



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CORAM: F. MUGAMBI, J
INCOME TAX APPEAL NO. E205 OF 2023

BETWEEN

COMMISSIONER OF DOMESTIC TAXES
APPELLANT

VERSUS

KENYA BREWERIES LIMITED
RESPONDENT

***(Being an Appeal against the Judgment of
the Honourable Tribunal delivered on 6th
October 2023 in Tax Appeal No. 668 of
2022)***

JUDGMENT

Background and introduction

1. The dispute between the parties pertains to excise duty assessments issued by the appellant (the Commissioner) against the respondent, Kenya Breweries Limited (KBL) for the period covering November 2021 to February 2022. The genesis of the dispute lies in changes to the legal framework governing the adjustment of excise duty rates. It is

not disputed that on 2nd November 2021, Legal Notice No. 217 of 2021 was published, introducing new adjustment rates for excise duty and revoking the earlier Legal Notice No. 194 of 2020.

2. Following the publication of Legal Notice (LN) No. 217 of 2021; **Mwaura Kabata & Others V Kenya Revenue Authority & Others, Petition No. 21 of 2021** was instituted in the High Court, challenging the legality and implementation of the said Notice. On 19th November 2021, the High Court issued an order maintaining the status quo pending the hearing and determination of the Petition. Subsequently, on 24th November 2021, the National Assembly approved Legal Notice No. 217 of 2021, in accordance with **Sections 11 and 12 of the Statutory Instruments Act.**
3. On 21st March 2022, the Commissioner issued an assessment to KBL covering the period between November 2021 and February 2022. The assessment computed the alleged variance between excise duty payable under the revoked Legal Notice No. 194 of 2020 and the new rates

introduced by Legal Notice No. 217 of 2021, amounting to Kshs. 513,706,981/=.

- 4.** KBL lodged an objection to the assessment on 20th February 2022. The Commissioner subsequently issued an objection decision dated 12th May 2022, thereby confirming the assessment.
- 5.** Aggrieved by the objection decision, KBL filed an appeal before the Tax Appeals Tribunal (the Tribunal). On 6th October 2023, the Tribunal allowed the appeal and set aside the Commissioner's objection decision. The Tribunal held that Legal Notice No. 217 of 2021 was not operational during the material period, thereby rendering the assessment unlawful.
- 6.** The Tribunal set aside the Commissioner's objection decision confirming an excise duty assessment of Kshs. 513,706,981/= against KBL. This decision precipitated the present appeal before this Court.
- 7.** From the Memorandum of Appeal dated 5th December 2023, the statement of facts and the submissions filed, which I have carefully considered, the following issues arise for determination:

- a) *Whether this Court has jurisdiction to hear and determine the present appeal;*
- b) *Whether the matter herein is now spent following the ruling of the **High Court in Pet. No. E024 of 2021: Mwaura Kabata & Anor V Kenya Revenue Authority & Another** and the impact of the current proceedings;*
- c) *Whether the Tribunal had jurisdiction to interpret the Ruling and Order of the High Court; and*
- d) *Whether the Commissioner failed to adhere to the status quo orders issued by High Court in **Pet. No. E024 of 2021: Mwaura Kabata & Anor V Kenya Revenue Authority & Another** and the impact on the tax demand herein;*

8. On the first issue, KBL raises a preliminary objection challenging the jurisdiction of this Court to entertain this appeal on the ground that it is fatally defective for want of a valid Notice of Appeal filed within the statutory timeline. It contends that the Tribunal delivered its judgment on 6th October 2023. Pursuant to **Section 32(1) of the Tax Appeals Tribunal Act (TATA)**, the Commissioner was obligated to file a Notice of Appeal within thirty (30)

days thereof, that is, on or before 6th November 2023.

- 9.** The Commissioner failed to do so and instead, on 3rd July 2024, approximately eight (8) months after the statutory period had lapsed, the Commissioner filed an application seeking leave to amend a Notice of Appeal allegedly filed on 6th November 2024 in **Tax Appeal No. 669 of 2022**. The purpose of the amendment was purportedly to correct a typographical error in the case number.
- 10.** KBL points out, however, that the Commissioner did not seek leave to file the amended Notice of Appeal out of time, as is mandatorily required under **Rule 4 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015**.
- 11.** According to KBL, the High Court, in its Ruling delivered on 15th November 2024, granted the Commissioner leave to amend the Notice of Appeal but did not issue any order extending the time for filing the amended Notice of Appeal. It adds that the Ruling was rendered more than one year after the

statutory deadline for filing the Notice of Appeal had expired.

- 12.** KBL therefore contends that the Commissioner's failure to obtain leave for extension of time within which to file the Notice of Appeal renders the present appeal incompetent and that there exists no jurisdictional foundation upon which the appeal can be sustained.
- 13.** The Commissioner on the other hand argues that this Honorable Court allowed its application dated 3rd July 2024 and accordingly the Notice of Appeal was deemed as duly on record.
- 14.** I have taken the liberty of confirming, for the sake of accuracy in the record, that prayer 2 of the application referenced by the Commissioner sought leave for the applicant to correct a typographical error in the Notice of Appeal dated 6th November 2023. Specifically, the correction was to amend the reference from TAT No. 669 of 2022 to TAT No. 668 of 2022, and to have both the Notice of Appeal and the Record of Appeal deemed as duly filed and properly on record.

15. Prayer 2 in the said application reads as follows:

“That leave be granted for the Applicant to correct the typographical error in the Notice of Appeal dated 6th November 2023 which to read TAT No. 668 of 2022 instead of TAT No. 669 of 2022 and deem the Notice of Appeal, the Record of Appeal to be duly on record.”

16. Subsequently, in a Ruling dated 15th November 2024 this Court held as follows:

“Given the public interest issues at stake, including matters of tax litigation and the significant sums in dispute, I find that the need to administer substantive justice and afford the appellant an opportunity to be heard far outweighs any potential harm to the respondent, if any. ... Accordingly, the application dated 9th April 2024 seeking to strike out

the appeal is dismissed. The application of 3rd July 2024 seeking leave to amend the typographical error is allowed. Each party shall bear its costs.”

- 17.** It is therefore clear that by allowing the application dated 3rd July 2024 unconditionally, the Court granted the reliefs sought therein in full. The preliminary objection raised by KBL accordingly fails. I now proceed to consider the appeal on its merits.
- 18.** The Commissioner contends that the core issue in the appeal before the Tribunal concerned the effect and interpretation of the status quo orders issued by the High Court, an issue that, in the Commissioner’s view, fell outside the Tribunal’s jurisdiction. Particular objection is taken to the Tribunal’s reasoning at paragraph 108 of its Judgment, where it purported to interpret the scope and effect of the High Court’s orders.
- 19.** The Commissioner asserts that the proper course would have been for the Tribunal to defer to the

High Court and refer the question for interpretation, rather than embarking on an interpretative exercise that risked encroaching upon the supervisory jurisdiction of the superior court.

- 20.** In response to this averment KBL urges that its appeal before the Tribunal (as set out in the Memorandum of Appeal) challenged the validity of the Commissioner's tax assessment. The sole issue before the Tribunal was the legal justification for the assessment, a question that was squarely within the Tribunal's jurisdiction. The Tribunal's jurisdiction was never in question. KBL defends the Tribunal for having simply found that in light of the status quo orders issued by the High Court on 19th November 2021 and clarified on 15th December 2021 meant that the assessment was not justified.
- 21.** I have reviewed the appeal filed before the Tribunal and agree that its central issue was the validity of the assessment made by the Commissioner. However, I respectfully disagree with the proposition that, because there was no express ground seeking interpretation of this Court's status quo orders, the matter was not *sub judice*.

22. The doctrine of *sub judice* is codified under **Section 6 of the Civil Procedure Act**, which provides that a suit is *sub judice* if the matter in issue is **directly and substantially in issue** in a previously instituted suit between the same parties, pending before a court competent to grant the relief sought. In the present case, the Commissioner raised the issue before the Tribunal that the proper interpretation and effect of the status quo orders issued by this Court on 19th November 2021 was still in issue.

23. In **Kenya National Commission on Human Rights V Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties), [2020] eKLR**, the Supreme Court articulated the proper approach in matters where the doctrine of *sub judice* is invoked. The Court stated:

“This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is

filed later ought to be stayed in order to await the determination to be made in the earlier suit.”

- 24.** In the present case, the existence of a pending constitutional challenge to Legal Notice No. 217 of 2021, coupled with the unresolved question of what status quo this Court intended to preserve through its orders, and the further dispute as to whether the Commissioner’s assessment made pursuant to LN 217/2021 was lawful, rendered the issues before the Tribunal inextricably linked to those pending before this Court. These issues were not only central to the determination of the appeal before the Tribunal, but also fell squarely within the scope of the *sub judice* rule.
- 25.** It is manifest that the Tribunal could not validly determine the lawfulness of the Commissioner’s assessment without necessarily engaging, either directly or by implication, in an interpretation of the High Court’s subsisting status quo orders. Such an exercise would have encroached upon matters actively under adjudication before a court of competent jurisdiction, thereby creating a real risk of conflicting findings and undermining the

authority and effectiveness of this Court's ongoing proceedings.

- 26.** In the circumstances, the Commissioner's apprehension that the Tribunal's determination could potentially conflict with the ongoing proceedings before this Court was entirely legitimate. The Tribunal was fully aware, as is clearly borne out by the record and the parties' submissions, that the Commissioner had filed an application dated 10th January 2022 seeking to set aside the orders of 19th November 2021.
- 27.** The application was pending a determination before the High Court. In such circumstances, the Tribunal was under a duty to exercise judicial restraint by deferring its determination until the constitutional petition or the application had been conclusively resolved. This course of action would have been in keeping with the constitutional principle of comity among courts and in due deference to the supervisory jurisdiction of the High Court as established under **Article 165 of the Constitution.**

- 28.** Moreover, the Tribunal observed that KBL's core ground of appeal was that the Commissioner had acted in breach of status quo orders. However, it did not merely acknowledge the existence of those orders. Rather, it proceeded to evaluate their legal effect, including whether they precluded the implementation of LN No. 217 of 2021. In so doing, the Tribunal necessarily ventured into interpreting the High Court's orders, which was outside the scope of its jurisdiction.
- 29.** This was not merely incidental to the tax appeal; it was the foundation of the Tribunal's decision. Without first interpreting the legal consequence of the status quo order, the Tribunal could not pronounce itself on whether the assessment was issued in breach of law.
- 30.** The Tribunal was therefore being invited, expressly or implicitly, to engage in judicial interpretation of High Court orders, which was jurisdictionally impermissible. Consequently, the Tribunal's finding that the assessment was unlawful, grounded as it was in an unauthorized interpretation of a superior court orders, is legally unsustainable. The Tribunal

ought to have declined to assume jurisdiction over an issue that was squarely within the constitutional purview of the High Court.

31. Accordingly, the Tribunal's decision is vitiated by jurisdictional overreach. In determining the meaning and effect of the status quo order, especially while the same issue was before the High Court, the Tribunal strayed into a constitutional and interpretive domain not open to it. This alone warrants setting aside its decision.

32. On the final issue, it is clear that these questions are now all res judicata as this Court on 24th August, 2024, interpreted the order and further stated what the effective date of the legal notice was. There is not controversy over the determination of this Court. At paragraph 48 of the Ruling the Court is quoted to have noted:

“Legal Notice No.217 of 2021 was published in the Kenya Gazette on 2nd November 2021. It means therefore that by virtue of that publication it became effective on 2nd November 2021. It was tabled

in Parliament on 8th November 2021. This was in line Section 11 of Statutory Instruments Act that required the same to be done within 7 days of publication. Once tabling was done and there was no annulment by Parliament it continued being in force and this was the case as at 19th November 2021 as its operation was now a matter of law.

33. At paragraph 52 of the Ruling the Court further noted:

“At the time the order of status quo was made by 19th November 2021, the legal notice was in force. The 2nd Respondent could thus not have breached the order of 19th November 2021 as the process was no longer in its hands. It was in place as a result of the operation of law. The Court did not suspend the operation of the gazette notice, it simply

maintained the status quo as 19th November 2021 which was not impactful as operationalization had been effective since the 2nd November 2021.

34. Although KBL objected to the Commissioner's reliance on the 2024 Ruling, on the basis that it was not pleaded in the Memorandum of Appeal, I have taken note that the Ruling was delivered after the filing of the present appeal and it directly bears upon the issues already in contention. Moreover, the Ruling is a matter of judicial notice, being a decision of a superior court of record in proceedings between the same parties. The Commissioner was therefore entitled to refer to it without the need to seek leave to amend the Memorandum of Appeal, as it did not introduce a new cause of action but merely supported the existing grounds of appeal.

35. As to the effect of the 2024 Ruling, KBL contends that it cannot operate to revive the Commissioner's assessment dated 21st March 2022, which had already been declared unlawful by the Tribunal. At the time the Tribunal rendered its judgment, the

status quo order, which was later clarified, remained valid, binding, and had not been set aside. According to KBL, the fact that the said order was subsequently vacated on 26th August 2024 does not, and cannot, retrospectively invalidate actions or decisions taken while the order remained in force.

- 36.** Having carefully considered the 2024 Ruling and the submissions of the parties, I am inclined to agree with the Commissioner that there was, in fact, no suspension of LN No. 217 of 2021 at any material time. The Legal Notice was published on 2nd November 2021 and tabled in Parliament on 8th November 2021, well within the statutory period prescribed under **Section 11 of the Statutory Instruments Act**. There being no annulment by Parliament, the Legal Notice came into force upon publication and continued to operate by virtue of law.
- 37.** The status quo order issued on 19th November 2021 did not suspend the operation of the Legal Notice, nor did it contain language to that effect. As clarified in the 2024 Ruling, the status quo order was granted on the mistaken belief that the

implementation of the Legal Notice had not yet commenced. However, as the Court expressly held that by 19th November 2021, the Legal Notice had already taken effect and its implementation had passed into the domain of the law, beyond the control of the Commissioner. The Court further noted that the order to maintain the status quo **had no practical impact**, as the instrument was already in force and operationalized.

38. This clarification, in my view, is of critical importance. It confirms that the regulatory framework introduced by LN No. 217 of 2021 remained valid and enforceable throughout the relevant period. In **Republic V National Environment Tribunal, ex-parte Palm Homes Limited & Another, [2013] eKLR**, Odunga J. stated:

“When a court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining

status quo is meant to preserve existing state of affairs. ... Status quo must therefore be interpreted with respect to existing factual scenario. ..."

39. Consequently, the Commissioner was lawfully entitled to apply the provisions of that Legal Notice in raising the impugned assessment. The Tribunal's finding to the contrary, premised on an erroneous interpretation of the status quo order, was therefore misplaced and without legal foundation.

Disposition

40. In the result, the appeal by the Commissioner succeeds. I find that the objection decision of 21st March 2022 made by the Commissioner was properly grounded in law and is therefore upheld. The findings or conclusions by the Tribunal suggesting that the Commissioner acted in breach of the status quo order, or that the LN No. 217 of 2021 had been suspended, are hereby set aside. Each party shall bear their own costs of the appeal.

**DATED, SIGNED AND DELIVERED AT NAIROBI
THIS 3RD DAY OF OCTOBER 2025.**

F. MUGAMBI
JUDGE

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