



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

TAX APPEAL NO. E039 OF 2020

BETWEEN

COMMISSIONER OF INVESTIGATIONS AND ENFORCEMENT...APPELLANT

AND

ESTAMA INVESTMENTS LIMITED.....RESPONDENT

(Being an appeal against the Ruling of the Tax Appeals Tribunal delivered on 31st March 2020

in Nairobi Tax Appeal No. 91 of 2017)

JUDGMENT

Introduction and background

1. This is an appeal by the Commissioner of Domestic Taxes ("the Commissioner") from the decision of the Tax Appeals Tribunal delivered on 31st March 2020 dismissing its application to enforce a settlement agreement.
2. The facts leading to this appeal are common ground. In 2015 to 2016, Estama Investments Limited ("the Respondent") was engaged by the Ministry of Health to supply mobile clinics for the Government of Kenya slum upgrading project. The Commissioner conducted an investigation of the Respondent's accounts covering the years 2010 to 2015. On 24th March 2017, it issued a notice of assessment to the Respondent demanding corporate tax of Kshs 49,783,283, Customs Duty of Kshs 110,471,6882 and Value Added Tax of Ksh 162,690,664 all-inclusive of penalties and interest.
3. The Respondent filed its notice of objection against the Commissioner's decision on 19th April 2017. The Commissioner issued its object decision on 21st April 2017 whereby it confirmed the tax assessment of Kshs. 322,945,629.33. The Respondent challenged the decision by lodging an appeal with the Tax Appeals Tribunal on 30th May 2017.
4. Pursuant to **section 28** of the *Tax Appeals Tribunal Act* ("TATA") and **section 55** of the *Tax Procedures Act*, the parties entered into the alternative dispute resolution (ADR) mechanism culminating in an agreement dated 20th March 2019 wherein the parties agreed that the Respondent would pay corporate tax of Kshs. 22,024,844 and VAT of Kshs. 128,903,727.75 ("the ADR Agreement").
5. According to the Respondent, immediately upon execution of the ADR Agreement the Ethics and Anti-Corruption Commission instituted **ACEC Civil Suit No. 1 of 2018: EACC v Estama Investments Limited & Others** ("the ACEC Suit") at the High Court seeking recovery of the whole or part of the contract sum that was subject of the appeal at the Tax Appeals Tribunal.
6. The Respondent requested the Commissioner to await the determination of ACEC Suit since the judgement therein will affect the taxes payable under the ADR Agreement. The Commissioner declined the request and filed an application at the Tribunal seeking various orders which, *inter alia*, that the Tribunal direct and order that the ADR Agreement between the parties was a legally binding agreement on the issues agreed upon and was capable of enforcement.

7. The Respondent opposed the application on the ground that enforcement of the Agreement would be prejudicial to it and amount to unfair administrative action in light of the pending ACEC Suit.

The Tribunal decision

8. The Tax Appeals Tribunal delivered its ruling on 31st March 2020 dismissing the application and directing that the application be stayed pending the hearing and determination of the ACEC Suit. After considering the arguments by both parties, the Tribunal concluded as follows:

[16] The Tribunal having considered the above makes reference to Section 28 of the Tax Appeal Tribunal Act 2013 which provides that:-

i) The parties may, at any stage during the proceedings, apply to the Tribunal to be allowed to settle the matter out of the Tribunal, and the Tribunal shall grant the request under such conditions as it may impose.

ii) The parties to the appeal shall report to the Tribunal the outcome of settlement of the matter outside the Tribunal.

[17] The Tribunal is of the considered view that ACEC Civil Suit No. 1 of 2018 against the Appellant/Respondent herein emanates and is premised on the same facts as the Appeal before the Tribunal and will affect the contractual sum that is the subject matter of the appeal and the executed ADR Agreement.

Appellant's case

9. The Commissioner now appeals on the basis of the grounds set out in the memorandum of appeal dated 14th May 2020. It contended that the Tribunal erred in failing to find the ADR Agreement was in fact binding on the parties as it was executed pursuant to **section 28(2)** of the **TATA**. It argued that that Tribunal erred in finding that ACEC Suit was premised on the same facts yet no evidence was tabled by the Respondent and that consequently the Tribunal erred in pronouncing itself on the facts of that suit without evidence.

10. The Commissioner also disputed the Tribunal's jurisdiction to grant orders which had not been sought in the application. The Commissioner also contended that the Tribunal erred in applying a similar ruling it had made in **Tax Appeal No. 189 of 2017** thus creating uncertainty in the judicial process. The Commissioner prayed that the appeal be allowed and the ruling of the Tribunal be set aside. It also prayed that this court finds and holds that the ADR Agreement is enforceable.

11. In addition to the broad ground set out in the memorandum of appeal, counsel for the Commissioner relied on written and oral submissions. He submitted the ADR Agreement was valid and binding on the parties and made extensive reference to the **Arbitration Act, 1995** to support the argument that the agreement was binding and could only be set aside under the provisions of the said **Act**. I reject the reference to the **Arbitration Act** because the ADR Agreement was reached after extensive negotiations between the parties and not a determination before a neutral third party in accordance with a prior agreement between the parties.

12. Counsel submitted that there was no basis upon which the Tribunal could pronounce itself on the fact of the ACEC Suit yet there was no evidence of the said suit placed before the court. Counsel pointed out that the Respondent's replying affidavit did provide for the pleadings in that suit hence the deposition violated the fundamental rule of affidavits that one must state the basis of knowledge and belief as required by **Order 19** of the **Civil Procedure Rules**. Counsel relied on the case of **Mbugua and Mbugua Advocates v Kenindia Assurance Company Ltd [2014] eKLR** and **Kamlesh M. D. Pattni v Nasir I. Ali and 2 Others [2005] eKLR**.

13. In support of its contention that the Tribunal erred by clothing itself with inherent powers by making the orders not prayed for, Counsel for the Commissioner submitted that the Commissioner did not seek the orders for stay which the Tribunal granted. He pointed out that the appeal had been scheduled for hearing after the Tribunal had directed the parties to file written submission on the issues identified for determination and that the ADR Agreement only settled the appeal on the terms agreed by the parties. Counsel cited **Republic v Industrial Court and Another exp Joel Kandie Chebii and Another [2012] eKLR** where the court held that parties are bound by their pleadings and the court can only grant the prayers sought in the pleadings and proved by evidence.

Respondent's Case

14. The Respondent relied on written and oral submissions by its counsel. Its case was that the ADR Agreement was entered without knowledge of the ACEC Suit which sought for the recovery of the whole or part of the contract sum, the subject of the taxes in the ADR Agreement. It contended that because of the likely recovery of the contract sum, there was doubt as to income subject of tax. In such circumstances counsel argued that in accordance with **section 4 (d)** of the **Income Tax Act**, where the income subject to tax is in doubt, as is the case herein, such income should be provided for as an allowable expense and treated as a taxable income in the year in which such provision or expense is reversed, so that the income of the Respondent will only be ascertained clearly upon the determination of the suit filed by the Ethics and Anti-Corruption Commission, and the tax applied in the year of determination. Relying on the decision in **Vestey v Inland Revenue Commissioners [1979] 3 ALL ER** counsel submitted that a citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined.

15. Counsel for the Respondent further urged that untimely enforcement of the ADR agreement before finalization of ACEC Suit may cause the Respondent to pay exorbitant taxes on income which it may be compelled to refund to the EACC thereby violating the Respondent's constitutional right provided in Article 210 which provides that, "No tax or licensing fee may be imposed, waived or varied except as provided by legislation". In addition, counsel submitted that the stay of implementation and enforcement of the ADR Agreement was necessary as the agreement would be amended or altered in accordance with the determination of ACEC Suit.

16. The Respondent also took the position that the Commissioner ought to co-ordinate with the EACC in-order to determine conclusively, the tax that is payable by the Respondent. Counsel cited the decision of the Supreme Court in **Matter of the National Land Commission [2015] eKLR** and **In Re the Matter of the Interim Independent Electoral Commission SCK Application No. 2 of 2011; [2011] eKLR** where the court held that independent Commissions and other Government institutions constantly co-ordinate and harmonize their functions in order to promote public interest. Counsel maintained that the Respondent would suffer immense prejudice if the two government departments are allowed to enforce conflicting interests to its detriment.

17. The Respondent further submitted that the Commissioner's request for the premature enforcement of the ADR Agreement violated its right to fair administrative action under **Article 47** of the Constitution as read with **section 4** of the **Fair Administrative Action**.

18. On the issue whether there was a basis for which the Tribunal reached the decision it did, the Respondent submitted that it raised the ACEC Suit in its replying affidavit to the Commissioner's application. Since the Commissioner did not object to the facts deponed therein, the Tribunal was entitled to rely on the uncontroverted facts in the affidavit.

19. Finally, counsel for the Respondent submitted that in its replying affidavit it prayed that the Tribunal grant an order to stay the proceedings of the Tribunal and the completion of the ADR Agreement which will be amended based on the determination of the ACEC Suit pursuant to **section 18** of **TATA**.

Determination

20. The main issue in this appeal is whether the Tribunal had jurisdiction to stay the appeal pending the hearing and determination of the ACEC Suit against the Respondent.

21. Before I deal with the primary of issue of jurisdiction, I think it is important to dispose of ancillary issues raised by the parties. The first issue is whether there was sufficient evidence of the ACEC Suit before the Tribunal to make the determination whether the facts in issue in that suit were similar to those in the appeal. Though the Respondent did not attach the pleadings in the ACEC Suit to its deposition, the counsel for the Commissioner did not take objection before the Tribunal. Instead, the Commissioner opposed the application on the ground that it was not party to the said suit. In the absence of an objection to that effect, the purport of the ACEC suit was deemed admitted and the Tribunal was entitled to proceed on the assertion made by the Respondent. I therefore do not find any error on this basis.

22. It must also be borne in mind that the Respondent is a taxpayer whose liability has been determined in accordance with the law. 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. As I understand, the decisions cited by the Respondent requiring the Commissions and other Government Officers to coordinate their functions relate to their public functions and to matters governed by their organising statutes.

23. Turning to the issue of jurisdiction, the Tribunal, as a statutory body, has jurisdiction conferred to it by statute. The essence of jurisdiction was clearly articulated in the oft cited case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** where the Court of Appeal stated as follows:

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter, or commission under the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matter of which the particular court has cognizance, or as to the area over which the jurisdiction shall extent, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

24. Under **section 12** of **TATA**, the Tribunal has jurisdiction to hear appeals from decisions of the Commissioner on any matter arising under the provisions of any tax law. Upon consideration of the appeal, the Tribunal, may make several orders under **section 29(3)** of **TATA** which provides as follows:

29(3) The Tribunal shall make a decision in writing –

(a) affirming the decision under review,

(b) varying the decision under review,

(c) setting aside the decision receive

25. What is clear is that the jurisdiction of the Tribunal is to hear and determine appeals to it. In relation to ADR agreements, **section 28** of **TATA** only states that the parties shall report to the Tribunal the outcome of the settlement. Further and in relation to alternative dispute resolution, **section 55** of the **Tax Procedures Act, 2015** provides as follows:

55 (1) Where a Court or the Tribunal permits the parties to settle a dispute out of Court or the Tribunal, as the case may be, the settlement shall be made within ninety days from the date the Court or the Tribunal permits the settlement.

(2) Where parties fail to settle the dispute within the period specified in subsection (1), the dispute shall be referred back to the Court or the Tribunal that permitted the settlement.

26. Although both provisions do not provide for the kind orders the Tribunal may make upon receiving the report on 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 course would be in accordance with the constitutional imperative under **Article 159** of the Constitution that enjoins the Tribunal to promote alternative dispute resolution. On the other hand, if there is no settlement, it follows that the Tribunal will proceed with the Appeal to its logical conclusion.

27. In none of those provisions I have cited does the Tribunal have jurisdiction to stay its own proceedings and at any rate on account of other proceedings pending in the High Court. Even if I were wrong on the issue of jurisdiction, the decision reached by the Tribunal cannot be supported. It is intolerable that the Tribunal would stay its own proceedings for an indeterminate period of time on the basis of a suit whose outcome is unknown. The Commissioner's objection that it was not party to that suit was valid and underlies the fact that the proper court upon which the Respondent would apply for stay of enforcement of the agreement would be the High Court.

28. 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. If the ACEC Suit succeeds, the Respondent would simply be given credit for the amount paid as taxes.

Disposition

29. For the reasons I have stated, I allow the appeal, set aside the ruling of the Tribunal dated 31st March 2020 and substitute it with an order allowing the Appellant's application dated 30th December 2019 to the extent that the Appeal before the Tribunal is settled in terms of the ADR Agreement dated 20th March 2019.

30. The Respondent shall bear the costs of the appeal.

DATED and DELIVERED at NAIROBI this 2nd day of NOVEMBER 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

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

Mr Muriuki instructed by MEMA Advocates LLP for the Respondent.