



**Chebut Tea Factory Limited v Commissioner of Domestic Taxes
(Income Tax Appeal E185 of 2023) [2024] KEHC 11040 (KLR)
(Commercial and Tax) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11040 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E185 OF 2023
JWW MONG'ARE, J
SEPTEMBER 19, 2024**

BETWEEN

CHEBUT TEA FACTORY LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

*(Being an appeal against the judgment of the Tax Appeals Tribunal at
Nairobi dated 15th September 2023 in Tax Appeal No.1273 of 2022)*

JUDGMENT

Introduction and Background

1. The Appellant is a company incorporated in the 1970s to collect and process green tea. In 2006, it formed Kaptumo Tea Factory Limited (“Kaptumo”) to inter alia off-load the processing of green tea in the Appellant factory. Kaptumo was then incorporated as a company on 8th September 2020 with the Chairman and Vice-Chairman of the Appellant as directors and secretary respectively and the Appellant as a director/shareholder of 2 ordinary shares.
2. The Respondent (“the Commissioner”), is an officer appointed under section 13(1) of the [Kenya Revenue Authority Act](#) (Chapter 469 of the Laws of Kenya) as an agent of the Government for purposes of collection, receipt and administration of all revenue and enforcement of all revenue laws. On 22nd March 2022, the Commissioner evinced its intention to verify the Appellant’s tax declarations more so in respect of the transfer of business between the Appellant and Kaptumo. It required the Appellant to avail documents for the examination, including; the contract document for the transfer, board resolution related to the transfer, journal entries relating to the transfer and valuation documents of Kaptumo relating to the transfer.



3. In a letter dated 21st June 2022, the Commissioner stated that it had reviewed the Appellant's tax declarations together with the documents availed and established that from an analysis of the income tax returns filed by the Appellant and Kaptumo, it was evident that there was a "transfer of business as a going concern". Value Added Tax(VAT) was thus charged on the assets the Commissioner claimed had been transferred to Kaptumo and assessed at Kshs.41,679,928.00/=. The Commissioner further noted that the Appellant had accumulated a depreciation of Kshs. 793,174,748.00/= which was higher than the value of assets giving an indication of overclaim of depreciation.
4. In sum, the Commissioner raised an additional assessment of Kshs.64,603,888.00/= inclusive of penalties and interest. By a letter dated 21st July 2022, the Appellant objected to the assessment. The Appellant denied that there was any transfer of assets from the Appellant to Kaptumo even though part of the business was transferred. Thus, the Appellant stated that VAT was not payable.
5. The Appellant faulted the Commissioner's computation by stating that the Commissioner used the net cost instead of the net book values as the assets were purchased in 2020 and they almost had fully depreciated. The Appellant asserted that there was no deed or agreement of transfer of business and transfer of assets between it and Kaptumo, that the VAT Act(Chapter 476 of the Laws of Kenya) and various tax laws do not provide a definition of assets. The Appellant stated Kaptumo filed the annual income tax returns for the year ended 30th June 2022 using draft accounts instead of audited accounts and that the said statements were incorrect and were to be amended. For these reasons, the Appellant urged the Commissioner to vacate the additional assessment.
6. After reviewing the Appellant's objection, the Commissioner rendered its objection decision by a letter dated 16th September 2022("the Objection Decision"). On the transfer of assets to Kaptumo, the Commissioner stated that its income tax return showed a reduction in the net current assets upon the incorporation of Kaptumo which also filed returns indicating ownership of assets which were of the same value as the movement noted in the Appellant's current assets. The Commissioner stated that the Appellant did not clearly elaborate the essence and nature of the transaction between it and Kaptumo and that it failed to satisfactorily demonstrate the assets deployed or costs incurred by Kaptumo in the generation of the sales declared. On the revised audited financial statements, the Commissioner noted the Appellant's contention of filing draft financial statements but then stated that the Appellant had not applied for the proposed amendment of the income tax returns at the time the Commissioner issued it with the notice to conduct the audit.
7. On the error in figures used in the tax computation, the Commissioner stated that what was used were the figures stated in the income tax returns as the Appellant did not corroborate the valuation figures of the assets charged that were to be adopted. That in any event, the review of documents submitted could not satisfy the amendments proposed in the objection. For these reasons, the objection was rejected and the additional assessment confirmed.
8. Aggrieved by the Objection Decision, the Appellant lodged an appeal with the Tax Appeals Tribunal ("the Tribunal"). Having evaluated the pleadings and submissions of the parties, the Tribunal rendered a decision on 15th September 2023 (*Chebut Tea Factory v Commissioner of Domestic Taxes (Tax Appeal 1273 of 2022)* [2023] KETAT 983 (KLR) (Commercial and Tax) (15 September 2023) (Judgment)]. In the judgment, the Tribunal distilled that the only issue for determination was whether there was a transfer of assets from the Appellant to Kaptumo.
9. The Tribunal noted that both parties were in agreement that the accounts that were filed were draft financial statements which were later amended to reflect the non-transfer position. That the logical sequence arising from this defence was that the Appellant should have gone into the Commissioner's



system to amend its filings but this was never done meaning that the only document available to the Commissioner to ascertain the tax liability of the Appellant were the draft financial statements which had been lodged by the Appellant.

10. The Tribunal thus held that the Commissioner was justified in making an objection decision based on documents and or draft financial statement presented.
11. The Tribunal stated that the Appellant was required to present evidence before the Tribunal to show that the transfer did not take place. That an affidavit by the auditor who prepared the said draft accounts without a concurrent proof that the said draft accounts have indeed been amended and filed is not sufficient. It instead amounts to mere allegations under oath without provision of proof of such allegations. Based on the foregoing analysis, the Tribunal found that the Commissioner was justified in its computation and confirmation of the assessment on the basis of transfer of business as a going concern.
12. Thus, the Tribunal found that the appeal lacked merit and accordingly dismissed it with the Objection Decision being upheld. It is this decision that has precipitated the filing of the instant appeal by the Appellant which is grounded on the Memorandum of Appeal dated 10th November 2023.
13. The Commissioner has responded to the appeal through its Statement of Facts dated 25th January 2024. The parties further rely on their written submissions which their respective counsel briefly highlighted before the court and which disposed of the appeal. Since the submissions regurgitate their respective positions summarized above, I will not rehash the same but make relevant references in my analysis and determination below.

Analysis and Determination

14. In determining this appeal, I am cognizant of the fact that this court is exercising appellate jurisdiction that is circumscribed by section 56(2) of the [Tax Procedures Act](#) (Chapter 469B of the Laws of Kenya) which provides that “An appeal to the High Court or to the Court of Appeal shall be on a question of law only”. The Court of Appeal in *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR summarised what amounts to “matters of law” as follows:
 - (38) The interpretation or construction of [the Constitution](#), statute or regulations made thereunder or their application to the sets of facts established by the trial Court. As far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the trial court.
15. This means that an appeal limited to matters of law does not permit the appellat court to substitute the Tribunal’s decision with its own conclusions based on its own analysis and appreciation of the facts. From the Appellant’s appeal, it can be summed that the court is being called to determine the same issue that was determined by the Tribunal; whether there was a transfer of assets from the Appellant to Kaptumo.
16. As stated, the Commissioner was of the opinion that there was indeed a transfer of assets at least based on the Appellant’s income tax returns and financial statements of Kaptumo which indicated an increase of its asset value, which correspondingly the Appellant indicated in its return, was a decrease. The Appellant was of the position that this was an accounting error which had since been amended through revised audited financial statements and tax returns.



17. The resolution of this matter was one of evidence. Section 30 of the [Tax Appeals Tribunal Act](#) and section 56 of the [Tax Procedures Act](#) impose the burden of proof on the tax payer, in this case, the Appellant, to prove that an assessment is excessive or a tax decision is incorrect.
18. I also do not think there is an argument that under section 59 (1) of the [Tax Procedures Act](#), a tax payer shall produce records when required to do so by the Commissioner for the purposes of obtaining full information in respect of their tax liability. This position is fortified under the [Income Tax Act](#) where section 54A requires a person carrying on a business to keep records adequate for the purpose of computing tax. In addition to the records being adequate, a taxpayer ought to ensure that the same is also relevant and competent (See [Republic v Kenya Revenue Authority; Proto Energy Limited \(Ex parte\) \(Judicial Review Application E023 of 2021\)](#) [2022] KEHC 5 (KLR) (24 January 2022) (Judgment). It is also trite that tax statutes in general have to be read in conjunction with others as was observed by the court in [Okiya Omtatah Okoiti v Attorney General & another NRB HC Petition No. 156 of 2017](#) [2020] eKLR.
19. It is not in dispute that by the time the Commissioner was rendering the Objection Decision, the Appellant had not amended its income tax returns to reflect its position that there was no transfer of assets. However, the same were amended after the Objection Decision but before filing the appeal the Tribunal on 12th October 2022. This is evident from pgs. 147-149 of the Supplementary Record of Appeal.
20. It therefore follows that by the time the Appellant was filing its appeal with the Tribunal, the amended tax returns had already been submitted to the Commissioner on iTax and the Tribunal had sight of this evidence. The Commissioner did not oppose or challenge the competency, veracity and relevance of this amended returns. It also did not challenge the evidence of the affidavits on record that the original returns were erroneous. Upto this point, I find that the Appellant had met the minimum threshold of competent and relevant evidence necessary to support its position. It should not be lost that what the Appellant was required by law to establish was a prima facie case and that the Commissioner and the Tribunal ought to have measured the said evidence on a preponderance of probabilities (See [Kenya Revenue Authority v Maluki Kitili Mwendwa ML HC ITA No. E078 of 2020](#) [2021] eKLR)
21. In my view, the Tribunal, having had the benefit of having the evidence of the amended income tax returns, which were not substantially challenged by the Commissioner who had stated that the objection had been denied for the reason that the Appellant had not amended its income tax returns, and since the same had already been done, there was no valid reason for the Tribunal not to uphold the Appellant's position.
22. Further, since the Appellant's evidence in the form of the affidavits (pgs. 150-152 of the Supplementary Record of Appeal) not being challenged as to their competency, credibility and veracity, the Tribunal had more reasons not to reject the Appellant's position. I am therefore in agreement with the Appellant's submission that the Commissioner failed to challenge the Appellant's prima facie position that the original filed returns were erroneous as they were based on draft financial statements that had since been amended. The lack of evidence by the Commissioner to rebut this position meant that the Appellant's position stood and that the Appellant had discharged its burden of proof.
23. My findings above lead me to conclude that the Tribunal did not fully appreciate the entirety of the evidence before it and as a result, arrived at a perverse conclusion. This warrants the interference of the court as this was an error of law.



Conclusion and Disposition

24. In the upshot, I find that the Appellant’s appeal has merit. The Appellant gave sufficient evidence that there was no transfer of assets between it and Kaptumo and as such, no VAT was payable. The decision of the Tribunal dated 15th September 2023 cannot stand and is hereby set aside with the consequence that the Respondent’s Objection Decision dated 16th September 2022 is also set aside. The parties are directed to bear their own costs of the Appeal. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF SEPTEMBER, 2024.

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J.W.W. MONG’ARE

JUDGE

In the Presence of:-

- 1. Ms. Kitur and Mr. Clyde for the Appellant.
- 2. Ms. Chelangat holding brief for Ms. Nyakundi for the Respondent.
- 3. Amos - Court Assistant

