Sanitation Company Limited v Commissioner for Domestic Taxes (Income Tax Appeal E309 of 2024) [2025] KEHC 11290 (KLR) (Commercial and Tax) (30 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11290 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E309 OF 2024

JK NG'ARNG'AR, J

JULY 30, 2025

BETWEEN

SANITATION COMPANY LIMITED ..... APPELLANT

AND

COMMISSIONER FOR DOMESTIC TAXES ..... RESPONDENT

JUDGMENT

1. The Appellant is a limited liability company that is non-profit making and fully owned by the County Government of Nyeri. Its core function is the provision of water and sanitation services to the residents of Nyeri Town and its environs, under a service provision license from the Tana Water Service Board.

2. The Respondent is a principle officer appointed under the *Kenya Revenue Authority Act* Cap. 469 and is charged with the mandate of assessment, collection and accounting for all revenues and taxes on behalf of the Government of Kenya.

3. Following a letter issued to the appellant on 30/3/2015, the respondent carried out a VAT audit of the Appellant's tax affairs and raised additional VAT assessment of Kshs. 35,384,476.00 on 7/5/2015 prompting the appellant to file a notice of objection on 28/5/2015. The respondent confirmed the addition VAT assessment on 28/7/2015 and the appellant filed an appeal before the tax tribunal vide memorandum of appeal dated 7/9/2015 on grounds that the respondent erred by excluding sewer and meter rent from zero-rated supplies which are part of water supply. The tribunal delivered its judgment on 22/11/2024 upholding the respondent's additional VAT assessment.

4. Being dissatisfied with that decision, the appellant filed the instant appeal vide memorandum of appeal dated 6/12/2023 which was based on 3 grounds. Those grounds included that the tribunal erred in holding that the respondent's objection decision was not valid, erred in failing to consider the

appellant's case on merit, and that the tribunal misdirected itself on both facts and law and thus arrived at an erroneous decision.

5. The appellant thus prayed that the judgment be set aside and it's objection decision be upheld.

6. Being dissatisfied with that decision, the appellant filed the instant appeal vide memorandum of appeal dated 25/11/2024 which was based on 6 grounds. Those grounds included that the tribunal erred in its interpretation of the VAT Act 2013 on meter rent and sewerage services, and failed to appreciate the effect of levying VAT on the appellant to its customers without appreciating the appellant's financial position and service delivery. That the tribunal failed to appreciate the regulated nature of the appellant in terms of tariffs as approved by the Ministry of Water through the Water Services Regulatory Board.

7. The appellant thus prayed that the judgment be set aside and it's objection decision be upheld.

8. The respondent opposed the appeal and filed its statement of facts dated 11/6/2025. The appeal was canvassed by way of written submissions with the parties advancing their respective positions.

Analysis and Determination

9. The main issue in contention is whether sewerage services are zero-rated and thus exempted from VAT. As it is, the Finance *Act No. 14 of 2015* introduces and expressly exempts the supply of sewerage services by the national government, a county government, any political subdivision thereof or a person approved by the Cabinet Secretary for the time being responsible for water development under Paragraph 23, Part II of the First Schedule of the VAT Act, 2013 with effect from 12th June 2015.

10. Agreeably, sewerage services involve disposal of sanitary waste and as such fell under Paragraph 5 of the Third Schedule to the repealed VAT Act (Repealed) which prior to September 2013, when the new VAT Act, 2013 came into effect, was exempt from VAT. However, between the period 2nd September 2013 to 11th June 2015, the VAT *Act No. 35 of 2013* did not list sewerage services under the exempted services thus 16% VAT was applicable for that period.

11. The audit period for the instant appeal was 2/9/2013 to 10/6/2015 when VAT Act No. 35 was in place thus 16% VAT was applicable for that period as correctly assessed by the respondent.

12. The appellant submitted that under that Act, the supply of natural water was zero-rated and sewerage services were incidental to water supply thus equally zero-rated. The 2nd Schedule of the VAT Act 2013 provided that: -

> " the supply of natural water excluding bottled water by National Government, County Government, any political subdivision thereof or a person approved by the Cabinet Secretary for the time being responsible for water development, for domestic or for industrial use"

13. Respectfully, I do not agree with that submission. Supply of natural water is entirely different from sanitation or sewerage services. Though the appellant argued that the meaning of water services ought to be derived from the definition in the Water Acts of 2002 and 2016, I do note that tax laws must be construed strictly within their meaning. The Court of Appeal in Mount Kenya Bottlers Limited and Others v Attorney General and 3 Others NRB CA Civil Appeal No. 164 of 2013 [2019] eKLR held that: -

> " This common law position is what pertains here and has been adopted by our courts as good law. In our view there cannot be an equitable construction of income tax legislation. The norm is that a taxing legislation must be construed with perfect strictness whether or not

such construction is against the State or against the person sought to be taxed. If however there is any real ambiguity in a taxing Act, such ambiguity may be resolved in favour of the taxpayer, or, as it is sometimes stated: contra fiscum."

14. It then follows that the Court cannot rely on other statues to determine tax matters. The court in Thika Water & Sewarage Company Limited v *Commissioner of Domestic Taxes (Tax Appeal 8 of 2020)* [2022] KEHC 173 (KLR) was faced with a similar situation and the argument that interpretation of water services ought to be reliant on the Water A ct of 2002 and 2016 was rejected. The late J. Majanja held as follows: -

> " Further, in classifying its income as zero-rated, the Appellant also argued that sewerage services could also be considered and interpreted as incidental to the supply of natural water, at least going by the Water Acts of 2002 and 2016 and that the VAT Act, 2013 ought to be interpreted and read to include the sewerage services unless the same is specifically excluded since both services are defined as "water service" under both "Water Acts...the court cannot second-guess or imply into the provisions of tax statutes. The court cannot begin to draw a conclusion into what the intendment of the legislature was when it zero-rated the supply of water. It cannot thus import a definition from a different statute that is not pari materia with the administration of taxes into a tax statute as the Appellant suggests. The VAT Act, 2013 and other tax legislations ought to be read without leaving any room for implication or intendment. If Parliament intended to zero-rate sewerage services or include its meaning into the supply of natural water, nothing could have been easier than to say so. I thus reject the Appellant's entreaty to find that sewerage services were zero-rated because the supply of water was also zero-rated as they meant one and the same thing."

15. The issue of ambiguity, though submitted on by the appellant, does not arise in this instance. The VAT Act of 2013 clearly left out sewerage services from the list of exempted services. As such, the issue of ambiguity in interpretation does not arise and there was no confusion as to whether or not VAT was applicable to sewerage services at the time.

16. In the circumstances, I do uphold the respondent's finding that sewerage services were taxable at 16% in the period between 2/9/2013 to 11/6/2015.

17. In the end, I do find that the tribunal's decision was sound and there is no justification in interfering with it. Consequently, the same is hereby upheld.

18. The upshot is that the instant appeal lacks merit and the same is hereby dismissed.

19. Each party shall bear its own costs.

20. Leave to appeal is granted.

21. Stay for 30 days granted.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 30TH DAY OF JULY, 2025.

In the presence of:

Kimotho for the appellant

Mwongera for the respondent

Siele/Peter: CA

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J.K.NG'ARNG'AR

JUDGE