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REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

MILIMANI LAW COURT

HCCOMM TAX APPEAL NO. E325 OF 2024

**KORMOM HOLDINGS LIMITED.....
APPLICANT**

VERSUS

**THE COMMISSIONER
LEGAL SERVICES & BOARD COORDINATION.....
RESPONDENT**

(Being an appeal against the judgment of the Tax Appeals Tribunal, delivered at Nairobi on 22nd November, 2024 in TAT No. E006 of 2024)

BETWEEN

**KORMOM HOLDINGS LIMITED.....
APPLICANT**

VERSUS

**THE COMMISSIONER
LEGAL SERVICES & BOARD COORDINATION.....
RESPONDENT**

JUDGMENT

1. This judgment arises from the decision of the Tax Appeals Tribunal delivered on 22.11.2024. This is in

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respect to Tax Appeals Tribunal Tax Appeal No. E006 of 2024.

Background Facts

2. The Appellant was the unsuccessful Appellant before the Tax Appeals Tribunal. The Respondent was and is still the Respondent.
3. The Appellant was issued with additional assessments dated 9th August 2023, for July 2022, April 2022, July 2021 and the years 2020/2021 and 2021/2022. The total amount said to have been based on variance derived from the Appellant's banking, was Ksh.16,317,502.35.
4. The Appellant proceeded to lodge an objection to the assessment and provide documentation to clarify the alleged variance between what it had declared vis - s vis what had been established as per the bank statements. This was done on 28.9.2023.
5. On 20th November 2023, the Respondent issued an Objection Decision, whereby it disallowed the Appellant's objection. It confirmed the principal tax assessments with respect to Income Tax and VAT.
6. The Appellant aggrieved by the decision of the Commissioner dated 20.11.2023, proceeded to file an

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Appeal to the Tax Appeals Tribunal (*herein after referred to as the "TAT"*).

7. The Tax Appeals Tribunal after due consideration of the Appeal proceeded to deliver a decision dated 22nd November, 2024 as follows;

"FINAL DECISION

The upshot of the foregoing is that the Appeal lacks merit and the Tribunal accordingly proceeds to make the following final orders:

- a) The Appeal be and is hereby dismissed.*
 - b) The Respondent's Objection Decision dated 20th November 2023 is hereby upheld.*
 - c) Each party to bear its own costs."*
8. The Appellant has now preferred an Appeal to this Court.
 9. In its Memorandum of Appeal dated 17th December, 2024, the Appellant raised the following grounds of appeal:
 - 1.) *The Honourable Tribunal erred in fact and law by upholding the objection decision of the Respondent, on the basis that the Appellant failed to discharge its burden of proof pursuant to Section 56(1) of the Tax Procedures Act.*
 - 2.) *The Honourable Tribunal erred in fact and law by failing to interrogate whether the documents requested by the Respondent were relevant in the*

process of determining if the VAT and Income Tax assessments raised were due and payable.

- 3.) *The Honourable Tribunal erred in failing to consider that the Appellant had delivered the documents in its possession and those relevant to the assessment to the Respondent together with its notice of Objection.*
- 4.) *The Honourable Tribunal erred in erroneously finding that the Appellant had not dislodged their duty to prove that the objection decision was incorrect despite the Appellant having delivered the documents in its possession and those relevant to the assessment in question together with its notice of objection.*
- 5.) *The Honourable Tribunal erred in law by disregarding the fact that the burden of proof had shifted to the Respondent to discharge after the Appellant had provided the requisite documents at the objection stage.*
- 6.) *The Honourable Tribunal erred in law and fact by failing to consider all the material facts, evidence and legal arguments presented by the Appellant and ultimately arrived at an erroneous decision.*

10. It is proposed to seek the following reliefs in this Appeal:

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- a) *This appeal be allowed with costs to the Appellant.*
- b) *The judgment for the Tax Appeals Tribunal dated 22nd November 2024 be set aside;*
- c) *Any other orders that this Honourable Court may deem fit to grant.*

Issues of Determination

11. The Court has considered the Record of Appeal, the Supplementary Record of Appeal, The Statement of Facts, the Memorandum of Appeal, the written submissions and the oral highlights by Counsel for the parties. The Court frames a single issue for determination as follows:

- a) *Whether the Tribunal erred in upholding the Objection Decision by the Respondent dated 20.11.2023.*

Analysis

12. The jurisdiction of this Court while hearing an Appeal from the Tribunal is narrowly circumscribed by Section 56 of the Tax Procedures Act (*herein after referred to as the "TPA"*). It provides as follows:

56. General provisions relating to objections and appeals

(1) In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.

(2) An appeal to the High Court or to the Court of Appeal shall be on a question of law only.

(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.

13. The burden to prove that the tax decision is incorrect or that the assessment is excessive lies upon the tax payer. It therefore follows that once the Tax Authority (the Respondent) has made an assessment, the burden of proof shifts to the tax payer. It is up to the tax payer to show that the tax decision is erroneous, excessive and did not follow the law or it should have been made differently. The rationale behind this being that bar any challenge, the tax decision stands as a valid decision that is executable.

a) Whether the Tribunal erred in upholding the Objection Decision by the Respondent dated 20.11.2023.

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14. The Appellant submits that the Honourable Tribunal misapplied the Banking Analysis Test by failing to take into consideration inter-bank transfers, loan, contra entries, bounced cheques and capital injections. That is erroneously by assuming that every deposit to the Bank Account was an income. That this runs contrary to Section 3(2) of the Income Tax Act.
15. Put differently the Appellant is heard to submit that the Tribunal failed to appreciate that not all the deposits or credits in the Bank Account were profits or an income. That any loans taken by the Appellant, would appear in the Bank statements as a deposit or a credit. Yet such a loan could not be treated as a taxable income by the Tribunal.
16. The Court was referred to decisions in **Bachmann v The Queen 2015 TCC 51, Hole v The Queen, 2016 TCC 55** on the manner in which the Banking Analysis method was to be applied in assessment of taxes.
17. That the Tax payer provides proof and documentation to support the case through the Notice of Objection. That the pendulum of evidence then shifts placing the duty to discharge the burden of proof upon the Respondent. The Court was referred to **Commissioner of Domestic Taxes v Trical and Hard Limited [2022] KEHC 9927 (KLR)**.

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18. It is submitted that once the Appellant provided the documentation sought, the Respondent had a duty to consider them. Therefore, it would make adjustments on non-income deposits from the banking made as per the banking slips.
19. It was submitted that failure to consider such materials then lay proof to a claim of abuse of legislative powers. For that reason, the Respondent could not rely on the tax decision. The Applicant cited **Kenya Revenue Authority v Export Trading Company Limited [2020] KECA 251 (KLR)**.
20. That tax statutes are to be considered with certainty and clarity was the subject of the decision in case of **Cape Brandy Syndicate V Inland Revenue Commissioner (1921) 1 KB 64** and **Kenya Revenue Authority v Republic (Ex parte Fintel Limited) NRB CA Civil Appeal No 311 of 2013 [2019] eKLR**.
21. For this reason, the Court was urged to allow the Appeal.
22. The Respondent opposed the Appeal and more so the proposition that it failed to consider the “Banking Analysis Test” that was employed in the assessment. That the said result was prejudicial to the Appellant.
23. The Court was referred to **Section 56 (1) of the Tax Procedures Act** on the evidential burden borne by the tax payer as follows:

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56. General provisions relating to objections and appeals'

(1) In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.

24. The Appellant relied upon **Section 30 of the Tax Appeals Tribunal Act** which provides as follows:

30. Burden of proof

In a proceeding before the Tribunal, the appellant has the burden of proving—

(a) where an appeal relates to an assessment, that the assessment is excessive; or

(b) in any other case, that the tax decision should not have been made or should have been made differently.

25. The Appellant relied upon the decisions in **Kenya Revenue Authority v Man Diesel & Turbo Se, Kenya [2021] KEHC 13347 (KLR)**. It confirmed that the tax payer bears the burden of proving the decision of the Tax authorities as incorrect.

26. The Appellant further submits that though it was requested by the tax authority to submit document in support of its Notice of Objection, those documents sought were not

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relevant at arriving at the decision of the Respondent. The documents sought were Bank credits, sales ledger/schedules, bank statements, audited financial statements and trial balances.

27. On what is competent and relevant evidence, the Respondent referred the Court to **Commissioner of Domestic Taxes v Trical and Hard Limited [2022] KEHC 9927 (KLR)**.

28. It was submitted that no burden of proof shifted as the Appellant did not provide any documentation. That those documents were not forwarded to the Tribunal or even in this Appeal. The Court has nothing by way of documentation to compare in this Appeal. The Court is urged to dismiss the Appeal.

29. The Court notes that the Tribunal framed the issues in the Appeal correctly as follows:

- i) Whether the Respondent was justified in issuing the additional Income Tax and VAT assessments; and*
- ii) Whether the Appellant had discharged its burden of proof.*

30. In its judgment, the Tribunal noted that the Respondent had requested the following documents from the Appellant prior to the assessment;

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- a) *Reconciliation of bank credits for the period August 2020 to July 2022 to sales declared in Appellant's Income Tax Company & VAT returns in the period along with relevant supporting evidence:*
- b) *Sales ledgers/schedules for the period under review:*
- c) *Bank statements, Audited Financial Statements & trial balances for the period under review:*
- d) *Evidence in support of allowability of the expenses incurred in the period under review: and*
- e) *Evidence in support of allowability of the disallowed purchase inputs claimed in Appellant's VAT returns for April 2022 in accordance with the provisions of Section 17 of the VAT Act 2013.*

31. The Appellant provided Bank Statements only and did not provide the other documents or details sought.
32. This Court notes that the Tribunal analysed the duty of a tax payer to maintain and keep records as per **Section 23(1)(a) and (b) of the Tax Procedures Act** as follows:

23. Record-keeping

(1) A person shall—

- (a) maintain any document required under a tax law, in either of the official languages;**

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(b) maintain any document required under a tax law so as to enable the person's tax liability to be readily ascertained; and

33. It also considered **Section 54 A (1) of the Income Tax Act** on the duty of a tax payer to keep records as follows:

54A. Keeping of records of receipts, expenses, etc.

(1) A person carrying on a business shall keep records of all receipts and expenses, goods purchased and sold and accounts, books, deeds, contracts and vouchers which in the opinion of the Commissioner, are adequate for the purpose of computing tax

34. The Tribunal also analyzed the provisions of **Section 58 and 59 of the Tax Procedures Act** which states as follows:

58. Power to inspect goods, records, etc.

(1) Notwithstanding anything to the contrary in any written law, an authorised officer may inquire into the affairs of a person under any tax law, and shall at all times have full and free access to all lands, buildings, places to inspect all goods, equipment, devices and records, whether in the custody or control of a public officer, or of

a body corporate or of any other person, and may make extracts from or copies of those records.

(2) An officer acting under subsection (1) may require the owner or employee, or a representative of the owner of the business, to give him all assistance and to answer all questions relating to the inquiry.

59. Production of records

(1) For the purposes of obtaining full information in respect of the tax liability of any person or class of persons, or for any other purposes relating to a tax law, the Commissioner or an authorised officer may require any person, by notice in writing, to—

(a) produce for examination, at such time and place as may be specified in the notice, any documents (including in electronic format) that are in the person's custody or under the person's control relating to the tax liability of any person;

(b) furnish information relating to the tax liability of any person in the manner and by the time as specified in the notice; or

(c) attend, at the time and place specified in the notice, for the purpose of giving evidence in

respect of any matter or transaction appearing to be relevant to the tax liability of any person.

(2) If the person required to produce documents under subsection (1)(a) is a financial institution—

(a) the documents shall not, while they are being examined, be removed from the premises of the financial institution or other premises at which they are produced;

(b) the Commissioner or authorised officer carrying out the examination may make copies of such documents for the purposes of any report relating to the examination; and

(c) the confidentiality of the information obtained in the course of the examination by the Commissioner or authorised officer shall be maintained and the information shall be used solely for the purposes of the tax laws.

(3) The Commissioner or authorised officer may require that the information referred to in subsection n (1) be—

(a) given on oath, verbally or in writing, and, for that purpose, the Commissioner or authorised officer may administer the oath; or

(b) verified by a statutory declaration or in any other manner that the Commissioner may prescribe.

(4) This section shall have effect despite—

(a) any law relating to privilege or the public interest with respect to the giving of information or the production of any documents (including in electronic format); or

(b) any contractual duty of confidentiality

35. Turning to the grounds of appeal relied upon, the Tribunal noted that no documentation was provided to the Tribunal. The Tribunal desired to see the details and documentation but was not provided with any. There was nothing to persuade the Tribunal to consider how the Respondent failed to consider the documentation provided. The Tribunal stated as follows:

“The Tribunal notes that the Appellant provided very strong grounds of Appeal. But the only documents to support those grounds tendered at the Tribunal were the Objection Decision and the Notice of Appeal. On each of those grounds, no evidence was tendered to the Tribunal to support the Appellant’s averments. The Tribunal would have appreciated to see the documents that the Appellant alleged to have given to the

Respondent and the evidence that the Respondent failed to consider those documents in making its Objection Decision. This would have assisted the Tribunal in resolving the dispute before it.

Further, although the Respondent indicated the documents it requested the Appellant to provide in its email of 12th October 2023 and a reminder on 23rd October 2023, the Appellant did not indicate to the Tribunal whether it provided those documents or the reasons for not having done so.

In determining this matter, the Tribunal is guided by the Court of Appeal holding in CMC Aviation Ltd vs. Kenya Airways Ltd (Cruisair Ltd) [1978] eKLR where the Court faulted the reliance on averments as evidence in arriving at a decision. The Court stated as follows;

“The pleadings contain the averments of the parties concerned. Until they are proved, or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of “evidence” in section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved. Averments

are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven. Averments in no way satisfy, for example, the following definition of “evidence” in Cassell’s English Dictionary, p 394:

Anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth. The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”

Since the Appellant did not give evidence of the documents that it may have supplied to the Respondent which were not considered in arriving at the decision to issue additional Income Tax and VAT assessments, the Tribunal finds that the Respondent was justified in issuing the additional Income Tax and VAT assessments.”

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36. The Court reaches a similar finding as the Tribunal. There is no documentary evidence before the Court to enable the Court apply its mind and arrive at a different decision.
37. The burden of proof at all times lay on the tax payer as per the provisions of **Section 56(1) of the Tax Procedures Act** and **Section 30 of the Tax Appeals Tribunal Act**. The records were maintained or the duty to maintain them was born by the tax payer as per the provisions of **Section 54 A of the Income Tax Act**.
38. The Court is unable to fault the decision of the Tribunal. In absence of the documentary evidence or materials, it is unable to apply its mind so as to reach a different decision. This Court can only apply itself to the record of proceedings and documentation before the Tribunal.
39. On costs the same lie at the discretion of this Court. The Court directs that each party to bear its own costs.

Determination

40. The Appeal is hereby dismissed for lack of merits and the Objection Decision dated 20th November 2023 is upheld.
41. Each party is to bear its own costs of the Appeal.
42. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MILIMANI THIS
12TH DAY OF MARCH, 2026.**

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**NJOROGE BENJAMIN K.
JUDGE**

In the presence of:

N/A for Mr. Wairegi for the Appellant.

Mr. Nyapara for the Respondent.

Peter Wabwire - Court Assistant.