



**Subru Motors Limited v Commissioner of Domestic Taxes (Tax Appeal E074 of 2020)
[2021] KEHC 195 (KLR) (Commercial and Tax) (3 November 2021) (Judgment)**

Neutral citation: [2021] KEHC 195 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
TAX APPEAL E074 OF 2020
DAS MAJANJA, J
NOVEMBER 3, 2021**

BETWEEN

SUBRU MOTORS LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

*(Being an appeal against the judgment of the Tax Appeals Tribunal
at Nairobi dated 10th July 2020 in Tax Appeal No. 109 of 2016)*

JUDGMENT

Introduction and Background

1. The Appellant is a motor vehicle dealer. It sells vehicles to customers on commission basis. The Respondent (“the Commissioner”) carried out an investigative audit of the Respondent’s tax affairs in April 2014 for the income period between 2010 and 2012.
2. Through its letter dated 9th May 2014, the Commissioner communicated its audit findings to the Respondent and raised additional assessments of KES 70, 446,388.00 and KES 28,079,989.00 under the tax heads of Corporation Tax and Value Added Tax (“VAT”) respectively. The Appellant responded and objected to the findings through its Notice of Objection letter dated 12th June 2014. The Commissioner then issued the Appellant with a notice dated 15th July 2014 stating that it intended to carry out an investigation audit of the Appellant’s operations for the year of income 2010-2013 in respect of Corporation Tax and VAT for 2010 to the date of the letter, year 2014. The Appellant, in its reply dated 25th July 2014 sought more time to comply with the Commissioner’s request for documents to facilitate the said audit.



3. In the meantime, the Commissioner replied to the Appellant's objection through its letter dated 9th September 2014 stating that it was reviewing the Objection. It also sought additional supporting documents from the Appellant which documents were provided. This precipitated a meeting of the parties on 3rd March 2015 with the Commissioner seeking further additional documents.
4. On 21st April 2016, the Appellant wrote to the Commissioner stating, inter alia, that it understood that its Objection dated 12th June 2014 has been disallowed pursuant to section 51(11) of the Tax Procedures Act, 2015 ("the TPA"). In its response dated 26th April 2016, the Commissioner informed the Respondent that the matter in dispute predated the TPA hence section 51(11) of the TPA did not apply. The Commissioner further stated that it had finalized the review of the all the issues raised by the Respondent in its objection and documents/records availed and would issue additional assessments under a separate cover.
5. On 27th April 2016, the Appellant wrote to the Commissioner reiterating its position that section 51(11) of the TPA applied to its case and that it intended to object to any further enforcement of the said assessments based on the Commissioner's interpretation of the law.
6. The Commissioner, by a letter dated 29th April 2016, issued additional assessments to the Respondent for the tax period from 2010 to 2013 amounting to KES 136,066,374 .00 and KES 107,539,873.00 in respect of Corporation Tax and VAT respectively. The Appellant was dissatisfied with these assessments by the Commissioner and formally objected to the same through its Objection letters dated 2nd June 2016 and 20th June 2016.
7. After reviewing the Objections, the Commissioner issued its Objection Decision dated 19th July 2016 and confirmed its earlier additional assessments ("the Objection Decision"). The Respondent lodged an appeal at the Tax Appeals Tribunal ("the Tribunal"). By the judgment dated 10th July 2020, the Tribunal found the Objection Decision was valid and the same was upheld. It also held that the Commissioner had powers to undertake and issue an additional assessment. In sum, the Tribunal dismissed the appeal.
8. The Appellant grounds its appeal on its Memorandum of Appeal dated 19th August 2020. The Commissioner opposes the appeal through the Statement of Facts dated 18th September 2020. The appeal was canvassed by way of written submissions with the parties advancing their respective positions.

The Appeal and the Appellant's Submissions

9. The Appellant submits that the Tribunal erred by failing to find that its objection dated 12th June 2014 ought to have been allowed as 60 days had elapsed since it was served upon the Commissioner and no objection decision was made. The Appellant submits that although the assessment predated the TPA, by virtue of section 113(1) thereof, the TPA applies to its case. It thus submits that the dispute fell within the scope the TPA and more so section 51(11) which provides that:

51.

- (11) Where the Commissioner has not made an objection decision within sixty days from the date that the taxpayer lodged a notice of the objection, the objection shall be allowed.

10. The Appellant submits that from a plain interpretation of section 51(11) above, once an objection has been made, the Commissioner's actions are limited; it may allow the objection in whole or in part or disallow it and that if the Commissioner does not act on it, the objection is allowed. The Appellant



further submits that from the same provision, the Commissioner cannot extend the timelines by ordering a fresh investigation. That it cannot stand over collection of the taxes does not extend the timeline. That the 60-day timeline is cast in stone and cannot be extended either by mutual consent or by acquiescence and once the 60 days lapse, the Commissioner has no jurisdiction to issue an additional assessment based on an original assessment which becomes inoperable by passage of the statutory timelines.

11. The Appellant faults the Tribunal for misapprehending the facts and the evidence on record by finding that the fresh audit conducted by the Commissioner was conducted at the instance or acquiescence of the Appellant. It submits that the Tribunal ought to have held that the additional assessment was illegal and contrary to the *Fair Administrative Act, 2015* consequently the Objection Decision was a product of a flawed process.
12. The Appellant submits that an assessment is a tax demand and not a fishing expedition which is made after the Commissioner's investigation and where the taxpayer fails to object to an assessment within 30 days, he /she is deemed to have accepted the tax liability. Conversely, the law allows the taxpayer to assume that once a valid objection is raised and served upon the Commissioner, if no objection decision is made within 60 days, then the objection has been allowed in accordance with section 51(11) of the TPA which is couched in mandatory terms. The Appellant further submits that the Commissioner cannot vary the timelines and flowing from this, before the Commissioner issues an assessment it ought to have conducted investigations and should not issue an assessment then carry out investigations because once an assessment is made, time starts running.
13. The Appellant contends that the notice issued by the Commissioner dated 15th July 2014 did not extend the timelines for rendering a decision. It urges that the mere fact that the Appellant complied with the notices should not be construed to mean that the Appellant acquiesced to the illegal extension of the statutory timeline to render an objection decision.
14. The Appellant further faults the Tribunal for finding that the Commissioner stood over its earlier assessment as there is no evidence that the Commissioner did so and in any event, standing over an assessment is unknown in law and that there is no express or implied provision of the law which grants the Commissioner such power. The Appellant submits that what the Commissioner stood over, was collection of the taxes pending the hearing and determination of the objection and that once an assessment has been objected to, as a matter of practice and fairness, the Commissioner usually stays the collection of taxes until an objection decision has been rendered. Further, where a tax payer appeals against a tax decision to the Tribunal, the Commissioner stays the enforcement of taxes pending the determination of the appeal as a matter of fairness. The Appellant therefore submits that by considering the "standing over" as the basis for rejecting the Appellant's construction of section 51(11) of the TPA, the Tribunal delved into irrelevant and extraneous issues leading to a miscarriage of justice. The Appellant submits that in any event, the issue of this timeline arose before the parties went to the Tribunal and the Commissioner did not raise the issue of the fresh audit before the Tribunal and that it only came up during the submissions as an afterthought.
15. The Appellant relies on the decisions of *Republic v Commissioner of Domestic Taxes Ex Parte Fleur Investments Limited NRB HC JR Application No. 152 of 2019 [2020] eKLR* and *Republic V Commissioner of Customs Services Ex-Parte Unilever Kenya Limited NRB ML HC Misc. Civil Application No. 181 of 2011 [2012] eKLR* to buttress its point that timelines are cast in stone unless the statute expressly permit their extension.
16. The Appellant assails the manner in which the Tribunal conducted its proceedings. It states that it erred by admitting as evidence the Commissioner's undated witness statement, which was neither sworn nor



signed. That it violated the principles of a fair trial by compelling the Appellant to proceed with the hearing even after the Appellant had raised concerns that it had been served with notice to introduce new evidence on the day of the trial thus depriving it sufficient time and opportunity to rebut. The Appellant submits that the Tribunal erred in finding that the Appellant had not proved its case on a balance of probabilities and that it ignored the evidence on record and delved into extraneous issues thereby occasioning a miscarriage of justice to the Appellant. The Appellant further faults the Tribunal for failing to resolve the obvious doubts in the Commissioner's case in favour of the Appellant to the Appellant's detriment.

17. In sum, the Appellant urges the court to find that the original assessments were vacated as the Commissioner did not make an objection decision within 60 days and as a result the additional assessments were made without jurisdiction. It adds that the Commissioner made additional assessments when the Appellant raised the issue of timelines. It submits that no legality can flow from an illegality and as such this court should allow the appeal.

The Commissioner's Reply

18. The Commissioner submits on three issues arising from the appeal. First, whether the Objection Decision was issued within the timelines and is valid. Second, whether the additional assessments issued by the Commissioner were lawful and last, whether there was a miscarriage of justice during the Tribunal's proceedings.
19. The Commissioner submits that the Appellant challenged the objection decision dated 19th July 2016 in line with section 52 of the TPA arising from its own objections dated 2nd and 20th June 2016. The Commissioner contends that the Appellant challenged the substance of the additional assessments and attached evidence in support of the same. Therefore, and in accordance with section 51(11) of the TPA, the Commissioner made the Objection Decision, within the prescribed 60-day timeline. The Commissioner adds that it is the Appellant's objections aforementioned which formed the subject of the appeal before the Tribunal as provided under section 56(3) of the TPA which provides that:

56(3) In an appeal by a taxpayer to the Tribunal, High Court or Court of Appeal in relation to an appealable decision, the taxpayer shall rely only on the grounds stated in the objection to which the decision relates unless the Tribunal or Court allows the person to add new grounds.

In sum, the Commissioner submits that it is the Appellant's objection that gave rise to the Commissioner's Objection Decision and this is what the Tribunal interrogated and which resulted in the judgment that is now challenged before this court.

20. The Commissioner submits that the Appellant's objection dated 12th June 2014 was overtaken by events and cannot be relied upon as it arose out of an estimated assessment and was set aside by the Commissioner invoking section 56 of the *Income Tax Act* ("the ITA") and section 48 of the *Value Added Tax Act*, 2013 ("VAT Act, 2013"). The Commissioner contends that these provisions allowed it to commence a fresh audit which resulted in fresh additional assessments which Appellant acknowledged and acquiesced to by its conduct.
21. The Commissioner maintains that the additional assessments, covering the period between 2011-2013, were issued on 29th April 2016 and were as a result of an in-depth audit that was undertaken with full knowledge and acquiescence of the Appellant as evidenced by the Appellant's letter dated 25th July, 2014 where it acknowledged that indeed, a fresh audit was to be conducted and requested more time before the commencement of the audit. Further, that it is the resulting assessments that were the subject of the Appellant's objections on 2nd and 20th June 2016 supported by additional documents and which



resulted in the Objection Decision made on 19th July 2020. The Commissioner also points out that in its objection, the Appellant acknowledges that the previous assessment was no longer applicable since it was ‘now replaced’. The Commissioner submits that the Appellant does not dispute the fact that it challenged the assessments through its objections dated 2nd and 20th June 2016 and it is these objections that were subject of the Objection Decision dated 19th July 2016. On the basis of the aforesaid facts, the Commissioner submits that the additional assessments are valid and lawful and also by reason of section 78 of the TPA which presumes validity of assessments where there is a common intent and understanding between parties concerned.

22. The Commissioner submits that the initial assessments for the period between 2011- 2013 were based on estimates as the Appellant failed to file any returns. The Appellant, later on, filed self-assessment returns on 30th June 2014 hence the estimated assessments were stood over through a letter dated 15th July 2014 in line section 56 of ITA and section 48 of the VAT Act, 2013 which enabled the Commissioner to commence a fresh audit which ultimately resulting in the additional assessments. The Commissioner states that the additional assessments issued in accordance with section 31 of the TPA and which was the subject of the audit with different parameters from the initial one, took account of all material information provided by the Appellant.
23. The Commissioner contends that it is not open for the Appellant to go back on these undertakings/ representations where the record is clear that the assessments were conducted with its full knowledge and acquiescence and the Appellant's subsequent letters, challenging the assessment, were therefore an afterthought, having clearly known and participated in the audit leading up to the assessments. That the Appellant is, through its conduct and acquiescence, estopped from denying the validity of the additional assessments. The Commissioner relies on a number of cases including [*748 Air Services Limited v Theuri Munyi NRB CA Civil Appeal No. 310 of 2014 \[2017\] eKLR*](#); [*Kenindia Assurance Company Limited v New Nyanza. Wholesalers Limited BSA HCCA No. 30 of 2015 \[2017\] eKLR*](#) and [*John Mburu v Consolidated Bank of Kenya NRB CA Civil Appeal No. 162 of 2015 \[2018\] eKLR*](#) in support of this position.
24. On whether there was a miscarriage of justice during the Tribunal's proceedings, the Commissioner submits that that the proceedings at the Tribunal were conducted in accordance with the law and that the witness statement, now challenged by the Appellant before this court, was duly served on it. The Commissioner submits that the Appellant consented to the statement, did not object to it nor contest it before the Tribunal whereupon the hearing proceeded. It further submits, that the Appellant has not demonstrated or shown the prejudice it has suffered by adoption of the witness statement.
25. In sum, the Commissioner submits that that this appeal lacks merit and ought to be dismissed.

Analysis and Determination

26. I have gone through the appeal, the record and submissions of the parties. First, I think it is important to point out that this court is exercising appellate jurisdiction that is circumscribed by section 56(2) of the TPA which provides that “An appeal to the High Court or to the Court of Appeal shall be on a question of law only”. Second, an appeal limited to matters of law does not permit the appellate court to substitute the Tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts. The Court of Appeal in [*John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others \[2018\] eKLR*](#) summarised what amounts to “matters of law” as follows:

(38) [T]he 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.

27. From the Memorandum of Appeal and submissions, there are two issues for determination. First, whether the Objection Decision was valid and second, whether the Tribunal conducted the proceedings fairly.

Validity of the Objection Decision

28. The Appellant's position is that the Objection Decision dated 19th July 2016 was invalid as it was a product of a flawed process as the Commissioner never rendered any decision in respect of its earlier objection dated 12th June 2014 within the statutory timelines, thus the same ought to have been allowed by operation of law and by dint of section 51(11) of the TPA. On the other hand, the Commissioner's position is that the earlier Objection was irrelevant as there was a fresh audit of the Appellant which resulted in additional assessments, new objections by the Appellant and the Commissioner's Objection Decision, which were the subjects of determination before the Tribunal.

29. I do not think it should be in dispute that even though the Appellant's objection dated 12th June 2014 was filed before the commencement of the TPA, the provisions of the TPA applied to this dispute and the Appellant's objection as no prosecution had been commenced and no appeal had been preferred by the Appellant in respect of the earlier assessments issued by the Commissioner. This position is provided for by the transitional and saving clauses of the TPA and more so section 113 which provides that:

113 Subject to this section, this Act shall apply to any act or omission that occurred or is occurring for which no prosecution has been commenced, or any assessment made against which no appeal has been made, before the commencement date.

1. Any appeal or prosecution commenced before the commencement date may be continued and disposed of as if this Act had not come into force.
2. If the period for any application, appeal or prosecution had expired before the commencement date, nothing in this Act shall be treated as having enabled the application, appeal, or prosecution to be made under this Act by reason only that a longer period is specified in this Act.
3. Any tax liability that arose before the commencement date may be recovered under this Act despite any action already taken for the recovery of the tax.

30. However, it appears that the Commissioner was of a different view at the time. When the issue was raised by the Appellant, the Commissioner, in its letter dated 26th April 2016 opined that the provisions of the TPA were not applicable as the issues in contention were not covered under the transitional provisions of the TPA, thus, according to the Commissioner, section 51(11) of the TPA was not



applicable in so far as its delivery of an objection decision within 60 days of the Appellant's objection was concerned. Based on this belief, the Commissioner, in the same letter stated in part as follows:

We have finalized the review of all issues raised in your objection and documents/records subsequently submitted by your agent. We shall shortly be issuing you with the relevant assessments under a separate cover

31. The objection being referred to here is that of 12th June 2014 since at the date of the said letter, there was no other objection filed by the Appellant. The Commissioner also does not state that it will render any decision in respect of the objection, but rather, it will be issuing other assessments. As I have already stated, this decision must have been informed by the Commissioner's belief that the TPA did not apply to the instant dispute and that it was not time bound to render an objection decision. I have already found that the TPA was indeed applicable to the instant dispute, thus the Commissioner's construction of section 113 above was flawed. It then follows that under section 51(11) of the TPA, the Commissioner ought to have made the objection decision within 60 days from the date of receipt of the notice of objection; or any further information the Commissioner may have required from the Appellant and that failure to which, the objection was deemed to have been allowed.
32. The Commissioner's position is that the additional assessments were in respect of a different and fresh audit of the Appellant's tax affairs which was conducted with the full concurrence, cooperation and acquiescence of the Appellant. The Commissioner referred the court to the Notice it issued to the Appellant through its letter dated 15th July 2014 evincing its intention to carry out an investigation audit of the Appellant's operations. The Appellant, in response, through its letter dated 25th July 2014 stated in part as follows:

This has reference to your letter of 15th July 2014

We are writing to request you to extend the time given for production of documents and commencement of the audit by two months. We have employed a new accountant and engaged a new tax agent who requires the required time to put your requirements in order.
33. Subsequent correspondences indicate that the Appellant delivered to the Commissioner the documents required for the audit exercise. It follows that the additional assessments issued by the Commissioner were in respect of this audit, which prompted the Appellant to file the objections dated 2nd and 20th June 2016 respectively and to which the Commissioner rendered the Objection Decision dated 19th July 2016. It is not in dispute that this Objection Decision was rendered within the statutory timeline provided by section 51(11) of the TPA and that it was the subject of determination before the Tribunal.
34. It is my finding that even if I am to hold that the initial objection dated 12th June 2014 was allowed by operation of law, the same holding cannot apply to the objections dated 2nd and 20th June 2016 which were in respect of different assessments issued by the Commissioner and that the consequent Objection Decision was timely. I also cannot fault the Commissioner for auditing the Appellant and calling for documents as it is within its mandate and as far as the procedure of the audit exercise was concerned, I find that the same was done properly and the Appellant was given an opportunity to respond and explain its position (see *Guaca Stationers Limited v Commissioner of Domestic Taxes NRB ML HC ITA No. 24 of 2017[2020] eKLR* and *Silver Chain Limited v Commissioner Income Tax & 3 others MLND HC JR No. 2 of 2016 [2016] eKLR*).
35. I therefore find and hold that the Objection Decision dated 19th July 2016 was valid as it was rendered within the statutory timelines under section 51(11) of the TPA and that it arose from the Appellant's



objections dated 2nd June 2016 and 20th June 2016, which objections arose from a validly and properly conducted audit exercise by the Commissioner.

Fairness of the Tribunal's proceedings

36. The Appellant faulted the Tribunal for conducting the trial in a manner that offended a fair trial by compelling it to proceed with the hearing even after the Appellant had raised concerns that it had been served with notice to introduce new evidence on the day of the trial thus depriving it sufficient time and opportunity to rebut.
37. I have gone through the Tribunal's proceedings and I am in agreement with the Commissioner that when it sought to introduce the witness statement, the Appellant, through did not object to its production. Further, the Appellant never raised the issue that the statement was unsworn and could not be admitted. This was even after the Tribunal noted that the witness statement had already been served upon the Appellant. Since the witness statement was produced by consent and without any objection from the Appellant, I do not see any prejudice or unfairness that was occasioned on the Appellant. Indeed, from the proceedings, both parties submitted extensively on their positions and I fail to find any hint of procedural or substantive unfairness that was occasioned upon the Appellant. This ground by the Appellant therefore fails.

Conclusion and Disposition

38. For the reasons I have set out above, the Appellant's appeal lacks merit and is dismissed with costs to the Respondent.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER 2021.

D. S. MAJANJA

JUDGE

Mr Komu instructed by Komu and Kamenji Advocates for the Appellant.

Mr Nyapara, Advocate instructed by Kenya Revenue Authority for the Commissioner of Domestic Taxes.

