



REPUBLIC OF KENYA



Eastleigh Mall Limited v Commissioner of Investigations & Enforcement (Income Tax Appeal E068 of 2020) [2023] KEHC 20000 (KLR) (Commercial and Tax) (17 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20000 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E068 OF 2020**

A MABEYA, J

JULY 17, 2023

BETWEEN

EASTLEIGH MALL LIMITED APPELLANT

AND

COMMISSIONER OF INVESTIGATIONS & ENFORCEMENT ... RESPONDENT

JUDGMENT

1. The respondent investigated the affairs of the appellant for the years 2008 to 2015 for rent income for corporation tax, VAT on commercial rent and PAYE on the employees' salary. By a letter dated June 16, 2015, the respondent raised an assessment of Kshs 386,701,864/-. The appellant opposed the assessment and the issue for VAT was agreed upon by the parties.
2. On April 28, 2017, the respondent issued an objection decision confirming the assessment of withholding tax at Kshs 140,965/-, PAYE of Kshs 2,712,094/- and Corporation tax of Kshs 22,211,047/-. Aggrieved by the assessment on Corporation tax, the appellant lodged an appeal at the Tax Appeals Tribunal ("the Tribunal"). By its judgment made on July 9, 2020, the Tribunal dismissed the said appeal and upheld the respondent's assessment.
3. Dissatisfied with that decision, the appellant has lodged this appeal vide a Memorandum of Appeal dated July 20, 2022 raising 6 grounds which can be summarized into two as follows: -
 - a. That the Tribunal erred in law and in fact in failing to consider the issues of evidence raised by the appellant and employing the wrong analysis in coming up with its determination.
 - b. That the Tribunal erred in fact and in law in failing to appreciate the timelines set out in the *Tax Procedures Act*, 2015.



4. The respondent filed its statement of facts dated January 17, 2023 in opposition to the appeal. He contended that the assessment of the Corporation Tax was with respect to the actual turnover of the appellant upon comparison between the self-assessed financial statements and the management accounts documents retrieved from the appellant's premises, cost acquisition on the amortization of the building cost of Kshs 95,986,450/- for the prepaid lease rentals and the goodwill that was disallowed of Kshs 9,000,000/- over a period of 13.5 years.
5. That the appellant sought to amend the financial statement for the year of income 2008 to change the value of the building from Kshs 95,986,450/- to Kshs 200,000,000/-. That the said value was contained in the valuation report dated May 16, 2017 made after the assessment was confirmed on 28/4/2017.
6. The respondent further contended that the appellant sought to inflate the cost of the building in order to reduce the tax liability. That goodwill was a capital item and its diminution was not allowable under section 16 of the *Income Tax Act*. That with respect to section 54 of the *Income Tax Act*, all expenditure ought to be supported by documentary evidence. That not all expenditure under section 16 of the *income Tax Act* was allowed to be deducted.
7. The appeal was canvassed by written submissions which I have considered. The appellant submitted that the Tribunal erred in dismissing its preliminary objection with respect to the time within which to lodge an objection decision. That the respondent's failure to render an objection decision within 60 days mean that the objection had been allowed. That the Tribunal erred in holding that the provisions of section 51(11) of the *Tax Procedures Act* was a technicality that could be bypassed through discretion as the discussions between the parties had the effect of extending time.
8. With respect to capital deductions, it was submitted that the cost of Eastleigh Mall in the sum of Kshs 95,986,450/- as lease for 13.5 years was understated and was not a reflection of the actual cost of construction of the mall. That the financial statements did not reflect a true position of the cost incurred and therefore a determination of the value of the building was based on that would stop the appellant from enjoying a deduction allowable under section 15(1) of the *Act*. That Tribunal erred in holding that the appellant was precluded from relying on the valuation report on the basis of section 54A of the *Income Tax Act*. That the amount of diminution of a prepaid lease should be based on the value of the property as per the valuation report.
9. On his part, the respondent admitted that the objection decision was made outside the 60 days provided for by section 51(11) but the Court should look beyond the technicalities. That the appellant's financial statements for the year of income 2008 revealed an amortization of building costs of Kshs 95,986,450/- as prepaid Lease rentals for the 13.5year period. That the appellant's attempt to reply on the valuation report dated May 16, 2017 and amend the value of the building to Kshs 200,000,000/- as opposed to Kshs 95,986,450/- which was contained in the statements was a ploy to defeat justice and evade tax.
10. In conclusion, it was submitted that the appellant had an option under section 90 of the *Income Tax Act*, before its repeal, to correct the cost of construction but did not do so since it had to give the correct figures to support the application.
11. I have considered the record of appeal, the statement of facts and the submissions by the parties. The appeal raises two grounds; whether the objection decision having been issued outside the statutory timelines was fatal and whether in the tribunal erred in upholding the respondent's assessment on Corporation tax.
12. On the first ground, it is not disputed that the objection decision was issued after the lapse of 60 days. The respondent urged the court to look beyond technicalities and be guided by Article 159 of *the*



- Constitution which mandates the court to do substantial justice. On its part, the appellant submitted that failure to issue the objection decision in time meant that its objection had been upheld and that the objection decision was time barred.
13. Section 51 (11) of the Tax Procedures Act provides: -
- “The Commissioner shall make the objection decision within sixty days from the date of –
- a. The notice of objection; or
 - b. Any further information the Commissioner may require from the tax payer,
- Failure to which the objection shall be deemed to be allowed.”
14. On validity of the objection decision, the Tribunal observed that the reason for the late objection was due to the fact that the parties were engaged in discussions and it was guided by Article 159 of the Constitution to do substantive justice.
15. In Equity Group Holdings Limited v Commissioner of Domestic Taxes (Civil Appeal E069 & E025 of 2020) [2021], the court observed that: -
- “Section 51 (11) of the TPA is couched in peremptory terms. Having correctly found that the decision was made after the expiry of 60 days, the TAT had no legal basis to proceed as it did and to invoke article 159(2) (d). First, there was no decision at all. The decision had ceased to exist by operation of the law. Second, the provisions of section 51 (11) (b) had kicked in. The Objection had by dint of the said provision been deemed as allowed. Third, the TAT had no discretion to either extend time or to entertain the matter further. Fourth, discretion follows the law and a tribunal cannot purport to exercise discretion in clear breach of the law.
- The TAT premised its decision on the provisions of Article 159 (2) (d) of the Constitution which requires courts to determine matters without undue regard to technicalities of procedure. On the face of a clear statutory dictate, I do not see how the TAT could term the express statutory edict as a matter of procedural technicality. This was a gross misapprehension of the law. Article 159 (2) (d) of the Constitution was not meant to oust express statutory provisions and to open a window for disregard of statutory requirements.”
16. Similarly, in Republic v Commissioner Of Customs Services Ex-Parte Unilever Kenya Limited [2012] eKLR, the court held that if the Commissioner does not render a decision within the stipulated period, the objection is deemed as allowed by operation of the law.
17. The same position was reiterated in Vivo Energy Kenya Limited v Commissioner of Customs & Border Control, Kenya Revenue Authority & another [2020] wherein it was held that: -
- “The provisions of the TPA are clear that where the Commissioner fails to make a decision on an objection within sixty days, the objection shall be allowed. This means that the objection dated 8th November, 2016 in which the Applicant sought for the revision of the Commissioner’s decision to demand the excise duty amounting to Kshs 127,183,364/= was allowed by operation of the law by dint of Section 51(11) of the TPA. Therefore, the 1st Respondent should not have continued to demand the payment of the excise duty through the letters dated 23rd, November, 2016, 3rd, February, 2017, 3rd, October 2019, 24th October 2019, and 7th, November 2019. All those demands amounted to nothing in law.”



18. It is clear from the forgoing that the provisions of section 51(11) of the *Tax Procedures Act* are mandatory. They are not cosmetic. Parliament in its wisdom knew that in matters tax, time is very crucial as those in commerce need to make informed decisions. If the Commissioner is allowed to exercise his discretion and stay ad-indefinitum before issuing an objection decision, the tax payer would be unable to make crucial decisions and plan his/her business properly. The timelines set are mandatory and not a procedural technicality.
19. In *Raila Odinga v Independent Electoral and Boundaries Commission & Others* [2013] eKLR, the Supreme Court of Kenya expressed itself as follows: -
- “Our attention has repeatedly been drawn to the provisions of Article 159(2)(d) of *the Constitution* which obliges a court of law to administer justice without undue regard to procedural technicalities. The operative words are the ones we have rendered in bold. The Article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law. In the instant matter before us, we do not think that our insistence that parties adhere to the constitutionally decreed timelines amounts to paying undue regard to procedural technicalities. As a matter of fact, if the timelines amount to a procedural technicality; it is a constitutionally mandated technicality.”
20. In view of the foregoing, the Court finds that the Tribunal erred in dismissing the objection raised by the appellant. The respondent’s failure to issue the objection decision within 60 days meant that the appellants objection had been allowed. In this regard, the Tribunal’s decision cannot stand. The Court need not therefore consider the second ground regarding the assessment of Corporation Tax.
21. Accordingly, I find merit in the appeal and the same is allowed with costs. The decision of the Tribunal is hereby set aside in its entirety as well as the respondent’s objection decision dated April 28, 2017.

It is so decreed.

DATED and **DELIVERED** at Nairobi this 17th day of July, 2023.

A. MABEYA, FCI Arb

JUDGE

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