



**Kaluworks Limited v Commissioner of Domestic Taxes (Income Tax Appeal  
E044 of 2021) [2023] KEHC 3991 (KLR) (Commercial and Tax) (5 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 3991 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E044 OF 2021**

**A MABEYA, J**

**MAY 5, 2023**

**BETWEEN**

**KALUWORKS LIMITED ..... APPELLANT**

**AND**

**THE COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT**

*(Being an appeal from part of the Judgment of the Tax Appeals  
Tribunal dated 7/5/2021 in Tax Appeals Number 37 of 2019)*

**JUDGMENT**

1. The appellant is a limited liability company incorporated in Kenya whose core business is the manufacture of aluminium cookware and roofing sheets.
2. The respondent is a principal officer appointed under section 11(4) of the [Kenya Revenue Authority Act](#) and is responsible for the control and management of the Domestic Taxes Department and accounting for tax under the law.
3. A background of this matter is that the respondent carried out investigations into the affairs of the appellant and subsequently issued an assessment dated September 28, 2018 for Kshs 839,798,594/- constituting the following: -
  - a) Corporation tax - Kshs 199,208,464/-
  - b) Value Added Tax (VAT) - Kshs 530,846,010/-
  - c) Customs taxes - Kshs 109,744,120/-
4. The appellant objected to the assessment vide a Notice of Objection dated October 26, 2018. The respondent confirmed the assessment through an objection decision dated December 18, 2018.



5. Being aggrieved by the objection decision, the appellant preferred an appeal to the Tax Appeals Tribunal (“the Tribunal”). The Tribunal heard the appeal and determined that the appeal was partially successful. In its judgement of May 7, 2021, the Tribunal struck out the appeal against the objection decision in relation to corporation tax and VAT and upheld the appeal in relation to the demand for customs duty and import VAT.
6. The appellant was dissatisfied with that part of the judgment that dismissed its appeal against corporation and VAT taxes and has appealed to this Court against the same. The appellant set out the following grounds: -

- “ 1. That the tribunal erred in law and in fact by misinterpreting the provisions of section 52(2) of The *Tax Procedures Act* (hereinafter called “TPA”).
2. That the Tribunal erred in law and in fact in failing to appreciate and to find that the Appellant’s Notice of Objection dated 28th October 2018 had been deemed allowed pursuant to the provisions of section 51(11) of *TPA* by reason of the Respondent’s failure to make an Objection Decision within sixty (60) days from the date the Appellant lodged the said Objection Notice.
3. That the Tribunal erred in law and in fact in failing to appreciate that the same Notice of Appeal could not be “valid” and “invalid” at the same time; valid as regards customs and excise taxes and invalid as regards Corporation tax and VAT.
4. That the Tribunal erred in law in failing to appreciate that tax legislations must be construed strictly and that any ambiguity therein must be construed in favour of the taxpayer.
5. That the Tribunal erred in law and in fact in holding that the sum of Kshs 24,195,074 was not disputed by the appellant as at January 7, 2019 (when the appellant’s notice of appeal was lodged) in the absence of any evidence to that effect.
6. That the Tribunal erred in law and in fact in holding that the sum of Kshs 24,195,074 was not disputed as at January 7, 2019 by reason only of the fact that the appellant subsequently changed its mind and conceded to part only of the demanded amount which they had hitherto disputed, during the pendency of the proceedings.
7. That the Tribunal erred in law in mechanically construing the word “paid” in section 52(2) of *TPA* in terms that unreasonably confines it to physical movement of money from one person to another.
8. That the tribunal erred in law in failing to appreciate that “payment” within the meaning of section 52(2) of *TPA* can be effected by settlement of accounts, by way of set off, where the commissioner owes the tax payer an amount which exceeds the tax due.
9. That the tribunal erred in law in failing to appreciate that where the respondent owed the appellant Kshs 229,960,139.53 while the appellant conceded to owing the respondent Kshs 24,195,074, then the appellant could lawfully “pay” the respondent the said sum by merely instructing the



respondent to deduct the same from the sum of Kshs 229,960,139.53 which was owed to it.

10. That the Tribunal erred in law in failing to find that by issuing the impugned assessments, the respondent:
  - a) Acted unreasonably and in bad faith.
  - b) Exceeded the scope of their jurisdiction under The [Kenya Revenue Authority Act](#).
  - c) Abused their power and used the same for improper purpose.
  - d) Violated the appellant's right to fair administrative action.
  - e) Acted in violation of the doctrine of legitimate expectation.
  - f) Acted illegally by adopting an incorrect interpretation of section 52(2) of [TPA](#).”
7. On the foregoing, the appellant urged that the appeal be allowed, the impugned order set aside and the respondent's assessments dated September 28, 2018 and the objection decision dated December 18, 2018 be set aside.
8. The respondent filed a statement of facts dated June 30, 2021 in opposition to the appeal. It was contended that section 52(2) of the [TPA](#) is couched in mandatory terms and that the Tribunal properly interpreted it. That the respondent responded to the appellant's notice of objection dated October 26, 2018 on December 18, 2018 which was within the 60 days provided under section 51(11) of the [TPA](#).
9. It was further contended that the Tribunal was correct in holding that the appellant's appeal with regard to corporation tax and VAT was invalid as domestic taxes such as VAT and corporation tax are governed by the [Tax Procedures Act](#) while customs duty is governed by EACCMA. That therefore, it was possible for a notice of appeal to be valid as regards a particular tax head and invalid regarding another.
10. It was the respondent's position that the appellant had expressly conceded to an amount of Kshs 24,195,074/- in its statement of facts in the appeal before the Tribunal. However, the appellant failed to prove that it had either paid the said amount or entered into a consensual agreement with the respondent on the mode of payment therefor before filing the appeal contrary to the express provisions of section 52(2) of the [Tax Procedures Act](#) and as such the appeal became invalid.
11. That the fact that the appellant was claiming VAT input of Kshs 229,960,139.53 did not mean that its claim in whole or in part was actually due.
12. The court has considered the record and the submissions of the parties.
13. I believe that the grounds of appeal can be collapsed to one, to wit, whether the Tribunal erred in striking out the appellant's appeal in relation to corporation tax and VAT.
14. The operative provision is section 52(2) of the [TPA](#) which provides: -

“ A notice of appeal to the Tribunal relating to an assessment shall be valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice.”



15. In its judgment, the Tribunal found that the appellant had not complied with this provision as it had admitted to owing VAT in its statement of facts filed in the appeal before the Tribunal. That although it had made such an admission, the appellant had not paid the conceded taxes before filing the appeal.
16. The appellant's contention was that it disputed all taxes demanded by the appellant in its notice of appeal filed on January 17, 2021 before the Tribunal. That in the premises, section 52(2) of the *TPA* was inapplicable.
17. The record shows that appellant filed a notice of appeal before the Tribunal on January 17, 2019. Subsequently, it filed its memorandum of appeal and statement of facts on January 29, 2019. The statement of facts is found on pages 50-72 of the appellant's record of appeal.
18. Paragraph 20.8 therein reads:  
'Based on the above reconciliation the appellant concedes to pay VAT totalling Ksh 24,195,074...'
19. In my view, by that statement, the appellant unequivocally conceded to that VAT amounting to Ksh 24,195,074/- was payable. The wording of section 52(2) *TPA* is clear that the undisputed taxes must be paid prior to filing the notice of appeal.
20. In this case, the appellant conceded to pay a certain amount of VAT after it had filed its notice of appeal and argued therefore that section 52(2) of the *TPA* does not apply. It relied on the case of *Rana Auto Selection Ltd & 2 Others v Kenya Revenue Authority & Another* [2021] Eklr for the proposition that taxes that are in dispute under section 52(2) of the TPA are not taxes that are due.
21. In my view, the import and intention of section 52(2) of *TPA* is to ensure that a taxpayer pays what is undisputed before he can challenge the assessments made by the Commissioner in the appeal process. Although the appellant did not concede to pay Kshs 24,195,074/- of VAT before the filing of its notice of appeal, it made the admission 12 days later when it filed its statement of facts.
22. The fact that there was that admission, the appellant was bound to pay the said taxes before taking any step whatsoever in the appeal. It was in the knowledge of the appellant before lodging the notice that the said taxes were due and not disputed. The submission that the Notice of Appeal had disputed all the taxes does not help. It goes to show that the appellant was double speaking, asserting a denial while well knowing the contrary was the truth.
23. I further agree with the Tribunal's finding that the statement of facts recorded events that occurred prior to the filing of the appeal. Therefore, the concession of VAT payable happened before the appeal was filed and as such should have been paid before lodging the notice of appeal.
24. The other complaints that the Tribunal failed to consider that the conduct of the respondent was irregular and unlawful do not have a basis. In any event, the appellant did not submit on them.
25. On the basis of the foregoing, I find that the appellant did not comply with the provisions of section 52(2) of the *TPA* and as such did not lodge a valid appeal before the Tribunal. On this ground alone, the appeal lacks merit and is dismissed with costs to the respondent.
26. It is so decreed.

**DATED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF MAY, 2023.**

**A. MABEYA, FCIArb**

**JUDGE**

