 1,855,281 on or before 20th April 2021
 - b) Kshs. 1,835,277 on or before 20th May 2021
 - c) Kshs. 1,835,277 on or before 20th June 2021
 - d) Kshs. 1,835,277 on or before 20th July 2021
 - e) Kshs. 1,835,277 on or before 20th August 2021
 - f) Kshs. 1,835,277 on or before 20th September 2021.”
34. I note that the TAT considered mutual agreement that the parties that the parties entered into during the ADR in detail and held as follows in respect to the Appellant's tax assessment as against the Respondent: -

“It would be remiss for the Tribunal to ignore the fact that the amounts mentioned in the ADR agreement are identical to those that form the basis of this appeal. Or that the ADR agreement specifically references the Appellant. Whereas we agree that information produced at the ADR level is adduced on a without prejudice basis, in the instant case, the Appellant and the taxes he owes are specifically mentioned in the ADR agreement. Accordingly, we are of the view that the is not a stranger to the agreement and has a right to rely on it. Since the tax in dispute has been effectively dealt with in the agreement, it would



be unfair for the Respondent to demand taxes from both Mahiga Homes Limited and the Appellant on the same income.

The Tribunal therefore finds that the matter in this appeal has been directly and substantially dealt with in the Tax Appeal Tribunal Case No. 198 of 2020 (Mahiga Homes Limited) and subsequently, this appeal is spent.”

35. My finding is that contrary to the Appellant’s claim that the ADR agreement only dealt with the subject of the PAYE and the taxes due from the company, the above extract of the said agreement shows that besides PAYE it also covered Income Tax and Withholding Tax Assessments for the year 2018. To buttress its position that the ADR settlement included the tax assessment against the Respondent herein, the Tribunal noted that not only were the amounts mentioned in the ADR agreement identical to the amount that formed the basis of the appeal before it, but that the ADR agreement specifically referred to the Appellant.
36. I find that the TAT arrived at the correct finding in holding that the tax dispute between the Appellant and the Respondent herein was dealt with and resolved in the Tax Appeal Tribunal Case No. 198 of 2020 (Mahiga Homes Limited).
37. For the reasons that I have stated in this judgement, I find that the instant appeal is not merited and I therefore dismiss it with costs to the Respondent.
38. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 11TH DAY OF JULY 2024.

W. A. OKWANY

JUDGE

