



ICEA Lion Life Assurance Company Limited v Jomo Kenyatta University of Agriculture and Technology; Kenya Revenue Authority (Interested Party) (Civil Case E881 of 2021) [2024] KEHC 11987 (KLR) (Commercial and Tax) (4 October 2024) (Judgment)

Neutral citation: [2024] KEHC 11987 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E881 OF 2021
PM MULWA, J
OCTOBER 4, 2024**

BETWEEN

ICEA LION LIFE ASSURANCE COMPANY LIMITED PLAINTIFF

AND

JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY DEFENDANT

AND

THE KENYA REVENUE AUTHORITY INTERESTED PARTY

JUDGMENT

1. The facts that give rise to the present suit are common and have been laid out by the court previously in ICEA Lion Life Assurance Company Limited v Jomo Kenyatta University of Agriculture and Technology [2019] KEHC 7453 (KLR). The Plaintiff is the past owner of LR No. 209/8287 (“the property”) on which stands a building then known as ICEA Building. Through an agreement for sale dated 4th July 2015, the Plaintiff sold the property to the Defendant for a sum of Khs.1,850,000,000.00. It was a term in the Sale Agreement that the Defendant as purchaser would pay Value Added Tax (VAT) on the transaction of Kshs.296,000,000.00 in addition to stamp duty and registration fees on transfer.
2. The court noted that as at the date of the judgment (2nd May 2019), VAT had not been paid and that prior to the presentation of the matter to Court, the Defendant had through a letter dated 29th September 2015 requested the Cabinet Secretary, Treasury for waiver of the VAT but that neither the waiver nor payment had come through by the time the matter came to Court. The Court further noted that as per the Interested Party’s (KRA) letter dated 4th September 2017, it was confirmed that the transaction qualifies for Zero Rate VAT status. The Court also noted the apprehension by the Plaintiff



that unless the assurance given to the Defendant by KRA is given to the Plaintiff, it was insufficient. The Court found this apprehension not to be misplaced because the parties agreed on whom the VAT liability would fall and that the Plaintiff was entitled to insist that it was unequivocally absolved from any future demand. That the intention of clause 14.1 of the Sale Agreement being to insulate the Plaintiff from payment of VAT, then the Defendant was under obligation to show that it had paid the VAT or if waived then that it would neither be demanded from it or the Plaintiff.

3. The Court found that the Defendant seemed to have appreciated that the Plaintiff had a legitimate interest in getting that assurance when its Tax Consultant signed off its Appeal of 11th April 2017 as follows:

“We look forward to your revised interpretation on this transaction which we intend to share with the transferor to enable them vacate their demand of VAT on the premises that the transaction is one of a going concern pursuant to the provisions of the VAT Act 2013 and thus zero rated”.

4. The Court noted that when the positive response to the aforementioned letter was written on 4th September 2017 by KRA, it was not copied to the Plaintiff. The Court held that it could not direct KRA to give that assurance to the Plaintiff because KRA was not party to those proceedings. However, that under the terms of the contract entered between parties, the Defendant was obliged to ensure that on the question of VAT on the transaction, the Plaintiff is free from any demand (past, present or future). For this reason, the Court gave an opportunity to the Defendant to obtain a letter from KRA which sufficiently assures the Plaintiff that it shall not suffer any demand (past, present or future) for VAT or any penalty arising or associated thereto in respect to the transaction captured in the Sale Agreement of 14th July 2015.
5. The Court directed that the letter referred to above was to be obtained and furnished to the Plaintiff within 60 days of the court’s judgment failing which the Defendant was to within 14 days of the expiry of that period give the Plaintiff an unequivocal undertaking to indemnify it of any demand, penalties or interest that KRA may levy in respect to VAT on the transaction in the Agreement for Sale of 14th July 2015 and that a copy of that undertaking was to be filed in Court.
6. The Plaintiff has now approached the Court by way of an Originating Summons dated 25th October 2021 made under Orders 37(11) of the Civil Procedure Rules, 2010, and Sections 1A, 1B, 3A and 63 of the *Civil Procedure Act* claiming that after several requests from the Plaintiff, the Defendant failed to obtain the said letter from KRA, and issued the Plaintiff with a Deed of Indemnity dated 1st August 2019, which was filed in Court in ICEA Lion Life Assurance Company Limited v Jomo Kenyatta University of Agriculture and Technology (supra) on 5th August 2019.
7. The Plaintiff avers that on 1st October 2019, KRA issued a Demand to the Plaintiff for payment of VAT on the above transaction which amount stood at Kshs. 417,360,000.00 and continued to attract interest and that despite this Demand being shared with the Defendant, the Defendant has blatantly refused and/or ignored to make good their Deed of Indemnity insisting that KRA would waive the VAT. That when KRA declined to waive VAT, the Plaintiff, in an effort to stop penalties from accruing, entered into a Settlement Agreement with KRA and that as a term of the Settlement Agreement, the Plaintiff was to pay the principal VAT of Kshs. 296,000,000.00 together with PAYE of Kshs. 51,017,755.00 to be able to get a waiver on penalties and interest upon application for the same from the Commissioner.
8. The Plaintiff contends that it has since paid the amount due in the Settlement Agreement in five equal installments of Kshs. 57,836,292.00 with two further installments being made on 19th February



- 2020 for Kshs. 51,022,685.00 and Kshs. 6,813,607.00. That it has demanded payment of the Kshs. 296,000,000.00 from the Defendant pursuant to the Deed of Indemnity which the Defendant has refused to honour and that the validity of the Deed of Indemnity and/or the amount payable as VAT in the transaction is not in dispute.
9. As such, the Plaintiff prays for judgment to be entered for it against the Defendant directing the Defendant to honour the terms of the Deed of Indemnity and to forthwith pay to the Plaintiff Kshs. 296,000,000.00 being VAT paid to KRA pursuant to the terms of the Settlement Agreement and further, the Defendant do pay to the Plaintiff interest on the sum of Kshs. 296,000,000.00 from the date of the Settlement Agreement until payment in full.
 10. The Plaintiff's Originating Summons is further supported by the affidavits of the Plaintiff's CEO and Director, George Nyakundi sworn on 18th October 2021, 16th September 2022 and 7th March 2024. The application is grounded on facts set out on its face together with the supporting affidavit of the Plaintiff's Finance Director, Sanjay Ramniklal Shah, sworn on 13th July 2023.
 11. The Defendant opposes the suit through the replying affidavit sworn by its Chief Legal Officer, Richard Wokabi Kariuki sworn on 12th April 2022. It avers that the Originating Summons is incurably defective, incompetent and is an abuse of the court process and does not disclose any reasonable grounds for the orders sought by the Plaintiff as it is based on falsehood and misrepresentation of facts. It states that since it was unable to secure a letter from KRA which sufficiently assures the Plaintiff that it shall not suffer any Demand (past, present or future) for V.A.T or any penalty associated with the conveyance, it executed a Deed of Indemnity in favor of the Plaintiff in the manner ordered by the Court. That since it had already secured a Letter from KRA exempting the conveyance from VAT, and since there had been no communication from KRA revoking the said exemption, there was nothing to make the Defendant apprehensive of KRA again making any demand for payment of V.A.T for the conveyance.
 12. The Defendant asserts that to date, it has never received any communication from KRA revoking the decision made through the letter dated 4th September 2017 and there has never been any correspondence between the parties and KRA regarding the said exemption. That to the Defendant's knowledge, the decision by KRA through the said letter remains valid and any actions by the Defendant was based on legitimate expectation that they would honor the said decision. The Defendant avers that it is a total stranger to the purported Settlement Agreement, which emanated from the Tax Appeal Tribunal No. 52 of 2019, between the Plaintiff and KRA, which agreement the Defendant states was unilaterally entered into by the Plaintiff without the knowledge, approval and/or participation of the Defendant in the purported proceedings. That the Plaintiff never informed it of the proceedings which the Defendant deems malicious, to the extent that the outcome of the said proceedings was to negatively affect the Defendant. That neither KRA nor the Plaintiff notified the Defendant of the said proceedings.
 13. The Defendant states that the said action by both KRA and the Defendant were contrary to Article 48 of *the Constitution* and Sections 4 and 6 of the *Fair Administrative Action Act* as the said proceedings informed a decision that negatively affected the Defendant without their knowledge and/or opportunity to participate in the same. That further, to date, the Defendant has never been informed of the existence of the said proceedings and/or supplied with the outcome thereof to enable it to challenge the said decision by KRA and only came to know about it upon being served with these proceedings. The Defendant states that the Plaintiff maliciously and with the intent of taking an unfair advantage on Defendant without informing the Defendant, engaged KRA for the remittance of the VAT on a transaction which they knew had been exempted from payment of VAT, so that they



can demand for the performance of the terms of the Deed of Indemnity, knowing very well that the Defendant would be cornered to pay the humongous amount of Kshs. 296,000,000.00.

14. That having not been a party in TAT No. 52 of 2019, and having not been informed of the said proceedings by either KRA and/or the Plaintiff and KRA having never revoked their decision communicated through the letter dated 4th September 2017, it would be prejudicial for the Defendant if the orders sought are granted as the Plaintiff ought to have engaged the Defendant at all times during their engagement with KRA, and which they maliciously failed to do just so that they can take advantage of the Deed of Indemnity.
15. As such, it is the Defendant's contention that KRA irregularly demanded for the VAT on the conveyance from the Plaintiff when it had already declared the said conveyance zero rated for VAT. The Defendant claims that it was never informed of the decision by KRA to revoke its decision through the letter dated 4th September 2019 and the Plaintiff intentionally and maliciously failed to inform the Defendant of its negotiations with KRA only for them to later invoke the Deed of Indemnity. For these reasons, the Defendant depones that the prayers sought by the Plaintiff are untenable and are an abuse of the court process and the same should be dismissed with costs of the application awarded to the Defendant.
16. The suit is also opposed by KRA through its Statement of Facts dated 6th February 2024. It avers that it correctly charged VAT of Kshs. 296,000,000 plus interest and penalties on the conveyance and that its position is informed by the fact that the Defendant was not a registered taxpayer for VAT purposes in September 2015 which is the time the transaction took place. That it is apparent, in obtaining the private ruling dated 4th September 2017 there was misrepresentation of facts leading KRA to erroneously believe that the Defendant was registered for VAT at the time of the transaction in question. That the private ruling having been obtained as a result of misrepresentation of facts is therefore not binding to KRA. Further, that a private ruling is exclusively binding to the applicant and the Commissioner and the Plaintiff cannot therefore rely on a private ruling issued to another party.
17. KRA states that the Plaintiff has never made an application for a private ruling under Section 65 of the *Tax Procedures Act* (TPA) on the subject transaction and that the procedure for application and processing of a private ruling is prescribed from Sections 65 to 67 of the TPA. KRA thus states that its letter dated 24th June 2020 was therefore not a binding private ruling and reiterates that in issuing the said letter, it relied on the misrepresented facts presented while issuing the private ruling to the Defendant. As such, KRA contends it is not bound by a decision arrived at as a result of misrepresentation of facts.
18. Further, that the Plaintiff was aware from the onset that the transaction in question was subject to VAT as exhibited by the sale agreement between itself and the Defendant. In clause 14.1 of the said Sale Agreement the parties agreed on who was responsible to pay VAT and that at the ADR, it was correctly confirmed that the transaction was chargeable to VAT and this convinced the Plaintiff to concede and pay. That the ADR agreement signed on 30th September 2019 bound the parties and is sacrosanct and the parties freely participated and consented to the terms agreed on.
19. KRA restates that its letter to the Plaintiff dated 24th June 2020 relied on the facts that had been previously misrepresented by the Defendant since the buyer (that is the Defendant), was not registered for VAT at the time of the transaction and yet Paragraph 7 of the Second Schedule (Part A) (now deleted) was clear and prescribed zero rating on the transfer of a business as a going concern by a registered person to another registered person. KRA states that its decision was fair and consistent with the law and that VAT on the transaction at hand (sale of a commercial building) is supported



by operation of VAT law (taxation by exclusion). That factually, failure to tax the transaction would amount to a distortion that would impact on competitiveness of the property market.

20. KRA avers that the Plaintiff is in blatant abuse of the process of the Court, in seeking to enjoin it in this suit since the entire dispute was compromised by consent in TAT No. 52 of 2019 and therefore the action to enjoin it is overtaken by events. That the Plaintiff ought to have filed an appeal or an application for review and or to set aside the consent dated 21st November 2019 which was adopted and recorded as judgement of the Tribunal on 15th January 2020 instead of filing this present suit. Based on these grounds, KRA prays that the Plaintiff's suit/claim against KRA be dismissed for lack of merit and that KRA's Decision contained in its letter dated 25th March 2022 be upheld.
21. In addition to their pleadings, the parties have filed written submissions which more or less mirror the positions I have already summarized above. I will make relevant references to the submissions in my analysis and determination.

Analysis and determination

22. I have gone through the parties' pleadings and submissions. The Court is urged to determine the following issues:
 - a. Whether the sale of the property was exempt from VAT
 - b. Whether alternatively, the conveyance transaction qualified for zero rated VAT
 - c. Whether the Defendant is still liable to compensate the Plaintiff as per the terms of the Deed of Indemnity
 - d. Whether the Deed of Indemnity is enforceable
 - e. Whether the transaction constituted a transfer of business as a going concern
 - f. Whether the Plaintiff was obligated to involve the Defendant in the Settlement Agreement

Whether the sale of the property was exempt from VAT

23. As stated, the court in ICEA Lion Life Assurance Company Limited v JKUAT (supra) found that as per KRA's letter of 4th September 2017, the transaction qualified for zero rating. However, the Plaintiff and KRA stated that this position had since been rescinded by KRA through its letter of 18th November 2021 clarifying that that the transaction was not a transfer of a business as a going concern hence was subject to VAT at the standard rate (16%) and the amount paid of Kshs. 296,000,000 by the Plaintiff was not tax paid in error. Both KRA and the Plaintiff averred that this was the last communication on whether VAT was payable on the transaction. This position was not countered by the Defendant who only averred that it was not aware of any communication retracting the previous position by KRA. However, KRA's letter of 18th November 2021 is proof and confirmation that KRA's previous position had changed and that VAT was now payable. It is therefore my finding that the sale of the property was not exempt from VAT.

Whether alternatively the conveyance transaction qualified for zero rated VAT

24. Having found that through its letter of 18th November 2021, KRA retracted their previous position that the conveyance was zero rated, I reiterate that the conveyance was not qualified for zero rated VAT.



Whether the Defendant is liable to compensate the Plaintiff as per the terms of the Deed of Indemnity

25. As stated, the Defendant issued the Plaintiff with the Deed of Indemnity unequivocally undertaking to indemnify the Plaintiff of “...any demand, penalties or interest that KENYA REVENUE AUTHORITY may levy in respect of the Value Added Tax (VAT) payable arising out of the purchase and transfer of L.R. No. 209/8287, Kenyatta Avenue, Nairobi in terms of the Agreement for Sale dated 14th July 2015”.
26. There is no dispute that KRA demanded VAT and penalties from the Plaintiff in the aggregate sum of Kshs. 347,017,754.00 and that the Plaintiff has already paid KRA this sum, which was in respect of the subject conveyance of the property. This position was acknowledged by the Defendant’s advocates as evidenced by their letter dated 24th April 2020 where the Defendant sought proof of the payment so that they could reimburse the Plaintiff. As per the terms of the Deed of Indemnity above, the Defendant was to indemnify the Plaintiff in the present circumstance. I therefore find that the Defendant is still liable to compensate the Plaintiff as per the terms of the Deed of Indemnity. This answers the issue whether the Deed of Indemnity is enforceable in the affirmative as I find no vitiating factor to make it unenforceable.

Whether the transaction constituted a transfer of business as a going concern

27. I find this issue in the negative as I have already found that the latest and uncontroverted position of KRA as per its letter of 18th November 2021 is that the transaction was not a transfer of a business as a going concern hence was subject to VAT at the standard rate.

Whether the Plaintiff was obligated to involve Defendants in the Settlement Agreement

28. On this issue, I am in agreement with the Plaintiff’s submission that there was no obligation or condition in the Deed of Indemnity that the Plaintiff ought to have included the Defendant in the negotiations leading up to the Settlement Agreement. The Deed of Indemnity was unequivocal and unconditional and the Defendant was still bound to honour it whether or not the Defendant was included in the negotiations and settlement between the Plaintiff and KRA.

Disposition

29. The upshot of my findings above is that the Plaintiff’s Originating Summons dated 25th October 2021 is merited and is allowed. I make the following final orders:
- i. Judgment be and is hereby entered for the Plaintiff against the Defendant directing the Defendant to honour the terms of the Deed of Indemnity dated 1st August 2019 and filed in Court on 5th August 2019 and to forthwith pay to the Plaintiff Kshs. 296,000,000.00 being VAT paid to KRA pursuant to the terms of the Settlement Agreement dated 30th September 2019.
 - ii. An order be and is hereby issued directing the Defendant to pay to the Plaintiff interest on the sum of Kshs. 296,000,000.00 from the date of the Settlement Agreement until payment in full.
 - iii. The Defendant shall bear costs of this suit payable to the Plaintiff and the Interested Party.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI

THIS 4TH DAY OF OCTOBER 2024.

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P. MULWA

JUDGE

In the presence of:

Ms. Dave for plaintiff

Ms. Some h/b for Ms. Kitur for respondent

Mr. Wairire for KRA (interested party)

Court Assistant: Carlos

