Commissioner of Legal Services and Board Coordination v Kapwell Enterprises Limited (Income Tax Appeal E215 of 2024) [2025] KEHC 12272 (KLR) (Commercial and Tax) (27 August 2025) (Judgment)

Neutral citation: [2025] KEHC 12272 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E215 OF 2024

RC RUTTO, J

AUGUST 27, 2025

BETWEEN

COMMISSIONER OF LEGAL SERVICES AND BOARD COORDINATION ..... APPELLANT

AND

KAPWELL ENTERPRISES LIMITED ..... RESPONDENT

(Being an Appeal against the judgment delivered on 28th June 2024 at the Tax Appeals Tribunal in Tax Appeals Tribunal Case No. E766 of 2023)

JUDGMENT

1. This appeal arises from a judgment delivered by the Tax Appeals Tribunal in Appeal No. E766 of 2023. In that matter, the Respondent challenged additional assessments for Income Tax and Value Added Tax (VAT) amounting to Kshs. 5,944,774 for the years 2015 and 2016. These assessments were based on alleged importation of goods in 2013 and 2014. The Respondent asserted that its sole business is clearing and forwarding, and that it has never imported goods either for itself or on behalf of its clients. It maintained that it was not a beneficiary of the alleged transactions and explained that a business associate had used its Personal Identification Number (PIN) to carry out the importations.

2. The Respondent stated that it had reported the matter to the Commissioner of Intelligence, Strategic Operations, Investigation and Enforcement, as well as to the Police. It further contended that the Appellant was aware of the actual beneficiaries of the scheme, whose PIN numbers were available and could be used to take appropriate enforcement action.

3. When the matter came before the Tax Appeals Tribunal, the Appellant argued that the Respondent had filed NIL returns for both Income Tax and VAT for the years 2015 and 2016, despite customs

data indicating that it had engaged in importation activities. Consequently, the Appellant treated the imports as undeclared sales and proceeded to assess Income Tax and VAT for the relevant years, which were the first returns filed by the Respondent following the rollout of the iTax system. Upon receiving the Respondent's objection wherein, the Respondent claimed not to have made any sales during the period under review and asserted that the goods had been cleared by third-party entities, namely Landmark Freight Services, Stemi Investment Limited, Bell Logistics Services, and Jamusa Enterprises, the Appellant requested additional customs data.

4. Following this, the Appellant partially conceded the assessments and indicated that it would engage the Respondent's business associate to settle the disputed tax. Nonetheless, it proceeded to issue an objection decision on 22nd September 2023, confirming the assessments totaling Kshs. 11,765,966.12, inclusive of penalties and interest.

5. The Tax Appeals Tribunal identified a single issue for determination: whether the Appellant erred in confirming the Respondent's VAT and Income Tax assessments based on the alleged imports. The Tribunal held that, under Section 4(3) of the *Tax Procedures Act* and Section 5(2) of the *Kenya Revenue Authority Act*, the Appellant has a statutory duty to conduct inquiries and investigations before making an assessment, in order to properly understand the taxpayer's business and associated costs.

6. The Tribunal found that the Appellant did not disclose the outcome of any investigation, if one had been conducted, to determine whether the adverse tax findings could be attributed to the Respondent. It further observed, based on the correspondence presented, that the Respondent had taken individual steps to prevent revenue loss by identifying the persons responsible for the misuse of its PIN and reporting the matter to the relevant authorities. In conclusion, the Tribunal found that the Respondent had discharged its burden of proof by demonstrating that it did not import any motor vehicles or goods. It therefore held that the assessment made by the Appellant, being based on purported imports, was excessive and that the tax decision ought to have been made differently.

7. The Appellant, being aggrieved by the entire judgment, lodged this appeal and set out the following grounds: that the Tribunal erred in fact and in law by failing to consider all the evidence presented before it; erred in fact and in law by failing to address all the grounds raised in the Respondent's Memorandum of Appeal; erred in law and fact by failing to adopt a holistic view of the matter; erred in law and fact by overlooking the fact that the Respondent relied on information provided by the Appellant; and erred in law and fact by disregarding certain material facts placed before it. The Appellant prayed that the appeal be allowed, that the judgment of the Tribunal delivered on 28th June 2024 and all consequential orders be set aside, and that it be awarded the costs of the appeal.

8. In accordance with the court's directions, the appeal was canvassed through written submissions. Both parties filed their respective submissions.

Appellant's Submissions

9. Counsel for the Appellant began by briefly outlining the background of the case and identified a single issue for determination: whether the Tribunal erred in vacating the Income Tax assessments for the years 2015 and 2016, and the VAT assessments for July and September 2015.

10. In addressing this issue, Counsel argued that the Tribunal erred in vacating the assessments on several grounds. Specifically, the Tribunal: that it failed to take into account the fact that the Appellant had relied on information provided by the Respondent; failed to consider all the grounds raised in the Respondent's memorandum of appeal; failed to evaluate all the facts presented before it; failed to adopt a holistic view of the matter; and further, ignored material facts that had been placed before it.

11. Counsel submitted that the Respondent had filed NIL returns for both Income Tax and VAT for the years 2015 and 2016, claiming that it had not conducted any business during that period. However, a review of customs data revealed that the Respondent had imported goods worth Kshs. 9,845,185 in 2013 and Kshs. 15,744,494 in 2014. During engagements between the parties, the Respondent explained that its role was limited to clearing and forwarding, and that a business associate had used its PIN to import goods in 2013 and 2014, contrary to their agreement.

12. Counsel further submitted that the Respondent had conceded to the assessment and undertook to engage its business associate to settle the disputed tax. It was contended that, in its Memorandum of Appeal, the Respondent admitted that its business associate had used the company's PIN to import goods, rather than for the agreed purpose of clearance.

13. Referring to the case of David Sironga Ole Tukai v Francis Arap Muge & 2 Others [2014] eKLR, Counsel argued that parties are bound by their pleadings and that a judicial authority should not determine issues that have not been pleaded. It was therefore submitted that the Tribunal erred by raising and determining matters not placed before it, and in doing so, failed to consider all the grounds of appeal set out in the Respondent's Memorandum of Appeal.

14. Relying on Section 61 of the *Evidence Act* and Section 13 of the *Tax Procedures Act*, Counsel submitted that the Personal Identification Number (PIN) issued by the Appellant is a unique identifier, and that a registered person can only be issued with one PIN at any given time. In this case, it was not disputed that the Respondent's PIN was used to import goods. Counsel argued that the Respondent had confirmed that a business associate used its company PIN to import goods, contrary to their agreement. Therefore, the Tribunal erred in failing to recognize that the importer of the goods was the Respondent, acting through its proxy. Counsel also submitted that the Appellant had considered Sections 31 and 51 of the *Tax Procedures Act* when issuing the additional assessments, and that the Tribunal's failure to uphold the same amounted to a denial of justice. Accordingly, Counsel urged the Court to set aside the judgment.

15. In reference to Section 4 of the *Fair Administrative Action Act* and Articles 47(1) and 50(1) of *the Constitution* of Kenya, Counsel submitted that the Appellant was entitled to a fair and reasonable hearing in the adjudication of the matter. In conclusion, the Appellant prayed that the Court grants the orders sought in the Memorandum of Appeal dated 19th August 2024.

Respondent's Submissions

16. The Respondent opposed the appeal, raising a single issue for determination, whether the appeal has merit. Counsel for the Respondent began by outlining the background of the case and submitted that the Respondent was a victim of identity theft, as its Personal Identification Number (PIN) was accessed and used by third parties to facilitate importation. It was argued that the Appellant's decision to compel the Respondent to pay Kshs. 5,944,775.04 in marked-up tax was both unjust and unfair. Counsel further submitted that, as the custodian of all tax-related information, the Appellant possesses both the capacity and the statutory mandate to investigate the identities of the directors of the clearing agents involved and to summon them for further inquiry.

17. Counsel contended that the appeal lacks merit, as it is grounded on matters of fact, contrary to Section 56(2) of the *Tax Procedures Act*, which limits the jurisdiction of the High Court to questions of law only. However, should the Court be inclined to entertain the appeal, it was submitted that the Appellant's decision to compel the Respondent to pay Kshs. 5,944,775.04 remained unjustified, given that the Respondent's PIN had been accessed and used by third parties without its knowledge or authority.

18. It was further submitted that the Respondent was not a beneficiary of the 560 motor vehicles imported, nor did it receive any payment or fee in relation to the said imports, as confirmed by its bank statements submitted to the Appellant. Relying on Section 4(3) of the *Tax Procedures Act*, Counsel argued that the provision is couched in mandatory terms and imposes a duty on the Appellant to conduct inquiries relating to tax compliance. In support of this position, the Respondent cited Anne Wanjiku Kahwai & Another v Kenya Revenue Authority & Another [2019] eKLR and Commissioner of Domestic Taxes v Neema Livestock & Slaughtering Investments Limited (Income Tax Appeal E316 of 2023) [2024] KEHC 9392 (KLR), asserting that the Respondent went above and beyond its obligations by identifying and disclosing the entities that accessed its PIN to facilitate the importation. Despite this, the Appellant failed to take any investigative or enforcement action, notwithstanding its statutory mandate to do so.

19. Regarding the use of the Respondent's PIN, Counsel submitted that no authority was sought or granted in writing for its use, and that the entities in question did not use the PIN in connection with the Respondent's tax affairs, as required by law. Consequently, the Respondent reported the matter to the police, resulting in the issuance of OB No. OB72/10/01/017 and the initiation of a criminal case, in which the Respondent's director recorded a statement and is a prosecution witness. While citing Section 13(3)(a) and (b) of the *Tax Procedures Act* and reaffirming reliance on the Neema Livestock case, Counsel argued that the Respondent had clearly discharged its burden of proof, and that it was the Appellant's inaction that ultimately led to the loss of revenue.

20. In conclusion, the Respondent urged the Court to dismiss the appeal with costs.

Analysis and Determination

21. Although the Appellant raised five grounds in its Memorandum of Appeal, the core duty of this Court is guided by Section 56(2) of the *Tax Procedures Act*, which expressly limits the jurisdiction of the High Court in tax appeals to questions of law only.

22. Guided by the above and having considered the record of appeal, the parties' written submissions, and the authorities cited, the sole issue for determination is whether the Tribunal erred in law by vacating the Income Tax and VAT assessments issued against the Respondent based on import data linked to its PIN.

23. This issue requires the Court to assess whether the Tribunal's decision to vacate the additional assessments was legally sound, considering both the procedural obligations imposed on the Appellant under Kenyan tax law and the factual context surrounding the alleged misuse of the Respondent's PIN.

24. The Appellant argued that tax assessments are presumed correct unless the taxpayer proves otherwise, citing Section 30 of the *Tax Appeals Tribunal Act* and Section 56(1) of the *Tax Procedures Act*. It maintained that the burden of proof lay with the Respondent to demonstrate that the assessments were incorrect or excessive. In response, the Respondent substantiated its position by confirming that it had reported the identity theft to both the Appellant and the police, and that it had not benefited financially from the alleged imports.

25. In its judgment, the Tribunal addressed the Appellant's conduct and the Respondent's efforts to report the misuse of its PIN. It observed:

> " 86. The Tribunal is of the view that the Appellant made efforts to ensure that the Respondent did not lose revenue by going beyond its responsibilities as indicated in the letters above. The Appellant indeed submitted that the

"Respondent is penalizing the Appellant for its failure to pursue the culprits of the identity theft and misuse of the Appellant's Personal Identification Number (PIN).

88. The situation in this matter is similar to the one indicated above because the Respondent promised to carry out an investigation and did not provide the results of the investigation and instead demanded taxes from the Appellant who had already reported to the Respondent and the police that it was a victim of identity theft.

89. The Tribunal further notes that the it is the Respondent who issues annual licenses to the Clearing and Forwarding Agents. With the information provided by the Appellant, all that the Respondent needed to do was to hold to account the Clearing Agents responsible for the transit Motor Vehicle units registered in Kenya.

90. The 5 Clearing and Forwarding Agents identified by the Appellant from the Respondent's Customs data would have been able to provide the information on the importers of the 560 units because those importers not only paid for the import duty (where applicable) but also settled the port clearance charges. But the Respondent chose not to follow the culprits and instead opted to pursue the Appellant who had reported the matter of its identity theft to the Respondent and the Police.

91. In view of the pleadings and documentation presented, the Tribunal is of the view that the Appellant discharged the burden of proof that it did not import any motor vehicle units or goods and that the assessment by the Respondent based on the purported imports was excessive and that the tax decision should have been made differently."

26. Sections 56 of the *Tax Procedures Act* outlines the general provisions relating to objections and appeals. It provides that: -

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.

27. Similarly, Section 30 of the *Tax Appeals Tribunal Act* provides that in proceedings before the Tribunal, the appellant bears 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.

28. Both provisions affirm the principle that the burden of proof lies with the taxpayer or appellant. In the present case, the Respondent was required to demonstrate that the tax assessments were incorrect or excessive.

29. Upon review of the record, this Court notes that the Respondent made considerable efforts to discharge its burden of proof. During its engagements with the Appellant, the Respondent disclosed the nature of its business, reported the misuse of its PIN, and identified the third parties involved. Despite this, the Appellant failed to take enforcement action against the identified entities or verify the legitimacy of the imports attributed to the Respondent. The Tribunal was therefore entitled, in law, to find that the Respondent had discharged its burden under Section 56(1) of the *Tax Procedures Act*.

30. It is also relevant to consider Section 13(3)(a) and (b) of the *Tax Procedures Act*, which provides that a taxpayer's PIN may only be used by a tax agent if: (a) The taxpayer has given written permission for its use; and (b) The PIN is used solely in connection with the taxpayer's own tax affairs.

31. In this case, there was no evidence that the Respondent had authorized the use of its PIN in writing, nor that the PIN was used in relation to its own tax obligations. Further Section 4(2) and (3) of the *Tax Procedures Act* imposes a statutory duty on the Kenya Revenue Authority (KRA) to conduct inquiries and investigations before concluding assessments. It provides that:

    (2) The Commissioner shall appoint authorized officers for the administration of tax law.

    (3) Authorized officers shall enforce compliance and make all due inquiries in relation to tax matters.

32. This Court reaffirmed that position in Commissioner of Domestic Taxes v Neema Livestock & Slaughtering Investments Limited [2024] KEHC 9392 (KLR), where it held:

> "36..... having established that it was not engaged in export business and having submitted the names/details of the 29 third parties that misused its PIN in the export business without paying taxes, the Respondent fully discharged its burden of proof in as far as the issue of misuse of its PIN certificate is concerned.
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> 37. It was not disputed that the Respondent was not engaged in export business yet the variance in the tax returns that the Appellant discovered during its audit of the Respondent's books was in respect to export data. I find that the Respondent discharged its burden of proof when it supplied the Appellant with the details of the 29 third parties that used its PIN for the Appellant's investigations.
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> 38. This court notes that the nature of the investigations to be conducted on the 29 entities is such that it is only the Appellant who is, under the law, capable of doing as mandated by the law."

33. This Court is persuaded by the reasoning in the Neema Livestock case and finds that the Appellant's failure to investigate the third-party misuse of the Respondent's PIN amounts to a dereliction of its statutory duty.

34. The Appellant's further contention that the Respondent conceded to the assessments is not supported by the record in a manner that would constitute a legal admission. The reference to engaging a business associate appears to have been a conciliatory gesture rather than an express acknowledgment of liability.

35. This Court also finds that the Appellant has not demonstrated any legal error in the Tribunal's handling of the factual and procedural aspects of the case. The Tribunal's decision was grounded in the evidence presented and was consistent with the applicable statutory provisions. The claim that the Tribunal failed to adopt a holistic view is unfounded, as the record reflects a thorough consideration of both legal and evidentiary elements.

36. Having considered the totality of the record, the applicable law, and the Tribunal's reasoning, this Court finds no basis to interfere with the judgment of the Tax Appeals Tribunal. The Tribunal acted within its legal mandate and correctly applied the law in determining that the assessments were excessive and unjustified. Its decision was neither perverse nor irrational.

37. Accordingly, this appeal lacks merit and is hereby dismissed. The judgment of the Tax Appeals Tribunal delivered on 28th June 2024 is upheld in its entirety, each party to bear its costs of the appeal.

38. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 27TH DAY OF AUGUST, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant