IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: NDIKA, J.A., MWANDAMBO, J.A., And KAIRO, J.A.)

CIVIL APPEAL NO. 388 OF 2020

JOHN EPIMAKI KESSY ..... APPELLANT

VERSUS

COMMISSIONER GENERAL,
TANZANIA REVENUE AUTHORITY ..... RESPONDENT

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

(H. A. Haji., Vice Chairman)

dated the 1st day of August, 2020
in
Tax Appeal No. 12 of 2019

JUDGMENT OF THE COURT

22nd October & 2nd November, 2021

MWANDAMBO, J.A.:

The Tax Revenue Appeals Tribunal (the Tribunal) dismissed Tax Appeal No. 12 of 2019 preferred by John Epimaki Kessy, the appellant, against the decision of the Tax Revenue Appeals Board (the Board). The Board had dismissed an appeal against an objection decision made by the respondent involving liability for payment of capital gains tax. The Tribunal concurred with the Board that the appellant had not adduced evidence to entitle him to benefit from the protection accorded to a transferor associate of an asset in terms of section 44 (2) of the Income Tax Act, 2004 [Cap. 332 R.E. 2006] (the Act), hence, the instant appeal.

The factual setting involved in this appeal is simple enough to tell. The appellant was, until April 2011, the registered owner of a landed property known as plot No. 21, Mikocheni Light Industrial Area, Dar Es Salaam City comprised in certificate of title No. 43521, henceforth, the property. He acquired the property in 1992 from where he conducted his business; a building contractor trading as J.E. Construction as a sole proprietor. The sole proprietorship survived until 1999 when the appellant together with one Beda J. Kessy formed a limited liability company; J. E. Construction Company Limited (the Company) with 99% shares owned by the appellant. For that matter, the appellant was, in terms of section 3 (c) of the Act, an associate of the Company. It is common ground that the Company assumed the business hitherto conducted by the appellant. Subsequently, the appellant transferred his property to the Company upon the Commissioner for Lands approving the transfer on 18/04/2011.

In terms of section 39 (a) of the Act, the transfer of ownership of an asset is treated as a realisation of that asset by the transferor attracting payment of capital gains tax calculated under section 36 of the Act. Considering that the appellant transferred the property to the Company; an associate, he was treated as having realized the property and derived an amount in the manner set out under section 44 (1) of the Act. Otherwise, the appellant was eligible for the treatment under section 44 (2) of the Act

provided that both the Company and him moved the respondent in that behalf subject to compliance with the requirements under section 44 (4) of the same Act.

Subsequent to the approval of the transfer by the Commissioner for Lands as alluded to earlier, on 11/05/2011, the appellant submitted a declaration of gain from realization of an interest in land or building presumably for the purpose of computation of capital gains tax (exhibit A4). That application was followed by the respondent's letter (exhibit A5) dated 17/06/2011 in which the respondent queried some of the particulars in the declaration including, the owner of the asset and error in the principal in the calculation of the gain. Through that letter, the respondent vacated the tax assessments issued earlier and intimated to issue a fresh notice of assessment reflecting the appropriate tax. Although the record does not reflect any form of assessment, it would appear the respondent issued one; No. 8986 reflected in the notice of objection vide letter Ref. No. PAN/07/11 dated 11/07/2011 (exhibit A6) lodged by PAN & Associates; the appellant's tax consultants. One of the peculiar features in exhibit A6 was that the transfer of the asset was governed by section 44(2) of the Act to which the appellant met the conditions prescribed under section 44 (4) thereof. In support of that assertion, the Tax Consultants indicated to have attached

their client's (appellant) letter electing the transfer to be governed by section 44 (2) of the Act.

The respondent rejected the objection which resulted into an appeal before the Board predicated on three grounds, namely; one, the respondent's decision offended section 44(2) of the Act; two, the decision lacked fairness and, three, the assessment offended section 49(2) of the Tax Administration Act No. 10 of 2015. The Board dismissed the appeal having found that the appellant had not furnished any evidence proving compliance with section 44(4) (e) to avail him of the treatment under section 44 (2) of the Act. However, the Board directed the respondent to issue a fresh assessment accompanied by the relevant computations based on the market value obtaining in the year 2011; the date of the transfer.

The Board's decision triggered an appeal to the Tribunal premised on three grounds. The first ground which is critical to the determination of this appeal, faulted the Board for failing to address his grounds of appeal on the applicability of section 44 (2) of the Act. Paragraph five of the statement of appeal to the Tribunal alluded to the appellant's notice of objection premised on the fact that the appellant had elected to apply section 44 (2) of the Act which exempted him from payment of capital gains tax. The said letter was annexed thereto marked **JEK-10** on the basis of which the appellant sought leave under section 17 (2) of The Tax Revenue Appeals

Act, [Cap. 408 R.E. 2010], (the TRAA) to be admitted as additional evidence. According to the appellant, the admission of that evidence had a serious bearing on the outcome of his appeal in his favour.

Be it as it may, the Tribunal refused to grant the appellant leave for the admission of additional evidence primarily because the appellant failed to meet the conditions precedent for its admission. The Tribunal concluded that the appellant's quest was an afterthought aimed at filling gaps in his wanting evidence before the Board. Ultimately, the Tribunal dismissed the appellant's appeal which has culminated in the instant appeal premised in two grounds of appeal.

The first ground faults the Tribunal for its failure to exercise its discretion judiciously for the admission of additional evidence pursuant to section 17 (2) of the TRAA. The second one contends that the Tribunal erred in holding that the appellant did not comply with section 44 (4) (e) of the Act.

The appellant has enjoyed the services of a firm of advocates styled as B & E AKO Law right from the Board up to this Court. During the hearing, Mr. Allan Nlawi Kileo, appeared assisted by Messrs Wilson Mukebezi and Stephen Axwesso, all learned advocates to prosecute the appeal. Messrs Cherubin Ludovick Chuwa and Harold Gugami, learned Senior State Attorneys teamed up to resist the appeal on behalf of the respondent.

Ahead of the hearing, the learned advocates for the appellant filed their written submissions in support of the appeal so did the respondent's learned counsel in reply. Mr. Kileo had a few aspects to highlight by way of oral submissions which he did after adopting the written submissions. The substance of the submissions both in writing and orally focused on the reason why the appellant found it accessary to ask for leave for admission of additional evidence. He argued that the appellant's resort to section 17 (2) of the TRAA was necessitated by the Board's stance raising an issue *suo mottu* in relation to lack of evidence proving compliance with section 44 (2) of the Act without affording the parties right to be heard on it. According to the learned advocates, had the Board afforded the appellant opportunity to be heard, they should have produced evidence by way of a letter dated 11/07/2011 annexed to the statement of appeal marked **JEK-10** on the basis of which he sought leave of the Tribunal to be admitted as additional evidence under section 17(2) of the TRAA which leave was refused by the Tribunal. The learned advocates argued further that, considering that the appellant was denied right to be heard on the alleged non-compliance with section 44 (2) of the Act, the admission of additional evidence was necessary and the Tribunal ought to have granted the leave sought. Several authorities from decided cases were cited along with Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 to underscore the

argument that breach of fundamental right to be heard is a fatal irregularity which should have been sufficient to grant leave to admit additional evidence.

At any rate, the appellant's advocate argued, the letter sought to be admitted as additional evidence was not new to the respondent as it was part of appellant's notice of objection (exhibit A6) thus, no prejudice could have been occasioned had the Tribunal exercised its discretion in favour of the appellant.

With regard to ground two, the learned advocate argued that contrary to the Board's decision, there was ample evidence that the appellant complied with section 44 (2) of the Act through an application by way of a letter dated 10/07/2011 received by the respondent on 15/07/2011 notifying him of his election under section 44 (2) of the Act (annex JEK-10 to the statement of appeal). Responding to the Court's question, the learned advocate was resolute that the appellant and his associate complied with section 44 (4) (e) of the Act thereby entitling the appellant to benefit from the protection under section 44 (2) thereof. On the basis of the foregoing, the learned advocate invited us to allow the appeal with costs.

Mr. Chuwa was fairly brief in his written and oral submissions. In essence, the learned Senior State Attorney argued in the written

submissions that the appellant failed to meet the threshold necessary for the Tribunal's exercise of discretion to allow the admission of additional evidence. To reinforce his argument, Mr. Chuwa relied on our decision in **As Sajan v. Co-operative and Rural Development Bank** [1991] T.L.R. 44 for the proposition that admission of additional evidence is subject to the appellant meeting three conditions which the appellant failed to meet. According to him, evidence proving the appellant's compliance with section 44 (4) of the Act never featured before the Board; it featured after its decision as an afterthought. The learned Senior State Attorney argued that since the appellant did not meet the conditions for the admission of additional evidence, the Tribunal was right in refusing the prayer in that behalf. With that, the learned Senior State Attorney implored the Court to dismiss the appeal with costs.

In his rejoinder, Mr. Kileo reiterated his submissions in chief and invited the Court to accept the proposition that the criteria for admission of additional evidence ought to be looked at on their individual merit considering that the issue subject of the additional evidence did not arise before the Board. He reiterated his argument that the additional evidence became necessary after the Board had made a decision on it holding that the transfer of ownership of the asset by the appellant to the Company was

between associates who had not met the requirements under section 44 (4) (e) of the Act.

Having examined the written submissions and heard counsel's oral arguments for and against the appeal, it is plain that the appeal revolves around the Tribunal's exercise of its discretion against the appellant's quest for admission of additional evidence in pursuance of section 17 (2) of the TRAA. That means our discussion will be conjointly on the two grounds of appeal. We find apposite at this stage to restate the legal position on the extent to which higher courts can interfere with lower courts/tribunals exercise of their discretion. In **The Commissioner General, Tanzania Revenue Authority v. New Musoma Textile Limited**, Civil Appeal No. 119 of 2019 (*unreported),* the Court quoted a passage from the judgment of the defunct Court of Appeal for East Africa in **Mbogo & Another v. Shah** [1968] E.A 93, 94 in which Sir Clement de Lestang, VP stated: -

> *"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that the decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should not have taken into consideration and in so doing arrived at a wrong conclusion."*

The bone of contention against the Tribunal's decision is that the additional evidence by way of annex JEK-10 was known to the respondent as it formed part of exhibit A6 and so there could not have been any prejudice to the respondent had the Tribunal granted the prayer for its admission as additional evidence. Annex JEK-10 referred to in para 5 of the statement of appeal (at page 123 of the record of appeal) is shown to be a letter in which the appellant appears to have made an election under section 44 (2) of the Act. It is common ground that a copy of that letter is not reflected in the record of appeal but its contents are reproduced at page 130 showing that the appellant is an associate of J.E.R. Construction Co. Ltd. It is that company to which he the appellant had transferred his asset requesting the respondent to apply section 44 (2) of the Act in effecting the transfer. The Tribunal concurred with the Board that much as the appellant was indeed an associate of the Company to which transfer of the asset had been made, there was no evidence of compliance with section 44 (4) (e) of the Act. There is no dispute that the provisions of section 44 (2) of the Act can be brought into play upon proof that both the transferor and transferee associates have made the election in writing. We find it necessary to reproduce the section for easy of reference:

> *44. (1) Subject to the provisions of this section and section 43, where a person realises an asset by way of transfer of ownership of the asset to an associate of*

the person or by way of transfer to any other person by way of gift –

(a) the person shall be treated as deriving an amount in respect of the realisation equal to the greater of the market value of the asset or the net cost of the asset immediately before the realisation; and The Income Tax Act [CAP. 332 R.E 2019] 63

(b) the person who acquires ownership of the asset shall be treated as incurring expenditure of the amount referred to in paragraph (a) in the acquisition.

(2) Where a person realises an asset, being a business asset, depreciable asset or trading stock, by way of transfer of ownership of the asset to an associate of the person and the requirements of subsection (4) are met –

(a) the person shall be treated as deriving an amount in respect of the realisation equal to the net cost of the asset immediately before the realisation; and

(b) the associate shall be treated as incurring expenditure of the amount referred to in paragraph (a) in acquiring the asset.

(3) Not relevant.

(4) The requirements specified in subsection (2) shall be–

(a) either the person or the associate is an entity;

(b) the asset or assets are business assets, depreciable assets or trading stock of the

associate immediately after transfer by the person;

(c) at the time of the transfer-

(i) the person and the associate are residents; and

(ii) the associate or, in the case of an associate partnership, none of its partners is exempt from income tax;

(d) there is continuity of underlying ownership in the asset of at least fifty percent; and

(e) ***an election for subsection (2) to apply is made by both the person and the associate in writing.*** *[Emphasis added]*

Mr. Kileo would have us hold that there was such compliance which should have been found to have existed by admission of additional evidence and not as an afterthought ploy to patch up evidence post the Board's decision. To appreciate his point, it will be inevitable to examine the appellant's notice of objection to the respondent (exhibit A6 at page 64 – 66 of the record of appeal) dated 11/07/2011. Through item 2 in that exhibit, the appellant's Tax Consultants made attempt to persuade the respondent that no profit had been realised by reason of the transfer of the asset from him to his associate. To prove that the appellant had made an election under section 44 (2) of the Act, the Tax Consultants indicated that they attached their client's letter for the respondent's consideration. The client referred to in exhibit A6 is none other than the appellant. We note from page 67 of the record that J.E.R. Construction Co. Ltd wrote a letter to the respondent through the Regional Manager, Kinondoni Tax Region informing

him of the transfer of the asset to her by his associate asking him to consider the transfer under section 44 (2) of the Act.

Although there is no indication in the proceedings how that letter found its way into the record, Mr. Kileo informed us from the bar that the letter was part of exhibit A6. That notwithstanding, that letter could not have been part of exhibit A6 because what was attached to it judged from para 2 (at page 65) is a letter by the Tax Consultant's client rather than the Company regardless of the fact that the appellant was its majority shareholder. The fact that the Tax Consultant's notice of objection claimed that all conditions under section 44 (4) of the Act were met, there is no indication that the two letters were part of exhibit A6. Indeed, it seems to us that the relevant letter annexed to exhibit A6 was the letter referred to in para 5 of the statement of appeal whose contents are reproduced at page 130 of the record of appeal. In our view, since, as shown above, the letter by way annex JEK-10 was already part of exhibit A6, it was a futile exercise to ask the Tribunal to admit it as additional evidence. If anything, the relevant letter for the purpose of the prayer for admission of oral evidence should have been the letter appearing at page 67 of the record. Otherwise, it is not clear to us why the appellant could have omitted to annex the letter referred to in exhibit A6 meant to prove that he had made the election

under section 44 (2) and complied with section 44 (4) of the Act as indicated in para 2 of exhibit A6.

Guided by the excerpt from **Mbogo & Another** (*supra*), the appellant's advocates have not pointed out to us that the Tribunal's decision refusing to admit additional evidence is wrong because it misdirected itself or because it acted on matters which it should not have acted or by reason of its failure to take into consideration matters which it should not have taken into consideration.

On the contrary, from our own examination of the record, the Tribunal was alive to requirement under rule 6 (1) of the Tax Revenue Appeals Board Rules, 2018 G.N. No. 217 of 2018 which is substantially similar to rule 7(1) of the Tax Revenue Appeals Board Rules, 2001 G.N. No. 57 of 2001 in force on the date of lodging the appeal on the appellant's duty to attach to his statement of appeal all material documents necessary for the determination of his appeal. The Tribunal was equally alive to rule 6 (4) on the appellant's avenue to file additional documents three days before the date fixed for hearing which he did not utilise.

We appreciate the written submissions by the appellant's advocates at para 3.3 and 3.4 to the effect that the prayer for admission of additional evidence became necessary because the Board made a decision on the appellant's compliance with section 44 (2) of the Act which was a departure

from the issue as to the applicability of that section to the transaction in dispute. We have a genuine and unfeigned respect to the learned advocates but we are not prepared to agree with them. This is because the applicability and compliance with section 44 (2) of the Act are inseparable considering that the appellant's objection by way of exhibit A6 hinged on the compliance with the very section upon meeting all the conditions for its application prescribed by section 44 (4) of the Act. That was indeed the appellant's case on which the Board found no evidence of compliance with section 44 (4) (e). The Tribunal concurred with that finding having rejected the appellant's prayer for admission of that evidence which was not additional evidence in the first place. Otherwise, if non-compliance with section 44 (2) of the Act was not the same as its application to the tax transaction in dispute, we fail to understand how could the Board have determined appellant's ground (i) in support of the appeal contending that the respondent was wrong for offending section 44 (2) of the Act. The upshot of the foregoing is that the appellant's submission contending as it does that the appellant was denied right to be heard on the issue involving compliance with section 44(2) of the Act falls apart.

There is yet another aspect which we think the Tribunal's decision cannot be successfully assailed. It relates to the relevance of the additional evidence sought to be tendered before the Tribunal. Mr. Chuwa referred to

our decision in **As Sajan's** case (*supra*) in relation to the third condition for the admission of additional evidence; credibility of the evidence sought to be introduced. It is plain that the quest for admission of additional evidence by way of the letter referred to in para 5 of the statement of appeal as well as the one said to be part of exhibit A6 appearing at page 67 of the record of appeal, were written and submitted to the respondent post assessment No. 8986 through the respondent's letter dated 17/06/2011. It is not entirely clear to us how could the appellant have availed himself of the protection from section 44 (2) of the Act post tax assessment. It is vivid from the two letters that the appellant asked the respondent to consider them in determining his objection to the assessment after the event. Logic, common sense and the law dictate that the election under section 44 (2) of the Act should have been made prior to the assessment. We cannot say with any degree of certitude that the credibility test was indeed met for the admission of evidence which was, on the face of it introduced after the respondent's assessment. In the premises we fail to understand in what way the evidence introduced at the objection stage would have been relevant for the determination of the appellant's case had it been admitted by the Tribunal. Under the circumstances we endorse the submission by Mr. Chuwa that the appellant failed to meet the conditions precedent for admission of additional evidence. The appellant has failed to surmount the

hurdle in assailing the Tribunal for the alleged improper exercise of its discretion under section 17 (2) of the TRAA. That said, we find it difficult to interfere with the Tribunal's discretion refusing to admit the purported additional evidence by way of annex JEK-10.

In the event, we find no merit in the appeal and dismiss it with costs as we hereby do.

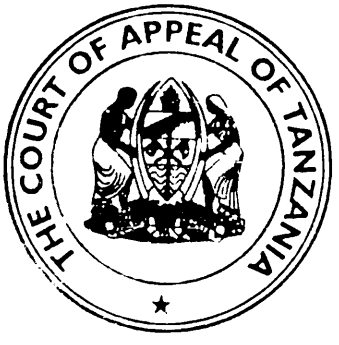
DATED at **DODOMA** this 1st day of November, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of November, 2021 in the presence of Mr. Noah Tito, learned Senior State Attorney for the Respondent and also holding brief of Mr. Alan Nlawi Kileo, learned counsel for the Appellant, is hereby certified as true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL