



Commissioner of Domestic Taxes v Ernie Campbell & Company Limited (Commercial Case E065 of 2020) [2024] KEHC 14005 (KLR) (Commercial and Tax) (8 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14005 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E065 OF 2020
MN MWANGI, J
NOVEMBER 8, 2024**

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

ERNIE CAMPBELL & COMPANY LIMITED RESPONDENT

JUDGMENT

1. The genesis of the dispute between the parties herein as claimed by the appellant is that it conducted investigations and uncovered that certain traders were reducing their VAT and Income Tax liabilities by using invoices from suppliers who were found to be issuing ETR invoices without making actual supplies. The appellant alleged that its investigations identified Harsidhi Enterprises Limited, Arav Hardware & Glass Enterprises, and Ramsa Steel & Hardware Trading as participants in the said scheme. The appellant claimed that the said companies were selling fraudulent ETR invoices, enabling the purchasers to claim input VAT from fictitious transactions. The appellant stated that its investigations also revealed that the respondent had claimed input VAT of Kshs.9,911,974.00 from the aforesaid suppliers between August 2015 and March 2016. Consequently, the appellant issued a Tax demand for Kshs.4,559,508.00, which was communicated to the respondent via email on 18th April 2018.
2. The appellant stated that in a letter dated 3rd May 2018, the respondent acknowledged the debt and requested an offset of this amount against Kshs.21,695,054.00 in Withholding Taxes and Kshs.3,569,233.64 due to the respondent as refunds. The request was however denied due to the specific procedures for Tax refunds, as explained in a letter dated 4th May 2018, and assessments were issued on 3rd May 2018. The appellant claims that on 13th August 2018, it requested the respondent to provide documents to review the impact of the disputed purchases on Corporation Tax. On 27th August 2018, the appellant provided invoices from Harsidhi Enterprises Limited, Arav Hardware



- & Glass Enterprises, and Ramsa Steel & Hardware Trading, the suppliers who had been flagged for questionable purchases. The appellant stated that after examining the invoices, it found them insufficient to validate the claimed purchases, for failing tests relating to delivery, payment and utilization. As a result, the purchases were disallowed for Corporation Tax purposes, and additional assessments were issued on 3rd September 2018.
3. Aggrieved by the said assessment, the appellant objected to it on the same day, but the objection was rejected in an objection decision delivered on 29th October 2018. The respondents then appealed to the Tax Appeals Tribunal vide a Memorandum of Appeal & statement of facts both dated 7th December 2018. In response thereto, the appellant filed a statement of facts dated 4th January 2019. The Tribunal identified two issues for determination; whether the VAT appeal was time-barred, and whether the additional Corporation Tax assessments for the years 2015 and 2016, in the sum of Kshs.4,521,572.40 and Kshs.682,214.89, respectively, were lawfully issued and were correct.
 4. In its judgment delivered on 27th March 2020, the Tax Appeals Tribunal determined that the first issue regarding the VAT appeal was irrelevant, as both the objection decision dated 29th October 2018 and the Notice of Appeal were solely in respect to Corporation Tax. On the second issue, the Tribunal noted that although the appellant claimed that the documents provided did not meet delivery, payment, and utilization requirements, it did not specify which additional documents it needed from the respondent. The Tribunal also found that the appellant failed to provide evidence supporting the allegation that Harsidhi Enterprises Limited, Arav Hardware & Glass Enterprises, and Ramsa Steel & Hardware Trading were issuing invoices without making actual supplies.
 5. The Tribunal noted that while the appellant argued that the suppliers were "missing," they were registered on i-Tax and had been issued with PIN numbers by the appellant, indicating that the appellant had not fully exhausted available resources to locate them. The Tribunal held that the respondent was entitled to its deductions under Section 15(1) of the *Income Tax Act*, as the appellant did not provide evidence proving the transactions were fictitious. Consequently, the respondent's appeal was upheld, and the appellant's additional assessments dated 3rd September 2018 in respect to the income for the years 2015 & 2016 for the sums of Kshs.4,521,572.40 and Kshs.682,214.89, respectively, were nullified.
 6. Dissatisfied with the Tribunal's decision, the appellant lodged the instant appeal vide a Memorandum of Appeal dated 29th May 2020 raising the following grounds of appeal –
 - i. The Tribunal erred in law and fact by holding that the appellant herein did not identify the specific documents it requested from the respondent during the audit thereby arriving at a wrong conclusion;
 - ii. The Tribunal misdirected itself and therefore arrived at the wrong conclusion on the doctrine of estoppel as raised by the appellant;
 - iii. The Tribunal erred in law by usurping the appellant's powers provided for under Section 31(4) (a) of the *Tax Procedures Act*, 2015 hence interfering with the appellant's discretion; and
 - iv. That the Tribunal failed to make a finding on the extent of its jurisdiction to interfere with the appellant's discretion despite an invitation to do so.
 7. The appellant's prayer is for this Court to allow the appeal herein with costs, set aside the judgment of the Tribunal dated 27th March 2020 in Tax Appeal No. 51 of 2022, and uphold the appellant's additional assessments dated 3rd September, 2018 in respect of the income for the years 2015 and 2016.



8. The instant appeal was canvassed by way of written submissions that were highlighted on 9th May 2024. The appellant's submissions were filed on 8th November 2023 by the law firm of Chelang'at Mutai Advocate, whereas the respondent's submissions were filed on 14th February 2024 by the law firm of Humphrey & Company LLP Advocates.
9. Ms. Chelang'at, learned Counsel for the appellant submitted that after discovering the respondent's involvement in a "missing trader" Tax fraud scheme, the appellant demanded underpaid Corporation Tax in a letter dated 18th April 2018 from the respondent. The respondent then requested an additional thirty (30) days to verify its records in a letter dated 23rd April 2018. That on 3rd May 2018, the respondent acknowledged the Tax owed, proposing an offset against its alleged tax refunds. Counsel stated that later on 13th August 2018, the appellant requested for further records to review the respondent's Corporation Tax, due to its involvement in the scheme, but the respondent only provided invoice copies on 27th August 2018. That thereafter, the appellant issued its objection decision on 29th October 2018 regarding the respondent's role in the scheme.
10. Counsel cited the provisions of Section 31(4) of the [Tax Procedures Act](#) and submitted that it grants the appellant discretion to amend assessments in cases of fraud, as is the case herein. She contended that since the said the respondent did not claim that the said discretion was misused, and considering that the appellant's objection decision was based not only on investigations but also on the respondent's failure to provide specific records requested for in the email sent on 13th August 2018, the Tribunal erred in concluding that no specific documents were requested for. Citing Section 93 of the [Tax Procedures Act](#), Counsel emphasized that it is an offence to prepare or authorize false documents or to falsify records related to Tax law.
11. Mr. Mbaye, learned Counsel for the respondent relied on the case of *Keroche Industries Limited v Kenya Revenue Authority & 5 others* [2007] KEHC 3680 (KLR), and submitted that having met the requirements set out under Section 17 of the VAT Act, the respondent had a legitimate expectation that its input VAT claims would be allowed. He agreed with the Tribunal's view that the appellant could not dismiss the respondent's documents by asserting that the suppliers did not deliver goods, as this would introduce grounds not provided for in law to deny the appellant legitimate input VAT claims. He noted that the Tribunal in its judgment found that the appellant failed to specify which additional documents were needed.
12. Mr. Mbaye cited the case of [Commissioner of Domestic Taxes v Shailesh Dattani, High Court Tax Income Tax Appeal No E012 of 2020](#), and highlighted that in this instance, the Tribunal held that the burden of proving fraud, lies with the claimant, and found that the appellant did not meet the legal standard of proving fraud.

ANALYSIS AND DETERMINATION.

13. Appeals against decisions of the Tax Appeals Tribunal or to the Court of Appeal are on questions of law only, pursuant to the provisions of Section 56(2) of the [Tax Procedures Act](#). The Court of Appeal in the case of *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR, defined what constitutes matters of law as follows -

“The interpretation or construction of [the Constitution](#), statute or regulations made thereunder or their application to the sets of facts established by the trial Court, as far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal



would have arrived at them. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the trial court.”

14. This Court is not permitted to substitute the Tribunal’s decision with its own conclusions based on its own analysis and appreciation of the facts, unless the Tribunal’s decision cannot be supported by any evidence.
15. Upon consideration of the Memorandum of Appeal, Record of Appeal and statement of facts together with the written submissions filed by Counsel for the parties, the only issue that arises for determination is whether the appellant’s additional assessment of the respondent’s Corporation Tax liability was valid.

Whether the appellant’s additional assessment of the respondent’s Corporation Tax liability was valid.

16. The appellant’s case is that it conducted investigations and uncovered that certain traders were reducing their VAT and Income Tax liabilities by using invoices from suppliers who were found to be issuing ETR invoices without making actual supplies. The investigation identified Harsidhi Enterprises Limited, Arav Hardware & Glass Enterprises, and Ramsa Steel & Hardware Trading as participants in this scheme. The appellant alleged that the said companies were selling fraudulent ETR invoices, enabling the purchasers to claim input VAT from fictitious transactions. The appellant stated that its investigations found that the respondent had claimed input VAT of Kshs.9,911,974.00 from the aforesaid suppliers between August 2015 and March 2016.
17. From the record, it is evident that in an email sent on 13th August 2018, the appellant requested the respondent to provide documents which included inter alia, purchase invoices and delivery notes from the said suppliers, internal requisition for the goods, local purchase orders, stock records, evidence of payment for the goods and stock movement register, to review the impact of the disputed purchases on their Corporation Tax liability. It is noted that in a letter sent to the respondent by the appellant on 27th August 2018, the appellant forwarded copies of the invoices mentioned in the aforesaid email and asked the appellant to bear with it as it was working on the other requirements.
18. The import of the letter dated 27th August 2018, is that the respondent only provided copies of invoices and was to provide the other documents sought by the appellant at a later date. The said contention is contrary to the respondent’s assertions in its statement of facts dated 1st July 2020 that it provided the appellant with copies of delivery notes, proof of payment, ETR receipts and purchase invoices. It is however worthy of note that upon perusal of the record, there is no evidence of whether the respondent ever provided the appellant with the other documents sought in the email sent on 13th August 2018.
19. The appellant found that the invoices provided by the respondent failed to meet the tests relating to delivery, payment and utilization, and proceeded to issue the respondent with an additional assessment for Corporation Tax on 3rd September 2018. The respondent objected to the said assessment vide an objection of even date, but the objection was rejected in an objection decision delivered on 29th October 2018. In the said objection, the respondent requested the appellant to provide a basis as to how the assessment was arrived at and indicated its willingness to cooperate and provide all the available documents and explanations as needed.
20. As was observed by the Tribunal at paragraph 33 of its judgment, the respondent’s objection was closely followed by the appellant’s objection decision contained in a letter dated 29th October 2018, rejecting the respondent’s objection. It is noteworthy that from the pleadings filed before this Court



and before the Tribunal, neither of the parties herein referred to the documents which were verified by the appellant during the objection proceedings.

21. The above notwithstanding, this Court agrees with the Tribunal's observation at paragraph 40 of its judgment that the appellant invoked the provisions of Section 31(4)(a) of the *Tax Procedures Act* in issuing the impugned additional assessments for the income for the years 2015 & 2016. Section 31(4) (a) of the *Tax Procedures Act* states that -

“The Commissioner may amend an assessment -

- a. in the case of gross or wilful neglect, evasion, or fraud by, or on behalf of, the Taxpayer, at any time

22. At paragraphs 6, 7 & 8 of the appellant's statement of facts dated 4th January 2019 filed before the Tribunal, the appellant contended that its investigations revealed that Harsidhi Enterprises Limited, Arav Hardware & Glass Enterprises, and Ramsa Steel & Hardware Trading were selling fraudulent ETR invoices, enabling the purchasers to claim input VAT from fictitious transactions. The appellant claimed that its investigation further revealed that the respondent had claimed input VAT of Kshs.9,911,974.00 from the aforesaid suppliers between August 2015 and March 2016, giving rise to the dispute herein.

23. The law is well settled that in allegations of fraud, the standard of proof is higher than that of a balance of probabilities, but lower than that of beyond reasonable doubt. It is an intermediate standard. In the case of *Gichinga Kibutha v Caroline Nduku* [2018] KEELC 3981 [KLR], the Court when considering an allegation of fraud held as follows -

It is settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. At page 427 in *Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition* quoting with approval the cases of *Wallingford v Mutual Society* (1880) 5 App. Cas.685 at 697, 701, 709, *Garden Neptune V Occident* [1989] 1 Lloyd's Rep. 305, 308, *Lawrence V Lord Norreys* (1880) 15 App. Cas. 210 at 221 and *Davy V Garrett* (1878) 7 chD. 473 at 489 it is stated that:-

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved. “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

Locally, the above principles have been stated in *HCCC No. 135 of 1998 Insurance Company of East Africa –vs- The Attorney General & 3 Others* as thus whether there was fraud is, however, a matter of evidence.

24. In this instance, as was correctly found by the Tribunal, in cases where there are allegations of fraud, the claimant has the burden of proving the existence of fraud. In this case, other than allege that the respondent participated in the aforesaid fraudulent scheme by purchasing fraudulent ETR invoices



from Harsidhi Enterprises Limited, Arav Hardware & Glass Enterprises, and Ramsa Steel & Hardware Trading, and claiming input VAT of Kshs.9,911,974.00 from the aforesaid suppliers between August 2015 and March 2016, the appellant did not adduce any evidence in support of the said allegation.

25. I therefore agree with the Tribunal's finding that the respondent having deducted purchase expenses for purposes of ascertaining its taxable income as provided for under Section 15(1) of the *Income Tax Act*, cannot be denied its legal entitlement on the basis of an unproved allegation that it bought fraudulent ETR invoices from alleged "missing traders".
26. In the premise, this Court finds that the appeal herein is bereft of merits. It is hereby dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF NOVEMBER 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Chalang'at for the appellant

Mr. Mwaniki h/b for Mr. Mbaye for the respondent

Ms B. Wokabi – Court Assistant.

