



**Mburu v Commissioner of Domestic Taxes (Income Tax Appeal E064 of 2021)
[2023] KEHC 2594 (KLR) (Commercial and Tax) (27 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2594 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E064 OF 2021
JWW MONG'ARE, J
MARCH 27, 2023**

BETWEEN

MICHAEL NDICHU MBURU APPELLANT

AND

THE COMMISSIONER OF DOMESTIC TAXES RESPONDENT

*(Being an appeal from the Judgement and Orders of the Tax Appeals
Tribunal dated 9/4/2021 in Tax Appeals Tribunal Number 404 of 2019)*

JUDGMENT

1. The Appellant is the director of Singapore Motors Limited, a dealer in used cars imported from Japan and the United Kingdom.
2. The Respondent is a principal officer appointed under section 13 of the [Kenya Revenue Authority Act](#).
3. The background of this case is that the Respondent carried out investigations into the business operations of the Appellant to confirm tax compliance of the company and the Appellant as its director. The said investigations covered the years 2013-2017 to establish whether the appellant under-declared his income during that period.
4. Following the investigations, the Respondent wrote to the Appellant vide its letter dated 4th September 2018 communicating its preliminary findings and affording the Appellant an opportunity to respond to the issues raised by 13th September 2018. Meetings were held between the Appellant and respondent where the Appellant was asked to provide the Respondent with specific documents that would be used to determine the appellant's tax liability.



5. The Respondent considered the said documents and issued its notice of assessment for Kshs 99,960,19.00 vide its letter dated 24th April 2019 being income tax inclusive of penalties and interest. The Appellant objected to this demand vide his letter dated 22nd May 2019.
6. The Respondent asked for documents relating to the issues raised in the objection. After considering the appellant's objection and documents submitted, the Respondent issued its objection decision dated 23rd July 2019 confirming that taxes of Kshs 20,448,466.00.
7. The Appellant appealed against the objection decision before the Tax Appeals Tribunal (hereinafter tribunal). The tribunal heard and determined the appeal and delivered its judgement dated 9th April 2021 where it dismissed the appeal and upheld the respondent's objection decision dated 23rd July 2019 for Kshs 20,448,466.00.
8. The Appellant being dissatisfied with the said judgement of the tribunal appealed to this court against the entire judgement on the grounds that:-
 1. The Honourable Tribunal fundamentally erred in law and in fact by dismissing the entire Appeal of the Appellant against the tax assessment of the Respondent dated 23rd July 2019 for Kshs 20,448,466/-
 2. The Honourable Tribunal fundamentally erred in law and in fact by determining the assessment of tax for the year of income 2013 is lawful despite the same being a tax assessment relating to a period beyond the statutory 5 year.
 3. The Honourable Tribunal fundamentally erred in law and in fact by upholding the Respondent's subjection of all the receipts into the Appellant's personal bank accounts to taxation and determining the same as taxable income.
 4. The Honourable Tribunal fundamentally erred in law and in fact by computing income tax on cash entries in the bank statements contrary to the provisions of the *Income Tax Act* that provide that tax shall only be charged on gains or profits.
 5. The Honourable Tribunal fundamentally erred in law and in fact by determining that the Appellant did not provide schedules and supporting documentation for its notice of objection as requested by the Respondent's letter dated 6th June 2019, despite the Appellant providing the documents four days before the Respondent confirmed the Assessment.
 6. The Honourable Tribunal fundamentally erred in law and in fact by upholding the respondent's failure to consider the Appellant's supporting documentation explaining the credits into his personal bank account, which was provided before the confirmation of the Assessment.
 7. The Honourable Tribunal fundamentally erred in law and in fact by determining the shortfall penalty and late payment interest applied by the respondent was lawful."
9. Based on the grounds above, the court prayed to have this appeal allowed and to have the tribunal's judgement dated 9th April 2021 set aside in its entirety.
10. The Respondent opposed the appeal by filing a statement of facts dated 15th November 2021.



11. The Respondent contended that the decision of the tribunal was well reasoned and it did not misdirect itself having considered the facts and the law. That the law allows it to issue an assessment beyond the statutory period in instances of fraud, wilful neglect or evasion by the appellant; that the Appellant failed to [provide documents to demonstrate his sources of income as provided under section 59(1) of the [Tax Procedures Act](#) 2015.
12. That the Appellant failed to discharge the burden of proof as provided by section 56(10) of the [Tax Procedures Act](#) 2015; that the tribunal did not err in finding that the credits in the appellant's bank account were income subject to taxation under the [Income Tax Act](#); that the Appellant failed to provide specific documents requested by the respondent such as sale agreements to demonstrate the source of funds in his bank account.
13. The Respondent asserted that the appellant failed to support its notice of objection as provided by law; that the tribunal did not err in confirming the respondent's position that the Appellants should pay a penalty as per section 72D of the [Income Tax Act](#) and that the tribunal did not err in finding that the appellant has a tax liability of Kshs 20,448,466.00 which is due and payable to the respondent.
14. The Respondent prayed to have the judgement of the tribunal upheld, its demand for taxes totalling Kshs 20,448,466.00 be upheld and costs of the appeal.
15. I have considered the parties' submissions, pleadings and annexures.
16. The grounds of appeal can be condensed to the following issues for determination:-
 1. Whether the tribunal erred in holding that the respondent's assessment for the year of income 2013 was lawful.
 2. Whether the tribunal erred in holding that the appellant ought to have filed income tax returns for the period under review.
 3. Whether the tribunal erred in holding that the appellant had not discharged its burden of proof.
 4. Whether the tribunal erred in holding that the shortfall penalty and the late payment interest applied were lawful.

Determination

Issue 1: Whether the tribunal erred in holding that the respondent's assessment for the year of income 2013 was lawful.

17. The Appellant asserted that the tribunal erred in determining that the assessment of tax for the year of income 2013 is lawful despite it being a tax assessment relating to a period beyond the statutory 5 year.
18. On the other hand the respondent submitted that the law allows it to issue an assessment beyond the statutory period in instances of fraud, wilful neglect or evasion by the appellant as provided under section 29(6) of the [Tax Procedures Act](#) 2015.
19. Section 29(5) and (6) of the [Tax Procedures Act](#) (hereinafter the [TPA](#)) states:-
 - “(5) Subject to subsection (6), an assessment under subsection (1) shall not be made after five years immediately following the last date of the reporting period to which the assessment relates.



(6) Subsection (5) shall not apply in the case of gross or wilful neglect, evasion or fraud by a taxpayer.”

20. In its judgement, the tribunal found that the appellant willfully neglected to file tax returns therefore it was lawful for the respondent to assess tax for the year 2013 as stipulated under section 29(6) of the [Tax Procedure Act](#)
21. The Appellant argued that the credits in his account did not fall within the definition of income as stipulated in the [Income Tax Act](#) therefore should not be subjected to income tax and that he had provided documentation to the respondent to prove this assertion to the respondent. Based on this, he did not need to file annual returns nor pay taxes on the funds in its account.
22. The record shows that the appellant did not file returns for the period under investigation contrary to his obligation under Section 52B of the [Income Tax Act](#) which states that every individual chargeable to tax under this Act shall for any year of income commencing with the year of income 1992, furnish to the Commissioner a return of income, including a self-assessment of his tax from all sources of income, not later than the last day of the sixth month following the end of his year of income
23. Whether or not the credits in his account amounted to income for taxation purposes, the appellant had the obligation to file his returns, even if they are nil returns but he neglected to do so.
24. Therefore I find that it was lawful for the respondent to assess tax for the year 2013 as stipulated under section 29(6) of the Tax Procedure Act.

Issue 2 and 3: Whether the tribunal erred in holding that the appellant ought to have filed income tax returns for the period under review and whether the tribunal erred in holding that the appellant had not discharged its burden of proof.

25. The court will determine these two issues together as they are interrelated.
26. The fundamental question to answer is whether the credits in the appellant’s accounts fell within the definition of income.
27. Section 3(2) of the [Income Tax Act](#) states:-

“Subject to this Act, income upon which tax is chargeable under this Act is income in respect of:

- a) Gains or profits from –
 - i. Any business, for whatever period of time carried on;
 - ii. Any employment or services rendered;
 - iii. Any right granted to any other person for use or occupation of property
- b) Dividends or interest;
- c) A pension, charge or annuity;
- d) An amount deemed to be the income of any person under this Act or by rules made under this Act;



e) Gains accruing in the circumstances prescribed in, and computed in accordance with, the Eighth Schedule.”

28. The respondent states that the appellant failed to provide sufficient documents to prove the source of income while the appellant submitted that it did.
29. I have reviewed the letter dated 19th July 2019 annexed as ‘MN-1A’ in the appellant’s submissions. It is a letter from the Appellant to the respondent in response to the assessment carried out by the respondent for the years of income between 2013 and 2017. In the letter the Appellant attempted to explain the sources of income in his personal accounts including borrowings from relatives and friends, property sale and personal banking. He emphasised that some of the credits were from repayments from short term cash advancements to Singapore Motors Ltd and that he would regularly advance loans to that company as stipulated in the facility agreement between them. The appellant also attached as ‘MN-1B’ a loan/credit agreement between himself and Singapore Motors Ltd.
30. I have also analysed the comments on credits in the appellant’s personal bank account and bank statements for the years 2014 and 2015 and the agreement for sale dated 8th May 2015 in which the appellant sold his property.
31. The Appellant argued that the credits in his account constituted repayments of credit advanced to Singapore Motors Limited by the appellant, advances from family members, dividend payments from certain companies, repayments of cash that had been advanced to friends, and proceeds from the sale of land.
32. The Appellant was requested to avail certain documents to prove the sources of income however the record shows that the documents were not provided to the respondent’s satisfaction.
33. The burden of proving that an assessment is wrong lies with the taxpayer as stipulated under section 56 of the [Tax Procedures Act](#) which states:-
- “In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.”
34. In the case of [Commissioner Investigations and Enforcement v Kidero](#) (Income Tax Appeal E028 of 2020) Majanja J held:-
- “The issue in this appeal is whether and to what extent the taxpayer is able to demonstrate that the money it received was campaign contribution. In line with section 56(1) of the [TPA](#), the taxpayer bears the burden of proving that assessment made by the Commissioner is incorrect. This also fits in with the principles of the law of evidence that he who asserts must prove encapsulated in sections 107 of the [Evidence Act](#) which provides, inter alia, that whoever desires any court to give judgement as to any legal right dependent on the existence of facts which he asserts, must prove those facts exist.”
35. I concur with the finding above. The respondent did not discharge its burden of proof by sufficiently providing documents requested by the appellant to prove that the deposits in his account were not income subject to income tax. The tribunal therefore did not err in finding that the credits in the appellant’s account were subject to income tax.

Issue 4: Whether the tribunal erred in holding that the shortfall penalty and the late payment interest applied were lawful.



36. The court has established that the Appellant failed in his obligation to file tax returns as stipulated under section 52B of the *Income Tax Act*. He also did not pay taxes during that period.

37. Section 72D of the *Income Tax Act* provided that “where any amount of tax remains unpaid after the due date, a penalty of 20% shall immediately become due and payable.”

38. Section 84 of the *Tax Procedures Act* states:-

“ 84. Tax shortfall penalty

(1) This section applies to a person

(a) if that person knowingly makes a statement to an authorised officer that is false or misleading in a material particular or knowingly omits from a statement made to an authorised officer any matter or thing without which the statement is false or misleading in a material particular; and

(b) if the tax liability of that person or of another person computed on the basis of the statement made by that person is less than it would have been had the statement not been false or misleading (the difference being referred to as the "tax shortfall").

(2) Subject to subsections (3) and (4), a person to whom this section applies shall be liable to a tax shortfall penalty of—

(a) seventy-five per cent of the tax shortfall when the statement or omission was made deliberately.”

39. It was therefore lawful for the Respondent to charge the appellant 20% of the tax payable for the period as penalty and interest of 1% per month or part thereof.

40. In the end, the court gives the following orders:-

- a. The appeal is dismissed.
- b. The judgement of the tribunal dated 9th April 2021 is upheld.
- c. Costs awarded to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF MARCH 2023

J. W. W. MONGARE

JUDGE

In the presence of:-

Mr. Manani holding brief Mr. Oduor for the Appellant

Ms Kamau holding brief Ms Nyaringita for the Respondent

Sylvia- court Assistant

