IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., MKUYE, J.A And WAMBALI J.A)

CIVIL APPEAL NO. 56 OF 2018

CELTEL TANZANIA LIMITED .... APPELLANT

VERSUS

COMMISSIONER GENERAL
TANZANIA REVENUE AUTHORITY .... RESPONDENT

(Appeal from the Judgment and Decree of the Tax Revenue Appeals Tribunal at Dar es Salaam

(Mataka- Vice Chairman)

Dated the 4th day of August, 2011
in
Tax Appeal No. 5 of 2011

JUDGMENT OF THE COURT

25th March, & 6th May, 2019

MWARIJA, J.A.:

The appellant, Celtel Tanzania Limited (currently known as Airtel Tanzania Limited) is a company which is incorporated in Tanzania. It deals with telecommunications business. In the year 2004, it made two payments to two foreign companies, Alcatel France and Ericsson AB for software and software licence at a total cost of TZS 830,115,584.00. The use of the purchased software was subject to Service Levy Agreement (SLA) and a Country Frame Contracts (hereinafter "the Agreement"). A copy of the software and software licence of Ericsson AB which is similar to that of Alcatel France was admitted in evidence by the Tax Revenue Appeals Board (the Board) as exhibit A1.

Later in the year 2008, the respondent, Commissioner General of the Tanzania Revenue Authority, after having conducted a tax audit in respect of the appellant's accounts for the year 2004 demanded an amount of TZS 217,905,341.00 as withholding tax in the form of royalty arising from the payments made to the two foreign companies for the purchase of the software and software licence. The respondent demanded TZS 166,023,117.00 as principal tax and TZS 51,882,224.00 as interest. The demand was made vide certificate No. WHT/CSL/8/5/2010.

The appellant objected to the demand on account that the payments did not constitute royalty. It successful lodged its complaint in the Board, Income Tax Appeal No. DSM 31 of 2010. The respondent was aggrieved by the decision of the Board and thus appealed to the Tax Revenue Appeals Tribunal (the Tribunal) which allowed the appeal. In its decision, the Tribunal held that the payments constituted royalty as defined under section 2(1) of the Income Tax Act 1973 (ITA 1973) and section 3 of the Income Tax Act, 2004 (ITA 2004) and therefore, the appellant ought to have deducted the payable amount and remit it to the respondent. Both the ITA 1973 and the subsequently enacted ITA 2004 which came into operation on 1/7/2004 were applicable to the payments because, whereas the 1st payment was made between February and June, 2004 the second one was made after 1/7/2004 hence the application of the two Acts to the dispute giving rise to the appeal. In its judgment at page 260 of the record, the Tribunal observed as follows:-

> *"Alcatel France and Ericsson AB are the owners of the protected software that Celtel (T) needed to be able to provide mobile telephone services. Celtel was licensed to use the said software (programs) and duly paid the two owners for that access and right to use. The receipt of that payment, called royalty, constituted business income on which the law required the earners to pay income tax."*

The appellant was dissatisfied with the decision of the Tribunal hence this appeal which is predicated on the following four grounds:-

> *"1. The Hon Tax Revenue Appeals Tribunal (the Tribunal) erred in law by ignoring to determine an issue brought before it namely; the relevance of the authorities placed before it which if considered the*

Tribunal would have decided the matter in favour of the Appellant.

2. *The Hon. Tribunal erred in law and fact in holding that the computer software in issue purchased from two foreign companies are intangible intellectual property which is protected through patent arrangements without any evidence in support of the finding.*

3. *That the Hon. Tribunal erred in law by holding that the mere right to use software program constituted use of copyright, giving rise to royalty.*

4. *The Hon. Tribunal erred in fact and law by holding that payments made for the purchase of computer software licence were subject to withholding Tax on Royalty in terms of S. 2 (1) (a) and (2 (1) (d) of the Income Tax Act No. 33 of 1973 hence allowing the Appeal before it."*

At the hearing of the appeal, the appellant was represented by Dr. Alex Nguluma, learned counsel while the respondent was represented by Mr. Noah Tito, learned counsel. The learned advocates for the appellant and the respondent complied with the requirements of Rule 106(1) and (8) of the Tanzania Court of Appeals Rules, 2009 as amended by GN. No. 362

of 2017 by filing their respective written submissions in support of the appeal and the reply thereto.

Dr. Nguluma argued together the 1st, 2nd and 3rd grounds of appeal. In his written submission which he highlighted during his oral submission in Court, he mainly contended that the Tribunal erred in holding that the payments made for the purchase of computer software and software licence were subject to withholding tax on royalty in accordance with the provisions of section 2(1) (a) and (d) of the ITA 1973. According to the learned counsel, the finding by the Tribunal that the computer software *"is intangible intellectual property which is protected through patent arrangements* is erroneous because that finding is not supported by evidence.

Relying on the definition of the word "patent" in **Black's Law Dictionary**, 10th Edn., Thomson Reuters, the provisions of the Patents (Registration) Act [Cap 217 R.E. 2002] and Copyright and Neighbouring Rights Act [Cap. 218 R.E. 2002], the appellant's counsel submitted firstly, that the Tribunal erred in its finding because neither was evidence of existence of a patent produced nor was it established, under any of the two legislation cited above, that the software was an intellectual property.

Secondly, the learned counsel challenged the Tribunal's finding that the payments were subject to withholding tax.

He contended that the definition of the term "royalty" under S. 2 of the ITA, 1973 and S.3 of the ITA 2004 do not cover the transaction at issue. He thus argued that, since both Acts do not provide for guidance on the application of the term royalty, a recourse should have been had to international sources for guidance.

He contended that the Organization for Economic Cooperation and Development (OECD) Commentary on the Model Tax Convection on Income and Capital (hereinafter "the OECD Commentary") should have been resorted to for guidance on characterization of the payments at issue. It was Dr. Nguluma's stance that, since the definition of the term royalty in the 1973 and 2004 ITA is similar to that which is provided in Article 12 of the OECD Commentary, in terms of paragraphs 12.2. and 14.2 thereof, it should have been found that the payments did not constitute royalty. The learned counsel states as follows at page 8 of his written submission.

> *"These explanations [in paragraphs 12.2 and 14.2] makes it clear that a payment for software which is for the acquirer's own use, and which does not confer any rights that would otherwise be an infringement of a*

copyright (such as copying the program for sale or distribution to other person is not a 'royalty' as defined falling within Article 12 of the Model convention. Such a payment is instead part of normal business profits falling within Article 7 of the Model convention."

Making reference to the Country Frame Contract (exhibit A1), Dr. Nguluma argued that since the appellant's rights in both Ericsson AB and Alcatel France is only for its own use and without a right to copy or modify the software or make it available to any other person, the payments do not fall under the definition of royalty and thus not subject to withholding tax.

He challenged the submission made by the respondent's counsel and acted upon by both the Board and the Tribunal, that the provisions of S. 2 (1) (b), (c) and (d) of ITA 1973 were applicable to the nature of the payments in question even though the same were not for the use of a copyright. According to the respondent's counsel the said provisions capture the nature of payments in this case because, if the Parliament had intended otherwise, the word "copyright" should also have been inserted in those paragraphs as without that word, royalty would not arise for payments made in respect of the items described under the said paragraphs (b), (c) and (d) of S. 2 (1) of the ITA 1973.

Dr. Nguluma contended that the said paragraphs (b), (c) and (d) are intended to capture royalty in the use of "art", "Science" and "technology" as described in those paragraphs. He stressed however, that the words appearing at the end of paragraph (d) cannot apply to subsection (1) (a) of that section. The relevant part of paragraph (d) states as follows:-

> *"... or for information concerning Industrial, Commercial or Scientific equipment or experience, and includes gains derived from the sale or exchange of any right or property giving rise to such royalty."*

According to the learned counsel, royalty would be payable for the items mentioned in paragraphs (b), (c) and (d) without inclusion of the word "copyright" because copyright do not necessarily apply to the items stated in those paragraphs.

Relying also on the meaning of the word "copyright" as defined under S.3 of the Copyright and Neighbouring Rights Act, the appellant's counsel submitted that the use of that word is crucial in determining whether or not payments were subject to withholding tax.

Dr. Nguluma went on to argue that, since in terms of paragraphs 8.2 and 8.4 of the Agreement the computer software was not transferred to the appellant but instead, the appellant was granted the right to use the computer software, the payments did not constitute royalty as per paragraphs 12 and 14 of the OECD Commentary or the ITA 1973. He gave an example of a text book which is protected by a copyright and stated that the use of such a book is different from copying and selling its copies which would amount to infringement of copyright. In the circumstances, he said, the payments made by the appellant amounted to a purchase of goods. To bolster his argument that in this case, the payments did not constitute royalty, the learned counsel referred the Court to the decision of the Income Tax Appellate Tribunal of India, Delhi Bench in the case of **Infra Soft Ltd. v. Assistant Director of Tax India**, 2009 which he cited during the hearing before the Board as a persuasive authority. He stressed that, like in that case, the position in the present case is that the payments could not be taxed as royalty but rather, as business income.

On the cases of **Bulyanhulu Gold Mine Ltd v. Commissioner General (TRA)**, Consolidated Civil Appeals No. 89 and 90 of 2015, **Tullow Tanzania BV v. Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 24 of 2018 (both unreported) cited by the respondent's counsel in his reply submission and the case of **BP Tanzania**

v. The Commissioner General of the Tanzania Revenue Authority, Civil Appeal No. 125 of 2015 (unreported) which was cited by the said learned counsel at the hearing of the appeal, Dr. Nguluma submitted that the decisions do not apply to the particular facts of the present case because while in **Bulyanhulu** Gold Mine Ltd (supra) case the claimed tax was in respect of disallowance of expenditure, in the other two cases, the tax related to consultancy services.

With regard to the 4th ground, Dr. Nguluma submitted briefly, that, S. 2(1) (d) of ITA 1973 does not apply to the payments made by the two off-shore companies because a computer software is not an industrial equipment. He contended that from the definition in **Collins Cobuild English Dictionary**, 1995 Edn, "equipment" is a tangible thing and therefore, the description under the provisions S. 2(1) (d) of the ITA 1973 does not cover a computer software which is an intangible thing.

In his reply submission which he also highlighted them in his oral submission, Mr. Tito opposed the submission made in support of the appeal. On the 1st – 3rd grounds of appeal, he argued in reply that the payments made to the two foreign companies constituted royalty because the payments were for the right to use an intellectual property, that is; the computer software which is a scientific work, the title and ownership of which remained with the owners in terms of clause 8.2 of the Agreement.

The learned counsel contended further that the payments made to the two off-shore companies was an income derived from the United Republic of Tanzania and therefore, under S. 3 (1) (b), 3 (2) (a) (iii) of the ITA 1973 and S. 6 (1) of ITA 2004, were subject to withholding tax. He also cited Sections 6 and 10 (c) of the ITA 1973 and S. 82 (1) of the ITA 2004 in support of his argument that payments derived from *inter alia*, royalty are gains or profits that are subject to taxation. On that basis, he argued, the appellant had the obligation to withhold the payable tax failure of which it became liable to pay such tax under S. 34 (5) (a) and (b) of the ITA 1973 and S. 84 (3) and (4) of the ITA 2004.

The learned counsel went on to argue that the Tribunal correctly found that the payments constituted royalty by virtue of interpretation of that term under S. 3 of the ITA 2004. Making reference to clause 8.2 of the Agreement, he submitted that the payments were in effect based on a lease of a computer software, an intangible asset to which the owners, who retained the right of ownership, received as consideration for the use of the computer software.

The respondent's counsel argued also that the Tribunal's finding that the payments were subject to withholding tax on royalty in terms of S. 2 (1) (d) of the ITA 1973 was correct. He contended that the finding was based on the definition of the term royalty which, he said, is not limited to payments made as consideration for tangible assets but also for gains derived from a sale or exchange of a right or property. He stated as follows at page 4 of his written submission:-

> *"... this section [S. 2 (1) (d) of the ITA 1973] is not limited to tangible things but broadly extends to include 'gains' derived from the sale or exchange of any right or property. There was an exchange of rights between the appellant and the foreign companies in which the appellant acquired the right to use software. The payment was gains derived from an exchange of right for the use of the software hence was subject to income tax in terms of sections 3 (1) (b), 3 (2) (a) (iii) of the Income Tax Act, 1973 read with sections 6 and 10 (f) of the Income Tax Act, 1973."*

On the use of the OECD Commentary in determining the issue whether or not the payments constituted royalty, Mr. Tito submitted that the Tribunal cannot be faulted for having declined to do so because as observed in the impugned decision, the definition of the term royalty appearing in both ITA 1973 and 2004 clearly covers the nature of the payments made by the appellant to the two foreign companies.

The learned counsel argued further in reply that, in any case, the transaction giving rise to this appeal was not based on any existing tax treaty between our country and countries of the two off-shore companies for adoption of the OECD Commentary. To bolster his argument, Mr. Tito cited S. 7 (1) (2) of the Tax Administration Act, 2015. On the case of **Infra Soft Limited** (supra), the learned counsel reiterated the argument he made before the Tribunal, that the decision in that case was based on the interpretation of the provisions of the Indian legislation which have no relevant similarity with the provisions of our tax legislation.

Citing the cases of **Tullow Tanzania BV** and **Bulyanhulu Gold Mine Limited** (supra), the learned counsel stressed that the Tribunal adopted a correct interpretation of the provisions of S. 2 (1) (a) and (d) of the ITA 1973 and S. 3 (a) of the ITA 2004 thereby arriving at a correct decision that the payments constituted royalty. He also relied on the case of **BP Tanzania** (supra) to emphasize his argument that a payment for consultancy services which is in the form of an intangible thing constitute royalty when such payment having its source within the United Republic of Tanzania, is paid to an off-shore company.

From the rival submissions made by the learned advocates for the parties, we agree with Dr. Nguluma's proposition that the grounds of appeal raise the following issues.

1. *Whether the Tribunal erred in fact and/or law by ignoring to determine an issue brought before it namely; the relevance of the authorities placed before it which if considered the Tribunal would have decided the matter in favour of the Appellant;*
2. *Alternatively, whether the Tribunal erred in law and fact in holding that the computer software in issue purchased from two foreign companies are intangible intellectual property which is protected through patent arrangement;*
3. *Whether the Tribunal erred in law by holding that the mere right to use software program constituted use of copyright, giving rise to royalty; and*
4. *Whether the Tribunal erred in fact and law by holding that payment made for the purchase of computer software licence were subject to withholding Tax on Royalty in terms of section 2 (1) (a).*

We need not be detained much in determining the first issue. Having read the impugned judgment, we find with respect that the Tribunal did not ignore to determine the relevance of the OECD Commentary to the case and the need to consider the case law from other jurisdictions. It indeed considered the application of the said commentary and the cited decisions. It was of the opinion that the interpretation of the term royalty under our law sufficiently covered the character of the payments in question and therefore, the Commentary and foreign decisions were inapplicable.

Since there was no dispute that the OECD Commentary had not, at the material time been domesticated, it is trite principle that the same could be applied as an aid to interpretation only when there is an ambiguity or gap in the definition of the term royalty as provided under our law. –See for example the case of **Bank of Kenya Limited v. Kenya Revenue Authority** [2009] e KLR (per. Nyamu, J.A.). In that case, the Court of Appeal of Kenya observed as follows on that principle:-

> *"...unless an international instrument has been domesticated, the local courts would apply it only where there is ambiguity or a gap in the domestic law..."*

On the basis of the above stated principle, the Tribunal could only apply the OECD Commentary if it found that the definition of the term royalty is ambiguous or when there is a gap in that definition such that it does not cover the character of the payments in question. The Tribunal found however, that there was no such ambiguity or a gap. It observed as follows in its judgment at pages 259 -260 of the record.

> *"It is my view that, under this ground the Appellant correctly defined the term royalty as provided for by ITA 1973 and ITA 2004.* ***It is also not proper to look at the definition of the term 'royalty' in other jurisdiction as our ITA provides a clear definition under Sec. 2(1) (a) (b) (c) and (d) .... In addition to that, it is our collective opinion that Sec. 3 of ITA 2004 provides better definition of royalty...."***
>
> [Emphasis added].

Now therefore, whether or not the Tribunal was right in the above stated findings is a question which, in our view, can be answered when considering the 3rd and 4th issues.

The 2nd issue can also be disposed of briefly. As submitted by Dr. Nguluma the issue whether or not a property is patented is a matter which can only be established by evidence. In its decision, the Tribunal held that the relevant computer software is intangible intellectual property which is protected through patent arrangements such that only the owner can allow or permit someone else to access and use it at a fee without transferring ownership. The Tribunal did not however refer to any evidence showing that there is such patent arrangements. The term "patent" is defined in **Black's Law Dictionary**, 9th Edn; as follows:-

> *"The Government grant of a right, privilege, or authority."*

In order to treat the computer software which was licenced to the appellant as a patented property therefore, existence of a grant to that effect must be established. That was not done in this case.

As shown above however, the decision of the Tribunal was not solely based on the finding that the software was a patented material, the use of which had` constituted royalty under S. 2 (1) (c) of ITA 1973 and S. 3 (a) of ITA 2004. The decision was also based on the finding that payments constituted royalty for use of copyright under S. 2(1) (a) of the ITA 1973 and S.3 (a) of the ITA 2004, not only for the use of a patent under S. 3 (a) of the ITA 2004. It is that finding which has given rise the 3rd and 4th issues which we now proceed to consider.

In determining the last two issues stated above, we find it instructive, as a starting point, to reproduce the relevant parts of S. 2 of the ITA 1973 and S. 3 of the ITA 2004 which define the term royalty. Under S. 2(1) of the ITA 1973 the term "royalty" is defined as follows:-

" 'royalty' means:-......

> *(a) any copyright of literary, artistic or scientific work; or*
>
> *(b) any cinematograph film, including film or tape for radio or television broadcasting; or*
>
> *(c) any patent, trade mark, design or model, plan, formula or process; or*
>
> *(d) any industrial, commercial or scientific equipment;*
>
> *or for information concerning industrial, commercial or scientific equipment or experience, and includes gains derived from the sale or exchange of any right or property giving rise to such royalty."*

In the subsequent Act, the ITA 2004, the term is defined as follows:

" 'royalty' means:-

(a) the use of, or the right to use, a copyright, patent, design, model, plan, secret formula or process or trademark;

(b) the supply of know-how including information concerning industrial, commercial or scientific equipment or experience;

(c) the use of, or right to use, a cinematography film, videotape, sound recording or any other like medium;

(d) the use of, or right to use, industrial, commercial or scientific equipment;

(e) the supply of assistance ancillary to a matter referred to in paragraphs (a) to (d); or

(f) a total or partial forbearance with respect to a matter referred to in paragraphs (a) to (e),

but excludes a natural resource payment. "

As stated above, the Tribunal held that the payments made for the use of the computer software constituted royalty under both provisions of the ITA 1973 [S. 2 (1) (a) and (d)] and the ITA 2004 [S.3 (a) and (d)]. In its judgment at page 262 of the record of appeal, the Tribunal had this to say:-

" ... we concur with the Appellant counsel that software was intellectual property much like artistic, literary or scientific work referred to under the entire section of ITA Cap. 33 1973, and that consideration for use of the software whether for private or commercial purposes, therefore amounts to royalty within the meaning of S. 2 of the ITA 1973."

Although from the passage quoted above, in concluding its judgment, the Tribunal relied generally on S. 2 of the ITA 1973, the parties are not in dispute that in characterizing the payments as royalty, the Tribunal relied specifically on the provisions of S. 2(1) (a) and (d) of the ITA 1973 and S. 3 (a) and (d) of the ITA 2004. The controversy is that, whereas the learned counsel for the appellant has strongly argued that the Tribunal erred in applying the above stated provisions, the respondent's counsel has, with equal force, supported the finding of the Tribunal.

In support of his submission, apart from relying on the OECD Cometary which as observed above was considered by the Tribunal but found to be inapplicable, Dr. Nguluma relied also on the case of **Infra Soft Limited** (supra). We agree with the learned counsel that, the case is relevant to the point at issue as a persuasive decision and the Tribunal should have considered it in determining whether or not the payments constituted royalty by virtue of interpretation of that term under the provisions of the ITA 1973 and ITA 2004. We will therefore consider it in this appeal to determine whether or not in the present case, the Tribunal erred in finding that the payments constituted royalty.

In the said case, which was decided by the Bench of the Delhi Income Tax Appeals Tribunal, the Tribunal considered whether or not the payments received under licence agreement allowing the use of software, was in the nature of royalty income or constituted the business profit of the assessee. In its decision, the tribunal relied on the definition of royalty in Explanation 2 of S. 9(1) (ii) of the Indian Income Tax Act, 1961 and Article 13(6) of the Double Tax Avoidance Agreement (DTAA) between Indian and the USA, the country from where the software was supplied. Explanation 2 of S. 9(1) (vi) of that Act defines royalty to mean *inter alia:-*

> *"consideration for the transfer of all or any rights (including the grant of licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films ..."*

Upon that consideration, the Tribunal held that, although the Revenue Authority treated the payments as royalty contending that there was transfer of some right including the granting of a licence in respect of the copyright, the payment was not royalty under either the Income Tax Act or under the DTAA. It held instead, that the payment was in the nature of business profit chargeable to tax.

On appeal to the High Court of Delhi in ITA 1034/2009, the decision of the Tribunal was upheld. In its decision, the High Court observed *inter alia* that, there in a distinction between the acquisition of a copyright and a copyrighted material. It held that when what is acquired is the use of a copyrighted article, then the payment does not constitute royalty. The relevant passage states as follows:-

> " *Distinction has to be made between the acquisition of a 'copyright' and a 'copyrighted article'. Copyright is distinct from the material object, copyrighted copyright is an intangible incorporeal of a privilege, quite independent of any material substance, such as a manuscript. Just because one has the copyrighted article, it does not follow that one has also the copyright in it. It does not amount to transfer of all or any right including license in respect of copyright. Copyright or*

even right to use copyright is distinguishable from sale consideration paid to copyrighted article. This sale consideration is for purpose of goods and is not royalty."

That court went on to state that:

> *"The payment is for a copyrighted article and represents the purchase price of an article and cannot be considered as royalty either under the Income Tax Act or under the DTAA."*

That decision of the High Court of Delhi is however, in conflict with another decision of the High Court of Karnataka in the Case of **Commissioner of Income Tax & another v. Sumsung Electronics Co. Ltd & others** (accessed through www.tax pundit.org). In that case which involved a number of consolidated appeals on the same subject matter, the definition of the term 'royalty' under Explanation 2 of S. 9(1) (vi) of the Indian Income Tax Act, 1971 and the provision of the DTAA between India and USA, France and Sweden, the countries from where the involved computer software were imported, that court observed as follows:-

> *" In view of the above said definition of royalty, it is clear that the necessary ingredient to be satisfied to find out as to whether the payment would amount to royalty is as*

follows; payment of any kind received as consideration for the use of, or the right to use, any copy right of literary, artistic or scientific work. It has been universally accepted that a literary work is entitled to a copyright and wherefore, a literary work is entitled to be registered as copyright. In India, the provisions of S. 2 of the Copyright Act 1957 defines literary work as under:-

> *'Literary work' includes computer programs, table and compilations including computer (databases). Therefore, 'computer software' has been recognized as copyright work in India also."*

Having also considered that, like in present case, from the parties' agreement the licence was only for the use of the computer software while the copyright continued to remain with the non-residents, the said court held as follows:

> *"...on reading the contents of the respective agreements entered into by the respondents with the non-resident, it is clear that under the agreement, what was transferred is only a licence to use the copyright belonging to the non-resident subject to the terms and conditions of the agreement as referred to above and the non-resident*

supplier continues to be the owner of the copyright and all other intellectual property rights. It is well settled that copyright is a negative right. It is an umbrella of many rights and licence is granted for making use of the copyright in respect of shrink wrapped software/off-the shelf software under the respective agreements, which authorize the end user i.e the customer to make use of the copyright software contained in the said software, which is purchased off-the-shelf or imported as shrink wrapped software and the same would amount to transfer of part of the copyright and transfer of right to use the copyright for internal business and per the terms and conditions of the agreement. Therefore, the contention by the learned Senior counsel appearing for the respondents that there is no transfer of copyright or any part thereof under the agreements entered into by the respondent with the non-resident supplier of software cannot be accepted."

As stated above, the Indian case cited by the appellant's counsel is in conflict with the earlier case of **Samsung Electronics Co. Ltd** (supra) which the High Court of Delhi declined to follow.

In the East African jurisdiction, it has been held, in the Kenyan case of **Kenya Commercial Bank Limited v. Kenya Revenue Authority**

[2016] eKLR, that a payment for the right to use a computer software constitutes royalty. Like in the present case, upon payment for a licence, the appellant bank was provided with computer software by a foreign company for use in banking services. The issue was whether or not the payment was in the nature of royalty. The decision was arrived at by the Court of Appeal of Kenya after having considered the definition of the term royalty under S. 2 of the Kenya Income Tax Act which is similar to the same section of our ITA 1973.

> The court answered the issue in the affirmative as follows:-
>
> *"...the agreement between the parties was for grant of a licence to the bank to use Infosys* ***computer software program*** *and for provision of other services. The agreement specifically provided,* ***inter alia*** *that Infosys would at all times retain all title, copyright and other proprietary rights in software and that the bank would not acquire any rights other than those specified in the agreement... It is plain from the agreement that the payment of licence fees was a consideration or the right to use Infosys intellectual property in the form of computer software program which is within the definition of royalty under clause (c) of S. 2 of the Act."*

We have considered the approaches taken by the courts in the three cases cited above regarding the issue whether or not payments made to foreign companies for licence to use computer software constitute royalty as defined in the laws of the courts' respective jurisdictions. The decisions in the cases of **Kenya Commercial Bank Limited** and **Samsung Electronics Co. Ltd** (supra) support the position taken by the Tribunal in the impugned decision.

In our considered view the decision of the Court of Appeal of Kenya, which is from the East African Jurisdiction and which was arrived at after the court had considered the interpretation of the term royalty in the provision which is almost in ***pari materia*** to the provisions our Income Tax Laws (the ITA 1973 and 2004) is highly persuasive. We subscribe to the interpretation made to the effect that the payments made in that case constituted royalty.

In the case at hand, the payments made to Ericsson AB and Alcatel France were consideration by the appellant for making use of the computer software subject to the terms and conditions stipulated under clauses 8.1, 8.2 and 8.3 of the Agreement. By such grant, the two foreign companies made limited or a partial transfer of their copyright to be used by the appellant in its telecommunication services. For these reasons, we hold that, although in its decision, the Tribunal extended its characterization of the payments to cover the other paragraphs of sections 2(1) of the ITA 1973 and S. 3 of ITA 2004 respectively as shown above, it did not err in deciding that the payments constituted royalty because it also precisely based its interpretation on the relevant paragraph (a) of those sections. The 3rd and 4th issues are therefore, answered in the negative.

In the event, we are satisfied that the appeal is devoid of merit. As a result, we hereby dismiss it with costs.

DATED at **DAR ES SALAAM** this 25th day of April, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F.L.K. WAMBALI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E.Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL