



**ICEA Lion Life Assurance Company Limited v Commissioner of Domestic Taxes (Income Tax Appeal E063 of 2021) [2024] KEHC 13631 (KLR) (Commercial and Tax) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13631 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E063 OF 2021  
A MABEYA, J  
NOVEMBER 7, 2024**

**BETWEEN**

**ICEA LION LIFE ASSURANCE COMPANY LIMITED ..... APPELLANT**

**AND**

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

**JUDGMENT**

1. This is an appeal against the decision of the Tax Appeals Tribunal (“the Tribunal”) delivered on 17/3/2023. The respondent issued an assessment to the appellant demanding a sum of Kshs. 828,857,568/- inclusive of principal tax, penalties and interest. The appellant objected to the assessment on 25/10/2018 and an objection decision was made on 27/12/2018 where the assessment was amended to Kshs. 698,318,590/-.
2. The appellant appealed against the decision to the Tribunal. The parties engaged in ADR and an agreement was signed by the parties on 31/9/2019. Based on the agreement, the appellant made payments amounting to Kshs. 347,017,754/- in 5 monthly installments.
3. The assessment arose, inter-alia, from a sale of a commercial building by the appellant to Jomo Kenyatta University of Agriculture and Technology (JKUAT). Prior to the appellant and the respondent engaging in the ADR that resulted in a settlement, JKUAT had applied for a private ruling on the transaction. The finding by the respondent was that the transaction qualified as a transfer of business and hence it was zero rated. This position was re-affirmed by the respondent in a letter dated 24/6/2020 but at the time the appellant had already made VAT payments amounting to Kshs. 296,000,000/.
4. On the basis of the JKUAT ruling, the appellant requested for a refund as the ADR settlement was as a result of an error. The respondent retracted its position on VAT in a letter dated 24/6/2020 stating that



the transaction was not a transfer of business and still confirmed that the interest of the transaction had accumulated to Kshs. 121,700,325. The appellant filed an objection on 17/12/2021 and an objection decision was issued on 25/3/2022.

5. Aggrieved by the respondent's failure to agree to a refund, the appellant appealed against the said refusal to the Tribunal. By its judgment made on 17/3/2021, the Tribunal struck out the appeal. The appellant was dissatisfied with a decision and lodged the present appeal setting out 5 grounds of appeal which can be summarized into two as follows: -
  - a. The Tribunal erred in fact and in law in holding that the issue of the VALUE ADDED TAX in respect to the sale of the building was determined with finality by the consent executed by the parties.
  - b. The Tribunal erred in holding that the appellant's appeal had offended the doctrine of res-judicata and that the appellant's recourse was to either seek a review or setting aside the judgment entered by the Tribunal in Tax Appeals Tribunal Appeal No. 52 of 2019.
6. The respondent opposed the appeal vide a statement of facts dated 15/6/2022. He stated that he had correctly charged VAT of Kshs. 296,000,000/- plus interest and penalties in the sale of the commercial building by the appellant to JKUAT. That his position was because as at the time the transaction took place in September 2015, JKUAT was not a registered tax payer for VAT purposes.
7. That the private ruling dated 4/9/2017 was as a result of misrepresentation of facts where the respondent had believed that JKUAT was a registered taxpayer for purposes of VAT and therefore not binding on the respondent. He further contended that the private ruling was not made between the appellant and the respondent, but rather it was only binding on the respondent and JKUAT. That the parties had willingly signed the ADR agreement which confirmed that the transaction was chargeable to VAT.
8. The appeal was canvassed by way of written submissions which I have considered. The appellant submitted that the issues in Tax Appeals Tribunal Appeal No 52 of 2019 were three which included, whether the sale of the ICEA building was a transfer of business as a going concern, whether insurance agents were employees for PAYE purposes and whether the private ruling issued to JKUAT was binding on the respondent.
9. That, in the subsequent Tax Appeals Tribunal Number 463 of 2022 the only issue raised was whether the appellant was entitled to a VAT refund of Kshs 296,000,000/- following the confirmation that the sale of the ICEA building amounted to a transfer. It was the appellant's submissions that the two appeals were as a result of two different objection decisions dated 27/12/2018 and 25/3/2022, respectively.
10. It was further submitted that the deliberations and settlements done on the ADR were on a without prejudice basis. That under section 29(3) *Tax Appeals Tribunal Act* ("the TAT"), a determination of a tax dispute entails either affirming the decision under review, varying the decision under review as well as setting aside the decision under review and either substitution of the decision or referral of the matter to the Commissioner for reconsideration.
11. That the letter dated 24/6/2020, which had affirmed that the sale of the building was a transfer of business, had created legitimate expectation that the sale of ICEA building was zero rated for VAT purposes. That in the premises, the payment of VAT of Kshs 296,000,000/- was made in error. That the private ruling was binding on the respondent to the extent of the contractual relationship between both parties. Finally, that section 68 of the *Tax Procedures Act* ("the TPA") provided the procedure to be followed in withdrawing a private ruling.



12. On his part, the respondent submitted that the issue of VAT had been determined with finality by the consent adopted as a judgment of the Tribunal on 15/1/2020. That the parties freely participated in the ADR and one of the issues raised and discussed was the accrual, assessment and payment of the principal sum. That any other issue directly and substantially in issue and revolving around the accrual and payment of VAT was settled by the consent filed in Tax Appeals Tribunal no 52 of 2019. That the consent had not been set aside or varied and remained an order of the court.
13. Further, that the appeal offended the doctrine of resjudicata and therefore the Tribunal did not have jurisdiction to handle it.
14. With respect to whether the VAT was payable, it was submitted that for a matter to be zero rated it must be between two tax payers who are registered under section 34 of the VAT Act. That at the time of the transaction, JKUAT was not registered as a VAT Tax payer and therefore, the private ruling had been granted pursuant to a misrepresentation of facts.
15. I have considered the record, the respondent’s response and the submissions on record. The main issue for determination is whether the Tribunal was justified in dismissing the appeal.
16. As set out at the beginning of this judgment, this dispute arose out of the objection decision issued by the respondent on 27/12/2018. The matter escalated to the Tribunal and the parties engaged in ADR which resulted in a settlement that was adopted as a judgment of the Tribunal. In the judgment, the appellant agreed to settle Kshs 296,000,000/- as VAT for the sale of the ICEA building.
17. The present dispute arose because shortly thereafter because the appellant demanded a refund of the said amount on account that, the VAT was paid in error since the subject transaction was a transfer of a business. The respondent issued an objection decision which formed the basis of the Tax Appeals Tribunal case of 463 of 2022. The Tribunal struck out that appeal on the basis that the matter was res-judicata.
18. The doctrine of res-judicata is anchored in section 7 of the [Civil Procedure Act](#) which provides: -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
19. In *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* (2017) eKLR, the Court of Appeal held that: -

“For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

  - a) The suit or issue was directly and substantially in issue in the former suit.
  - b) That former suit was between the same parties or parties under whom they or any of them claim.
  - c) Those parties were litigating under the same title.
  - d) The issue was heard and finally determined in the former suit.



- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

...

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.

20. It is clear from the foregoing that, the doctrine or res-judicata applies once the circumstances set out in section 7 of the CPA arise. These are that; there must be a final decision on the merits, the parties involved must be the same, the issues in the subsequent case must be substantially similar to those in the prior case and, the court making the determination must have had jurisdiction to do so. If these conditions are satisfied, courts are therefore barred from reconsidering the same issues in a bid to reinforce finality of judicial decisions.
21. Applying the above criteria to the circumstance of this case, it is clear that the issue of payment of VAT was live in the objection decision of 27/12/2018 where it was stated that zero rating is only with respect to two registered tax payers. In the ADR agreement, the parties agreed that VAT amounting to Kshs 296,000,000/- was payable. The question that arises is, could the appellant re-open the matter because of the private ruling that JKUAT had obtained subsequent thereto?
22. From the facts of this case, the issue of payment of VAT was in issue in both the appeals. In the first appeal, the appellant challenged the payment of VAT while in the second appeal the appellant was demanding a refund of the same. The parties were the same in the two appeals. The ADR settlement was a final judgment.
23. The appellant argued that the ADR settlement was made on a without prejudice basis. In *Ocean bulk Shipping and Trading SA V TMT Asia Limited and 3 others* [2010] UKSC 44, the Supreme Court of the United Kingdom stated: -

“The approach to without prejudice negotiations and their effect has undergone significant development over the years. Thus the without prejudice principle, or, as it is commonly called, the without prejudice rule, initially focused on the case where negotiations between two parties were regarded as without prejudice to the position of each of the parties in the event that the negotiations failed. The essential purpose of the original rule was that, if the negotiations failed and the dispute proceeded, neither party should be able to rely upon admissions made by the other in the course of the negotiations. The underlying principle of the rule was that parties would be more likely to speak frankly if nothing they said could subsequently be relied upon and that, as a result, they would be more likely to settle their dispute”.



24. In *Lochab Transport Ltd Vs Kenya Arab Orient Insurance Ltd* [1986] eKLR, it was held that: -
- “... if an offer is made "without prejudice", evidence cannot be given on this offer. If this offer is accepted, a contract is concluded and one can give evidence of the contract and give evidence of that 'without prejudice' letter”.
25. From the foregoing, the without prejudice rule is used in negotiations to reassure parties that anything said during the negotiations cannot be used against one in court. However, once the negotiations result in a settlement or agreement, the same amounts to a contract between the parties and is binding. The agreement can therefore be tendered in evidence and cannot be rescinded from unless under the circumstances in which a contract is to be rescinded.
26. In the present case, the consent was signed because the parties agreed to be bound by the terms contained therein. The same was recorded as a judgment of the Tribunal. No party could thereafter bolt out of it except as permitted by law. Surely, the without prejudice rule could not apply to a duly entered judgment.
27. In light of the above, the Court finds that the Tribunal did not err in striking out the suit on the basis of res-judicata. The issue of VAT could not be re-litigated afresh. This is so notwithstanding that it was a subject of a fresh objection decision.
28. Accordingly, I find no merit in the appeal and the same is dismissed with costs.  
It is so decreed.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

