



**Sirikwa Eldoret Hotel Limited v Commissioner of Domestic Taxes (Tax Appeal E115 of 2021)  
[2024] KEHC 12771 (KLR) (Commercial and Tax) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12771 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
TAX APPEAL E115 OF 2021  
WA OKWANY, J  
OCTOBER 17, 2024**

**BETWEEN**

**SIRIKWA ELDORET HOTEL LIMITED ..... APPELLANT**

**AND**

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

*(Being an appeal against the judgment of the Tax Appeals Tribunal made  
on the 25th day of June 2021 in Nairobi Tax Appeal No. 408 of 2019)*

**JUDGMENT**

1. The Appellant herein, Sirikwa Eldoret Hotel Limited, is a limited liability company and a registered taxpayer under KRA pin no. P051xxxxxxJ. The Appellant was previously known as Hotel Sirikwa under KRA PIN no. P051xxxxxxV.
2. The Respondent is the Commissioner of Domestic Taxes appointed under and in accordance with Section 13 of the [Kenya Revenue Authority Act](#), and is charged with the responsibility of assessing, collecting, accounting and the general administration of tax revenue on behalf of the Government of Kenya.
3. The Respondent conducted an audit of Hotel Sirikwa's books of accounts and on 17<sup>th</sup> June 2010 issued it with a tax assessment of KShs. 54,845,733 including penalties and interest.
4. In a letter dated 8th July 2010, the Appellant accepted liability for the assessed principal tax of Kshs. 18,304.263.00 and proposed a payment plan which was however rejected by the Respondent who proposed a different payment plan.



5. The Appellant did not pay the taxes thereby precipitating the Respondent's commencement of enforcement measures. The Appellant challenged the Respondent's action through an application made in *Republic v Commissioner' General, Kenya Revenue Authority & 2 others* [2012] eKLR.
6. The Appellant's aforesaid application was heard and determined on 3<sup>rd</sup> July 2012 after which the Respondent moved to recover the outstanding taxes of Kshs. 18,304,263.00 by levying of distress over the Appellant's movable properties.
7. Aggrieved by the Respondent's enforcement action, the Appellant once again moved to the High Court in *Republic vs. Kenya Revenue Authority & 2 others Ex Parte Sirikwa Eldoret Hotel Limited* [2019] eKLR.
8. The aforesaid case was heard and determined vide a ruling delivered on 25<sup>th</sup> June 2019 wherein the Appellant's application was dismissed with cost to the Respondents.
9. The Appellant filed an appeal at the Court of Appeal (Eldoret Civil Appeal No. 38 of 2020) challenging the decision and at the same time filed an appeal before the Tax Appeals Tribunal. (TAT no. 408 of 2019).
10. On 25<sup>th</sup> of June 2021, the Tax Appeals Tribunal rendered a verdict in favour of the Respondent herein.
11. Dissatisfied with the decision of the Tax Appeals Tribunal in Nairobi Tax Appeal No.408 of 2019 delivered on 25<sup>th</sup> June 2021, the Appellant filed the instant appeal challenging the entire decision.

### **The appeal**

12. The Appellant listed the following grounds of appeal in its amended Memorandum of Appeal: -
  1. THAT the Tribunal erred in fact and in law in finding that the respondents did not act in excess of their statutory jurisdiction.
  2. THAT the tribunal erred in fact and in law in finding that there was a transfer of tax liabilities from M/s Hotel Sirikwa to the appellant without any factual foundation and or analysis to anchor the finding, thereby arriving at a wrong decision.
  3. THAT the tribunal erred in fact and in law in finding that there was a transfer of tax liabilities from M/s Hotel Sirikwa to the appellant based on an erroneous interpretation of the provisions of the Business Transfer Act, which provision was not applicable in the circumstances and thereby arrived at a wrong decision.
  4. THAT the tribunal erred in fact and in law in finding that there was a transfer of tax liabilities from M/s Hotel Sirikwa to the appellant based on an erroneous interpretation of the agreement for sale of shares/equity dated 17<sup>th</sup> of May 2011 in respect of Mayfair Services & Investments Limited, despite it being obvious that the said M/s Hotel Sirikwa was not a party to the said contract.
  5. THAT in arriving at the decision that there was a transfer of tax liabilities from M/s Hotel Sirikwa to the appellant, the tribunal erred in fact and in law in the application of the principles of law as set out on *Salomon v Salomon & Co Ltd* [1987] AC 22, and thereby purported to lift the corporate through procedure not known in law and which was not applicable in the circumstances hence prejudicing the Appellant.



6. THAT the tribunal erred in fact and in law in failing to make a determination that the Respondent acted ultra vires and or unlawfully by issuing agency notices against the directors of the appellant, namely Samuel Kiptala Chemelili & Albert Kipkorir Kimwatan.
  7. THAT the Tribunal misdirected itself by failing to find that the agency notices issued to the directors of the Appellant Company was unlawful and did not comply the statutory provisions precedent to recovering the taxes from the directors of a Tax payers.
  8. THAT the tribunal erred in fact and in law in deferring its determination despite the High Court directing that the matter be heard by the statutory body as prescribed in the [Tax Procedures Act](#) and [Income Tax Act](#).
  9. THAT the Tribunal misdirected itself by dismissing the Appeal by the appellants against unchallenged evidence on record.
  10. THAT the Tribunal failed to properly analyze the evidence on record, the submissions and thereby arrived at a completely erroneous conclusion.
  11. THAT in all circumstances of the case, the findings of the tribunal are insupportable in Law.
13. The Respondent filed its Statement of facts in response to the amended Memorandum of Appeal in which it states that: -
- a. It did not exceed its statutory jurisdiction as it is responsible for the management and control of the Domestic Taxes Department and accounting for tax due under the [Income Tax Act](#), Value Added Tax and [Excise Duty Act](#) among others.
  - b. It exercised its statutory jurisdiction by issuing the tax assessment dated the 17<sup>th</sup> June 2010 in accordance with its mandate under section 41 and 42 of the [Tax Procedures Act](#) and consequently initiated recovery of the said taxes through the agency notice and distress orders.
  - c. The Tribunal did not find that there was a transfer of tax liability from M/S Hotel Sirikwa to the Appellant as this was a finding by the High court in Republic vs. Kenya Revenue Authority & 2 others Ex Parte Sirikwa Eldoret Hotel Limited [2019] eKLR where it was held;  
  
“ Given the foregoing it is clear there was a transfer of tax liability from Hotel Sirikwa to Sirikwa Eldoret Hotel Limited.”
  - d. The above decision of the high Court on transfer of tax liability was binding on the tax appeals Tribunal as the Tribunal could not sit as an appellate court in a decision of the High Court.
  - e. If the Appellant was aggrieved by the finding that there was a transfer of Tax liability from M/ S Hotel Sirikwa to itself then the right forum to challenge the same is in the Court of Appeal and not the Tax Appeals Tribunal nor this Court.
  - f. The agency notices to the director of the appellant company were issued after the taxes in dispute had been subjected to two different court matters being Eldoret Judicial Review Application No.26 of 2010: Republic versus Kenya Revenue Authority exparte Hotel Sirikwa Limited and Eldoret Judicial Review application number 8 of 2018: Republic versus Kenya Revenue Authority & 2 others.
  - g. The high Court did not direct that the matter be heard by the Tax Appeals Tribunal but held that it was not satisfied that the Appellant had exhausted all the alternative remedies.



- h. The Tribunal was properly guided by both statutory law and precedent.
14. The Respondent seeks the dismissal of the Appellant's Appeal with costs.
15. The Appeal was canvassed by way of written submissions, which I have considered. The main issue for determination is whether the TAT made the correct finding when it held that it lacked the jurisdiction to review the High Court's decision.
16. The gist of the instant appeal is the Appellant's claim that it was not one and the same entity as Hotel Sirikwa as demonstrated by the fact that they are registered as separate entities under the [Companies Act](#) and further, by the fact that the Respondent issued each entity with separate PIN numbers. The Appellant therefore faulted the TAT for finding that there was transfer of tax liability from Hotel Sirikwa to the Appellant.
17. The Respondent, on its part, argued that the Appellant had regurgitated the issues that had already been canvassed and determined by the High Court in Republic vs. Kenya Revenue Authority & 2 others Ex Parte Sirikwa Eldoret Hotel Limited [2019] eKLR where the court held that there was a transfer of tax liability from Hotel Sirikwa to the Appellant. According to the Respondent, the right forum for the Appellant to address its grievance over the issue of transfer of tax liability was the Court of Appeal and not the TAT since a determination over the same issue was made by the High Court.
18. I have perused the TAT's judgment and I note that it rendered itself as follows on jurisdiction: -
- “61. The Appellant submitted that judicial review is not concerned with private rights or the merits of the decision being challenged, but the decision-making process. That in judicial review proceedings, the courts are only concerned with the process leading to the making of the decision and not the merits of the decision itself. The Appellant further argued that the High Court in JR No. 8 of 2018 declined to issue a final determination on the merits of the tax decision, indicating that it was not the object of judicial review proceedings and instead referred the matter to the Tribunal.
62. The Tribunal however disagrees with the Appellant's submissions. It is the Tribunal's view that the High Court clearly pronounced itself on the matter by stating that: -
- “Given the foregoing it is clear there was transfer of tax liabilities from Hotel Sirikwa to Sirikwa Eldoret Hotel Limited.”
63. The Tribunal also concurs with the Respondent's view that the High Court is superior to this Tribunal and its decision is binding on the Tribunal. The Tribunal cannot sit as an appellate court in a decision of the High Court in terms of Article 165 (6) of [the Constitution](#) which stipulates that: -
- “The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”
64. As such the Tribunal will not review the merits or demerits of the tax decision as called upon by the Appellant in view of the High Court Ruling in JR. No. 8



of 2018. The right forum to do so, is in the Court of Appeal and the Appellant has already exercised this option.” [Emphasis added].

19. This court’s jurisdiction to hear and determine this appeal is provided for under section 53 of the Tax Appeals Act which stipulates as follows:

A party to proceedings before the Tribunal who is dissatisfied with the decision of the Tribunal in relation to an appealable decision may, within thirty days of being notified of the decision or within such further period as the High Court may allow, appeal the decision to the High Court in accordance with the provisions of the *Tax Appeals Tribunal Act*, 2013 (No. 40 of 2013).

20. My finding is that even though section 53 of the Tax Appeals Tribunals Act grants this court the jurisdiction to hear appeals from proceedings before the Tribunal, the unique feature about this appeal is that the Appellant had, prior to the filing of the appeal before the Tribunal, filed 2 judicial review applications before the High Court in Eldoret. The Tribunal noted, as can be seen from the above extract of the TAT’s judgment, that the High Court had substantively determined one of the most fundamental issues regarding the transfer of tax liability from Hotel Sirikwa to the Appellant herein. The TAT noted that it could not entertain issues that had already been determined by the High Court and were the subject of an appeal before the Court of Appeal.
21. A perusal of the High Court’s ruling in Eldoret JR Application No. 8 of 2018 reveals that the said court considered the Appellant’s claim before it and arrived at the verdict that “there was a transfer of tax liability from Hotel Sirikwa to Sirikwa Eldoret Hotel Limited.”
22. The said court summarized the Appellant’s case in the JR Application as follows: -

“The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents proclaimed the ex-parte applicant’s office furniture and hotel equipment. The ex-parte applicant claims that the proclaimed property does not belong to Hotel Sirikwa Limited, but to a different entity, the ex-parte applicant.

The ex-parte applicant claims that it is completely different and distinct from Hotel Sirikwa and that it is alien to the debt allegedly owed to them by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

The ex-parte applicant further claims that the respondent’s actions is a blatant and unlawful interference with the property and business operations of the ex-parte applicant whose only intention is to recover an alleged debt that has got nothing to do with the ex-parte applicant and were done and taken in bad faith and in abuse of office power.”

23. The Appellant submitted that its appeal before the Court of Appeal challenges the High Court’s jurisdiction in the Judicial Review matters. According to the Appellant, the High Court travelled outside its mandate by making a merit-based finding and thereafter referring the matter to the tribunal for determination. It was submitted that the jurisdiction in judicial review matter is limited to determining whether the process leading to the tax decision was proper and legal. For this argument, the Appellant cited the decision in *Municipal Council of Mombasa vs. Republic & Umoja Consultants Limited* [2002] eKLR where the jurisdiction of the Superior Court in adjudicating over a judicial review matters was discussed.
24. My observation is that by the Appellant’s own admission, its appeal to the Court of Appeal was precipitated by what it refers to as the High Court’s merit based decision on the judicial review application. I note that the impugned High Court decision was clear on the issue of transfer of tax liability from Hotel Sirikwa to Sirikwa Eldoret Hotel Limited. It is this decision that the Appellant



challenged before the Court of Appeal and at the same time referred to the Tribunal. I also note that the Appellant has raised the same issue of the difference or distinction between itself and Hotel Sirikwa that was raised and determined in the JR application. The insistence, by the Appellant, on this line of argument lends credence to the Respondent's claim that the Appellant had regurgitated the same issues that had been determined in the JR Application.

25. I find that the TAT arrived at the correct determination when it found that it could not entertain matters that had already been determined by the High Court. It is to be noted that it was the Appellant who opted to challenge the Respondent's tax enforcement measures through a Judicial Review application instead of filing its challenge, in the first instance, before the TAT. This court is at a loss as to how the Appellant expected the Tribunal to tackle the issue of the transfer of tax liability from Hotel Sirikwa to itself when the issue had already been determined by the High Court in the judicial review application. It is my humble view that the Appellant cannot have its cake and eat it by on one hand, appealing against the High Court's decision in the judicial review matter and at the same time asking the Tribunal and this court to once again determine same issue that had been determined by the High Court.
26. My take is that the mere fact that the High Court held that the issue of taxes due and payable by the applicant go to the merit of the decision and ought to be left to the statutory bodies and tribunals as opposed to a judicial review does not take away or obscure the fact that the said court still went ahead and made a merit based decision regarding the transfer of tax liability.
27. Having regard to the findings and observations that I have made in this judgment, I find that the instant appeal is not merited and I therefore dismiss it with costs to the Respondent.
28. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 17<sup>TH</sup> DAY OF OCTOBER 2024.**

**W. A. OKWANY**

**JUDGE**

