Maxland Restaurant Limited v Commissioner of Domestic Taxes (Tax Appeal E006 of 2023) [2024] KEHC 12970 (KLR) (Commercial and Tax) (25 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12970 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

TAX APPEAL E006 OF 2023

A MABEYA, J

OCTOBER 25, 2024

BETWEEN

MAXLAND RESTAURANT LIMITED ..... APPELLANT

AND

THE COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT

JUDGMENT

1. Vide her objection decision dated 3/12/2021, the respondent dismissed the appellant's objection to tax assessment. On 20/1/2023, the Tax Appeal Tribunal ("the Tribunal") affirmed the respondent's tax assessment finding that the appellant had not discharged the burden of proof under Section 59 of the *Tax Procedure Act*. The Tribunal found that the appellant failed to supply the documents requested by the respondent yet they were essential in discharging the burden of proof.
2. Aggrieved by that judgment, the appellant lodged this appeal setting out 4 grounds of appeal that can be summarized as follows: -
    a. The Tribunal erred in denying the appellant an opportunity to be heard on the appeal and thereby breached the principles of fair hearing.
    b. The Tribunal misdirected itself in dismissing the application for stay of the judgment and seeking review.
    c. That the Tribunal erred in failing to consider the grounds of appeal.
3. The respondent filed a statement of facts in response to the appeal.
4. The appeal was canvassed by way of written submissions. The appellant's submission was that it was disenfranchised and that it was not advised of the hearing date and further directions in the

matter. That the application for review and to adduce additional documents was dismissed despite overwhelming grounds in its favor. It relied on Article 50 of the *Constitution* and the rules of natural justice on the principle that no man should be condemned unheard.

5. It was submitted that the appellant was not aware of the respondent's call for additional documents and that the email of 24/11/2021 requesting for the documents did not reach it. That the additional taxes were erroneous and were based on wrong estimates. That the assessment included VAT on LPG gas, raw and unprocessed milk and rental income which were VAT exempted during the subject period. That the impugned judgment did not address these issues as the Tribunal dismissed the appellant's case on technicalities.

6. The respondent filed rival submissions and framed the issues for determination as; whether the appeal before Court is valid, whether the Tribunal afforded the appellant an opportunity to be heard and whether the judgment and the ruling on the review application were justified.

7. On the validity of the appeal, it was submitted that the appellant did not file the requisite Notice of Appeal against the judgment. That what was on record was the Notice dated 8/2/2023 against the respondent's decision delivered on 2/12/2021. That therefore, the memorandum of appeal should collapse pursuant to the provisions of section 32 of the *Tax Appeals Tribunal Act* ("the Act") as read together with Rule 3 of the *Tax Appeals Tribunal (Appeals to the High Court) Rules 2015*.

8. That on 28/11/2022, the Tribunal properly proceeded in the appellant's absence and acted within its powers under section 20 (1) (b) of the Act. That the appellant had been granted reasonable notice but failed to file its submissions and the Tribunal had the liberty to proceed as per the provisions of the law.

9. That the appellant's argument that it was dealing in zero-rated supplies was unsubstantiated and unsupported. Its case could not be allowed by virtue of section 51(3) of the *Tax Procedures Act*. That a site visit carried out by the respondent to verify the facts of the objection proved that the appellant's claim that the goods and supplies in question were zero rated was not supported by records and evidence on the ground.

10. That the Tribunal rightly dismissed the appeal in finding that the respondent did not err in making her assessment on the basis of documents that were in her possession. That the appellant did not take any steps, after receiving the email to produce them. That there was no evidence before the Tribunal to suggest that respondent had exercised its best judgment capriciously, unfairly and or illegally. Lastly, that the judgment had complied with section 29 of the Tax Appeals Act having addressed all the issues raised in the Notice of Objection.

11. Section 56(2) of the *Tax Appeals Procedure Act* provides that: -

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

12. An appeal on points of law should demonstrate that the Tribunal erred in its interpretation and application of statute or principles of law or that the decision was not based on any evidence. Having considered the grounds of appeal and parties' submissions, the issues for determination are whether there is a valid appeal before Court, whether the appellant had discharged its burden of proof, and whether the Tribunal erred in disallowing new evidence.

13. Section 32 of the *Tax Appeals Tribunal Act* provides: -

> "(1) A party to proceedings before the Tribunal may, within thirty days after being noticed of the decision or within such further period as the High Court may allow, appeal to the

High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party."

14. On the other hand, Rules 3 & 4 of the *Tax Appeals Tribunal (Appeals to The High Court) Rules, 2015* provide: -

> 3 The appellant shall, within thirty days, after the date of service of a notice of appeal under section 32(1), file a memorandum of appeal with the Registrar and serve a copy on the respondent."

15. I have considered the record. The Notice of appeal against the judgment is on record and was filed on 8/2/2024. In this regard, the contention of invalidity of the appeal by the respondent has no basis and is rejected.

16. However, the appellant did not appeal against the decision declining its application for review as there is no Notice of Appeal on record in that regard. In this regard, any ground of appeal directed on the decision declining the review cannot therefore fall for consideration.

17. On whether the appellant was denied a hearing and shut out from the proceedings, section 30(3) of the Act provides that: -

> 3 Where only the respondent attends and if the Tribunal is satisfied that notice of hearing was - (a) duly served, it may dismiss the appeal; (b) not duly served, it shall direct a second notice to be served; or (c) not served in sufficient time or for other reasonable cause, the appellant was unable to attend, it shall postpone the hearing."

18. The record shows that, the mention notice dated 5/5/2022 was sent to maxlandhoteljja@gmail.com. That the appellant was notified of the mention date on 22/5/2022. A further email was also sent to the appellant's advising that the matter would proceed through viva voce evidence and parties were to file written statements and avail documents.

19. A further mention notice was sent to the same address, this time referring to a mention for 11/7/2022. The appellant acknowledged of this particular notice in its letter dated 16/1/2023 but stated that, the preferred mail was maxlandrestaurant2017@gmail which was the official itax mail.

20. The appellant argues that the 11/7/2023 was a holiday. However, the mention notice shows that the Tribunal was to send a virtual link. The appellant did not contend or disclose whether it received a virtual link to log into the proceedings for 11/7/2023 or not. There is no evidence of a hearing notice being sent prior to 28/9/2022 when the matter was heard ex-parte . Further proceedings were also taken in the appellant's absence.

21. The appellant was represented by Counsel and in my view, both Counsel and the litigant have a duty to ensure expeditious hearing and resolution of their cases and further duty to follow up on their cases. This is an overriding objective that cuts across. The appellant's letter dated 16/1/2023 was the only communication and form of follow up. The appellant was seeking directions on two matters which had been pending before the Tribunal. In the present case, the appellant wanted to know about its position one month after judgment.

22. In *Savings & Loan Limited v Susan Wanjiru Muritu* Nairobi (Milimani) HCCC No 397 of 2002, the court held that: -

> " Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed

for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case....."

23. In *Philomena Waithera Njoroge v Peter Munyambu Gitau* [2021] eKLR, it was held: -

> " At a time when courts are deluged by heavy caseloads, they can hardly afford to entertain litigants who prosecute matters at leisure, ignoring their duty to assist the Court in furthering the overriding objective. The imperative in Article 159 (2) (b) of the *Constitution* and the overriding objective in section 1A of the *Civil Procedure Act* is the facilitation of just, expeditious, proportionate, and affordable resolution of disputes. Parties and their advocates are obligated under Section 1A (3) of the *Civil Procedure Act* to cooperate with the Court in furthering the objective by complying with directions and orders of the Court."

24. It is apparent that the appellant had been lax in the manner it carried out its case. It is trite that equity does not aid the indolent. That notwithstanding, the Tribunal addressed the appellant's case before it vis a vis the respondent's decision

25. The Tribunal had power to receive additional documents during the trial under section 17 of the Act. However, it held that the objection could only be proved through production of the documents that had been requested by the respondent. There was no attempt to produce those documents at the appropriate stage before the Tribunal.

26. Given the foregoing, the Tribunal cannot be accused of locking out the appellant. The Tribunal observed, and it was not shown otherwise, that the appellant had not taken any steps to respond to the respondent's request at the assessment stage.

27. Notably, the appellant had these documents as part of its business records which ought to be available for inspection at the stage of either assessment or objection.

28. On whether the Tribunal considered the appellant's case, there is no standard style in judgment writing. The essential ingredients of a judgment are met where issues are framed and resolved. That the parties' respective cases are considered and addressed.

29. In the present case, the judgment of the Tribunal is elaborate on parties' respective positions and also considered the statement of facts filed. The dispute was that the respondent's assessment was based on VAT on zero rated items listed as LPG gas, unprocessed milk and income tax. The Tribunal considered the pleadings before it, the evidence tendered and the submissions before coming up with its decision. That complaint is therefore unfounded and is rejected.

30. On whether the appellant discharged it's burden of proof, section 56 of the *Tax Procedure Act* places the legal burden of proof on the tax payer as follows: -

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

31. As earlier stated, the necessary documents that were kept by the appellant were never produced. Those were documents that consisted the business records of the appellant. Section 48 (3) of the *VAT Act* provides that: -

> " Every person required under subsection (1) to keep records shall, at all reasonable times, avail the records to an authorized officer for inspection and shall give the office every facility necessary to inspect the records."

32. The appellant's premises was visited and the respondent requested for additional documents which were not provided. The appellant's business records and machinery did not confirm if indeed the appellant owned and operated a milk processing business since only cows and machines were found but the records of ownership of the milk plant was not produced. Proof of payment of alleged supplies was also not provided.

33. The value of milk sold could also not be ascertained. No receipts of the gas sales could be availed. The end result is that, Tribunal's finding was not perverse or one that was made without evidence. The appellant did not prove on a balance of probability that Maxland Restaurant Ltd operated zero- rated business and that the sales were tax exempt. That ground also fails.

34. In the premises, I find that the appeal is without merit and dismiss the same with costs to the respondent.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024.

A. MABEYA, FCI Arb

JUDGE