Rumish Limited v Commissioner of Domestic Taxes (Income Tax Appeal E158 of 2021) [2023] KEHC 20136 (KLR) (Commercial and Tax) (10 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20136 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E158 OF 2021

A MABEYA, J

JULY 10, 2023

BETWEEN

RUMISH LIMITED ..... APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT

(An Appeal from the judgment and decree of the Tax Appeals Tribunal in TAT No. 353 of 2028 made on 23/7/2021)

JUDGMENT

1. The appellant is a limited liability company in the hardware business. The respondent is a principal officer appointed under the *KRA Act* and is responsible for the control, collection and accounting for tax.

2. The respondent carried out a tax investigation on the appellant and issued an assessment on July 23, 2018 for VAT for Kshs 463,001.53. The appellant objected vide letter dated August 13, 2018. The respondent then requested for additional documents vide its letter dated September 22, 2018 and subsequently issued its objection decision on October 12, 2018 confirming the VAT assessment.

3. The parties unsuccessfully attempted ADR and the appellant filed an appeal before the Tax Appeals Tribunal ("the Tribunal") on November 9, 2018. The tribunal delivered its judgment on July 23, 2021 in favor of the respondent and it upheld the assessment of October 12, 2018.

4. Being dissatisfied with that judgment, the appellant filed the instant appeal vide a memorandum of appeal dated September 27, 2021 citing 12 grounds which can be summarized as follows: -

    a. That the Tribunal erred by failing to give due regard to the pleadings and evidence before it and failing to give due regard to the provisions of sections 50 and 59 of the *Tax Procedures Act* ("TPA") as relates request and production of information and communication of the respondent's decision thereon.

    b. That the Tribunal erred in failing to recognize that issuance of VAT assessment was an enforcement mechanism and could only issue after VAT due had been determined with finality. That it failed to recognize that the respondent's objection decision of October 12, 2018 was subject to amendments and was not final.

    c. That the Tribunal erred in failing to recognize that notwithstanding the assessment of July 23, 2018 and decision of October 12, 2018, the appellant's objection under section 51 of the *TPA* crystalized as the resolution between the parties at ADR and the execution of the tribunal ought to be halted pending the reassessment of the appellant's tax obligation.

    d. That the Tribunal erred in failing to appreciate that the VAT due had not been determined as the parties were still engaged in conciliation vide ADR and it was only after reconciliation that the respondent could issue a tax assessment/ decision and wait for the period of objection to lapse before enforcement mechanisms could issue. That the respondent's enforcement of its initial assessment prior to issuing a decision on the basis of the appellant's evidence for reassessment was unfair and contrary to article 47(1) of the *Constitution*.

    e. That the Tribunal erred in faulting the appellant for not availing the necessary documentation to support its objection despite that all documents were supplied.

5. On the foregoing, the appellant urged that its appeal be upheld and the Tribunal's judgment be set aside.

6. The respondent filed its statement of facts dated November 2, 2021. He contended that the respondent realized that the appellant had a mismatch in its sales and purchases declared. That the appellant had lumped sales and failed to recognize registered VAT claims. That the appellant had also combined purchase numbers with credit notes thus casting doubt on some of its claims and had failed to declare some sales. That for those reasons, the respondent issued the additional assessment of July 23, 2018.

7. That the appellant failed to respond to the demand letter of July 23, 2018 and failed to submit supporting documents for both Income Tax and VAT to proof that all sales were declared and to support the purchases claimed. That the appellant only sent purchase analysis without supporting documents thus assessments could not be amended. That the appellant objected to the respondent's assessment on August 13, 2018 and the respondent requested for additional documents on September 22, 2016.

8. That due to lack of pivotal supporting documents, the respondent confirmed its assessment via the objection decision dated October 12, 2018.

9. In response to the grounds of appeal, the respondent submitted that the Tribunal properly found that it could not admit documents filed in the appellant's submissions without leave to the detriment of the respondent. That the Tribunal properly considered section 59 of the *TPA* and made a finding on the appellant's failure to avail the requested records.

10. That the method used by the responded in raising the assessment was legal by virtue of sections 29 and 73 of the *TPA* and the same was upheld by the Tribunal. That all the issues in the appellant's objections were considered and the appellant failed to produce sufficient records to support any of the claims contended in its appeal despite being accorded sufficient time. That the appellant had not discharged its burden of proof under section 56(1) of the *TPA*.

11. The appellant then proceeded to file a supplementary affidavit dated February 25, 2022 in response which then triggered the respondent to file an application dated August 23, 2022 seeking to strike out that affidavit.

12. From the onset, this Court notes that the affidavit was filed without leave and the same is not properly before Court and is hereby struck out and all contents and evidence therein is disregarded. There is no provision that allows the filing of an affidavit to produce additional evidence as sought by the appellant. The procedure known in law is for a party to properly seek leave to produce additional evidence on appeal.

13. The parties were directed to canvass both the appeal and the application together by way of written submissions. The appellant's submissions were dated February 25, 2022. The Court has considered the submissions and the entire record. The appeal is mainly centred around the application of section 51 and 59 of the *TPA*.

14. As a first appellate court, this court has a duty to examine matters of both law and fact and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing own independent conclusions. See *Peter M Kariuki v Attorney General* [2014] eKLR, wherein it was held that: -

> " We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See Ngui V Republic, (1984) KLR 729 and Susan Munyi V Keshar Shiani, Civil Appeal No 38 of 2002 (unreported)."

15. In *Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others* [2013] eKLR, the Court of Appeal held: -

> " What are the points of law raised in this appeal? An appellate court will not ordinarily differ with the findings on a question of fact, by the trial Judge who had the advantage of hearing and seeing the witnesses. Our role is to review the evidence and determine whether the conclusions reached are in accordance with the evidence and the law."

16. The grounds of the appeal are inter-related and will therefore be determined together.

17. The appellant's main contention was the application of section 51 and 59 of the *TPA*. The main issue thus is whether the respondent erred in its assessment of tax on the appellant.

18. The appellant submitted that by virtue of section 29 of the *TPA*, the respondent may make a default assessment if the tax payer fails to submit a tax return for a specific period. That the respondent was required to base such decision on the information available and to the best of his judgment.

19. The appellant submitted that it had given reasonable explanations and evidence thus discharged its burden of proof. That however, the respondent made his decision without considering that evidence or the appellant's explanation for the self-assessment for the year ending December 31, 2016. That the explanation was consistent with the appellant's record, bank statements, ledger accounts, statement of accounts and invoices.

20. That the Tribunal's decision to refuse to admit the appellant's documents filed in its submissions was misinformed as the respondent was presented with those documents on September 25, 2019 and they ought to have been considered in the Tribunal's decision. That the documents were thus properly on record but the Tribunal failed to consider them and relied on a technicality of irregular filing to refuse their admission.

21. It was thus submitted that the Tribunal contravened article 47 of the *Constitution* which guarantees a right to fair administrative action and its judgment ought to be set aside.

22. In its judgment, the Tribunal found that the appellant had failed to provide the required documents to support its objection and ignored all communication from the respondent. It thus upheld the respondent's assessment.

23. In *Commissioner of Domestic Services V Galaxy Tools Limited* (2021) Eklr, it was held that: -

> " This country operates under a self-assessment tax regime. Under this regime, the tax payer assesses self and declares what he considers to be taxable income on which he then pays tax to the authorities. For this reason, the tax laws are coached in a manner that gives the tax authorities wide powers and discretion in ascertaining ex-post facto, what taxable income is.
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> Further, the tax Laws reverse the well-known principle of evidence of "he who alleges must proof". In this regard, the tax authorities would assess what it considers to be the tax due from a taxpayer and the tax laws would burden the tax payer to disprove that the assessment or tax demanded is wrong or incorrect.
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> This is borne by the fact that the assessment and demand is ordinarily made way after the tax payer has assessed himself and made a declaration of what according to him is the tax payable and has already paid such tax. The burden is therefore shifted to the tax payer because, the tax authority has to rummage through the documents of the tax payer years after the tax payer assessed himself and paid what he considered to be his tax liability."

24. In the above case, the court was considering this country's tax system of self-assessment. Amongst the laws that the court was referring to included section 30 of the *Tax Appeals Tribunal Act* and section 56 of the *Tax Procedures Act*. These provisions impose the burden of proof on the tax payer to prove that an assessment is excessive or a tax decision is incorrect. Section 59 of the *Tax Procedures Act* and section 43 of the *VAT Act, 2013* refer to the keeping and production of documents when required by the tax authorities.

25. These provisions are not to be read in isolation of other provisions of the law. They are to be considered together as held in *Okiya Omtatah Okoiti v Attorney General & Another* [2020] Eklr, wherein the court stated thus: -

> " Once again I observe that a section or sections of a law should not be read in isolation of the other provisions of that law. The impugned provisions are only meant to enforce the tax laws after a tax payer fails to self-assess for tax purposes or once it is evident that a tax payer is dishonest. The Act as a whole has safeguards that ensures that the taxpayers receive

fair administrative action from the tax collector whenever the need arises to put a particular taxpayer through the administrative process".

26. This Court has considered the record before it. Upon filing its objection decision, the appellant was requested to supply additional information to support that objection. The appellant only supplied the sales analysis and copies of some receipts.

27. The appellant however attempted to file further supporting documents through its submissions dated September 16, 2019 before the Tribunal without leave. In this appeal, the appellant argued that the Tribunal ought to have admitted those documents as they had already been sent to the respondent at an earlier date.

28. To begin with, there was no evidence to support that the documents had been sent to the respondent as alleged. Secondly, if at all the appellant intended to rely on those documents in its appeal before the Tribunal, it ought to have filed them along with the appeal and give the respondent an opportunity to respond to them. Adducing those documents through submissions was un-procedural and the Tribunal correctly declined to admit them.

29. The Court notes that the appellant attempted to do likewise in this appeal by filing more documents by way of a supplementary affidavit. This Court has already made a finding that that was un-procedural and the same disregarded.

30. In view of the foregoing, can it be said that the appellant discharged its burden of proof? Section 17 of the *VAT Act* provides for credit for input tax. Sub-section (3) thereof provides for the documentation that is required for purposes of the credit on input tax. It provides: -

> "(3) The documentation for the purposes of subsection (2) shall be-
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> a. an original tax invoice issued for the supply or a certified copy;
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> b. ...
>
> c. ...
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> d. a credit note in the case of input tax deducted under section 16(2); or
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> e. a credit note in the case of input tax deducted under section 16(5)".

31. The above documents were not produced by the appellant. The appellant's explanations for its returns of 2019 was therefore not supported by evidence.

32. Section 59 of the *TPA* and Section 43 of the *VAT Act* give power to the respondent to request for more and additional information to satisfy himself on the taxable income declared or matters tax. The respondent invoked those powers on September 26, 2018 and requested the appellant to supply various documents including; Income Tax returns for the period 2016 and accounts, creditors ledger for all the appellant's suppliers for 2015-2016 and contacts, monthly or annually supplier's statements, bank statements, payment receipts for the suppliers and copy of the offer letter for all the loans. The appellant failed to comply with the said request whereby the respondent proceeded to uphold his assessment based on the information in his possession.

33. In this regard, the Tribunal correctly found that the appellant ought to have at the very least provided the documentation in section 17(3) of the *VAT Act*.

34. In view of the foregoing, this court finds that the tribunal correctly found that the respondent did not err in his assessment of tax on the appellant. There is no justification in interfering with that assessment. The tribunal's judgment is hereby upheld and the appeal dismissed with costs.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JULY, 2023.

A. MABEYA, FCIArb

JUDGE