



**Commissioner of Domestic Taxes v Busia Bottlers Limited (Income Tax Appeal E045 of 2021)  
[2023] KEHC 22545 (KLR) (Commercial and Tax) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22545 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E045 OF 2021  
FG MUGAMBI, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT**

**AND**

**BUSIA BOTTLERS LIMITED ..... RESPONDENT**

**JUDGMENT**

**Brief Facts**

1. The appellant in a letter dated April 4, 2017 issued an additional assessment on the tax affairs of the respondent amounting to Kshs 117,153,182/=. In return, the respondent filed an objection notice through a letter dated June 15, 2017 and submitted documentation for review by the appellant. Upon review of the documentation, the appellant issued an objection decision on July 11, 2017 reducing the assessment to Kshs 20,833,931/=.
2. Dissatisfied with the decision, the respondent filed an appeal at the Tax Appeal Tribunal (the Tribunal). In the meantime, parties began negotiating with a view to settling the matter out of court.
3. Against this background, the Tribunal based its judgment largely on whether the appellant was wrong in failing to record a consent with the respondent despite having reached an out of court settlement. The consent was confirmed by both parties during the Tribunal proceedings. The parties stated that the same was not recorded because the appellant was awaiting the approval of the Ethics and Anti-Corruption Commission (EACC), who had forwarded the matter to the appellant for investigation.
4. The Tribunal delivered its judgment on April 1, 2021 and ordered the parties to execute and file before the Tribunal the consent arrived at in the ADR or alternatively present the draft consent failure of which the appeal would be deemed as settled. None of this was done.



5. Aggrieved by the said judgment, the appellant filed this appeal vide a Memorandum of Appeal dated May 13, 2021 raising nine (9) grounds of appeal. It sought the following prayers:
  - i. This appeal be allowed, the decision of the tax appeals tribunal be set aside and the objection decision dated June 11, 2017 and tax assessment of Kshs 20,833,931 in lieu of corporation tax, VAT and PAYE for the period of 2011 up to 2015 be upheld.
  - ii. Any other alternative relief the Honourable court may deem fit to grant
  - iii. The respondent be ordered to pay costs of this appeal.
6. The appellant filed written submissions dated November 17, 2021 in which it condensed the issues for determination into the following three (3) issues:
  - i. Whether the Tribunal erred in law and in fact, in failing to consider that it is trite law that the burden of proof relating to an excessive tax assessment lies on the person assessed in this case the Busia Bottlers Limited leading it to shift the burden of proof relating to an excessive tax assessment to the appellant contrary to law.
  - ii. Whether the Tribunal erred in law and in fact in failing to appreciate section 52(2) of the *Tax Procedures Act*, that 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.
  - iii. Whether the Tribunal's decision to take into consideration issues of an agreement and/or consent not before it to reach its decisions are anchored in law.
7. In response to the first issue the appellant submitted that the respondent did not avail all documentation for the purchases and that is why the appellant was unable to revise the assessment to nil. It was submitted that the Tribunal erred in shifting the burden of proof to the appellant when it held that the appellant was at fault for not recording the consent. According to the appellant, the Tribunal further erred in failing to discharge its mandate or ask for additional evidence by way of the alleged consent to guide in its finding, thus making its decision flawed.
8. In response to the second issue, the appellant submitted that the appeal was incompetent since the respondent's tax agent had agreed with the findings of the appellant's officers. The appellant further submitted that the Tribunal had delved into the issue of the consent agreement which was not the subject of the dispute. Counsel submitted that the consent had not been placed before the Tribunal to warrant it forming the whole judgment. Counsel further submitted that there was no real contract therefore nothing was binding upon the parties.
9. In opposition to the appeal the respondent filed its statement of facts dated October 27, 2021, further statement of facts dated February 24, 2023 and written submissions dated December 15, 2021. The respondent stated that the parties had engaged in ADR with an aim of expeditiously resolving the dispute. Counsel submitted that the issues raised by the appellant relating to the documentation that the appellant has requested from the respondent was part of the issues dealt with in the ADR.
10. The respondent also confirmed that all the outstanding issues were considered and parties reached a consent. The only reason that the consent was never filed was because the appellant was awaiting instructions and approval from the EACC.



11. In any event, the respondent faulted the appellant for having used a margin of 5% in its computation of taxes as opposed to 2% as the respondent's primary business was only distributorship. The respondent further faulted the appellant for erroneously allowing few adjustments of Kshs 36,044,354 for the years 2011 to 2015.

## Analysis

12. I have carefully considered the pleadings, submissions and evidence presented by the parties in support of their rival positions. The substantive grounds of appeal raised by the appellant are dependent on the question of whether the Tribunal erred in placing reliance on the consent agreement in determination of the appeal. This is because a valid consent would determine the issues in dispute without the need to get into the substance of the appeal.
13. Under section 12 of the [Tax Appeals Tribunal Act](#) (TATA), the jurisdiction of the Tribunal is to hear and determine appeals from the decision of the Commissioner on any matter arising under the provisions of any tax law. Under section 28 of the [TATA](#), parties are required to report to the Tribunal the outcome of settlement of the matter outside the Tribunal. The place of ADR in tax dispute resolution is further bolstered under section 55 of the [Tax Procedures Act](#) (TPA), which permits parties to settle a dispute out of Court or the Tribunal.
14. I agree with the observation made by the Court (Majanja, J) in [Commissioner of Investigations & Enforcement V Estama Investments Limited](#), [2020] eKLR that while these provisions do not prescribe the kind of orders that the Tribunal may make upon receiving confirmation of a consent or settlement, it is not inconsistent with those provisions for the Tribunal to accept any settlement or compromise of the appeal on terms agreed by the parties. This would be in accordance with article 159 of the [Constitution](#) which enjoins Tribunals to promote ADR.
15. I have re-evaluated the record before me and I note that the fact that the parties engaged in ADR is uncontroverted. Further, the fact that there was an agreement reached between the parties to compromise the dispute is also not controverted. The appellant's witness testified that the Commissioner was willing and ready to sign the consent agreed upon by the parties, subject to the approval of the EACC. Parties did not avail a copy of the consent before the Tribunal although both confirmed that it was awaiting approval of the EACC. Would this make the consent invalid or not binding on the parties? Better still, what was the effect of such a settlement between the parties?
16. The Court in the *Estama Investments* case (*supra*), considered the place of ADR agreements in tax disputes and emphasized that:

“The ADR agreement between the parties was valid and binding and the only option available for the Tribunal was to resolve the appeal in terms of the agreement. I do not see how the respondent would suffer prejudice.”
17. It is my understanding of the law that once a suit has been settled by way of a compromise between the parties, the decree is passed on the basis of the new contract between the parties, which supersedes the original cause of action. In my view, the fact that the Court was not provided with the signed consent does not negate the fact that parties engaged and made commitments to each other on the terms upon which the liability of the respondent would be settled. They both confirmed this position. It would of course have been a different matter altogether if either of the parties stated that there was no such consent. This settled all the issues raised before the Tribunal and compromised the appeal.



18. The appellant has shown no basis either on the grounds of fraud, misrepresentation or undue influence which would allow this Court to set aside a consent which was negotiated by parties and binds them. (As held in *Wasike V Wamboko* [1988] KLR 429). Likewise, the Court of Appeal in *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited & Another*, NRB CA Civil Appeal No 95 of 1999, [2001] eKLR observed that: “the parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”
19. The reason given by the appellant for not signing the consent is unimpressive. The Tribunal observed, and correctly so, that despite the matter being a multi-agency operation, the EACC had no other mandate in the matter and its presence would only be seen as influencing the outcome of the case. This is an unfortunate state of affairs as the *Constitution* establishes Institutions that are expected to act independently although interdependently. In this aspect, I agree with the Tribunal’s finding that the EACC should have downed its tools after the case was handed over to the Commissioner and had no role to play in the consent.
20. Addressing itself to an almost similar instance, the Court in the *Estama Investments Limited* case (*supra*) observed that:

“Since the parties entered into an agreement settling its tax liability, it cannot be argued that its liability was in doubt or in dispute. The ADR Agreement, in my view, confirms this fact. It was therefore unnecessary for the Commissioner to consult with any other Commission, independent office or authority to determine this liability. (emphasis mine).
21. The question therefore before the Court is whether the Tribunal should have decided the appeal on merit despite the existence of the consent agreement. As I stated earlier, the consent between the parties herein had the effect of determining the rights and liabilities between them. This was stated in submissions by the respondent, a fact that has not been controverted by the appellant. The only option was for the Tribunal to accept any settlement or compromise of the appeal on terms agreed by the parties. The appellant ought to be estopped from taking advantage of the respondent who in good faith approached the negotiation table.
22. Once the Tribunal established that the parties were at consensus ad idem, there was no need to deliberate on the merits of the dispute before it. I disagree with the submission by the appellant that the consent was an irrelevant factor of the proceedings. In fact, I note that even the authorities presented before this Court by the appellant support the fact that the Court is inclined to give weight to agreements between the parties, whether these are reduced to writing or by conduct of the parties.
23. As I have said, the only impediment to settling the dispute, and which may unfortunately be the reason as to why the consent alluded to was not signed and filed, was the involvement of the EACC. I would find no other rational explanation for this. In this regard, I find no error on the part of the Tribunal. The parties were given timelines within which to execute and file the consent before the tribunal. None of the parties adhered to that and the appeal was deemed as settled.
24. It is improper for the appellant to thereafter approach this Court seeking to submit on the merit and issues which the Tribunal did not deal with because of the consent agreement.

### **Determination**

25. In the upshot, I find no merit in the appeal and the same is dismissed. The judgment of the Tribunal dated April 1, 2021 is hereby upheld.



26. To that extent, the parties shall execute the consent between themselves and without any reference to the Ethics and Anti-Corruption Commission, and the consent shall be the basis upon which the respondent shall meet its tax liability. There shall be no orders to costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2023.**

**F. MUGAMBI**

**JUDGE**

**Delivered in presence of:**

Court Assistant: Ms. Carolyne Kyalo

