



**Metropolis Property Management Limited v Commissioner of  
Domestic Taxes (Tax Appeal E008 of 2023) [2023] KEHC 22547 (KLR)  
(Commercial and Tax) (26 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22547 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
TAX APPEAL E008 OF 2023  
DAS MAJANJA, J  
SEPTEMBER 26, 2023**

**BETWEEN**

**METROPOLIS PROPERTY MANAGEMENT LIMITED ..... APPELLANT**

**AND**

**COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT**

*(Being an appeal against the judgment of the Tax Appeals Tribunal  
at Nairobi dated 13th January 2023 in Tax Appeal No.597 of 2021)*

**JUDGMENT**

**Introduction and Background**

1. The Appellant is a company in the business of property management services. The Respondent (“the Commissioner”), in the course of its statutory duty of administering and collecting government revenue noted variances between the Appellant’s income tax returns and aggregated 12 months as per the VAT returns and employment expenses as claimed in income tax returns and aggregated 12-month gross cash pay as per the PAYE return for the period 2015-2019. The Commissioner undertook verification of the Appellant’s tax declarations and on 16.04.2020 served the Appellant with a verification notice and requested it to explain the variance. The Commissioner thereafter raised additional assessments in respect of VAT and Corporation Tax amounting to Kshs. 10,106,537.00 on 10.07.2020.
2. By its letter dated 05.08.2020, the Appellant objected to the assessments. It averred that the VAT assessment was erroneous because it was not registered for the VAT obligation during the respective periods and would therefore not be in a position to declare VAT sales. That the assessment was further based on an erroneous assumption that the total sales for the subject period occurred in the month of



February 2019 being the month the taxpayer registered for the VAT obligation. On the Corporation Tax assessment, the Appellant stated that the same was as a result of disallowing the salary and wages expenses for the reason that it was supposed to have been subjected to PAYE without verifying the nature and the amount involved. That in the Commissioner's letter of 16.04.2020, the Commissioner indicated that there was need to verify the taxpayer's PAYE operations but did not take any further step before raising the assessment.

3. The Appellant averred that it did not have the PAYE obligation prior to the assessment because the wages were only allowances paid to caretakers and security personnel employed by the respective landlords for assisting in rent and documents collection and was far below the PAYE threshold. For these reasons, the Appellant urged the Commissioner to review the assessments and amend them accordingly.
4. The Commissioner made its objection decision on 30.08.2021 ("the Objection Decision"). It stated that while the Appellant had argued that the sales declared in the financial statements included rental income earned by its director, it failed to provide a detailed schedule of bank deposits differentiating the agency fees and rental income. It stated that it reached out to the Appellant for information which it never availed and where availed, it was incomplete. For instance, the bank statement presented on 27.07.2021 only covered the period 06.07.2018 to 31.012.2018 and lacked the schedule to support the transactions.
5. The Commissioner thus confirmed its earlier VAT assessment of Kshs. 5,954,368.08 and stated that VAT is chargeable on property management services upon attainment of a turnover of Kshs. 5 million. On the objection in respect of the Corporation Tax assessment, the Commissioner noted that the analysis provided by the Appellant was incomplete and lacked proof that the salaries and wages were incurred in the furtherance of the property management. That it failed to provide proof of payment to the employees, their KRA PINs and a link to the bank statement showing how the cash payments were done. The Commissioner further noted that the Appellant provided an incomplete cashbook which had a credit side only and the debit side was missing and that it was therefore impossible to confirm that indeed the Appellant paid the employees.
6. In view of the foregoing, the Commissioner stated that it would allow the salaries and wages expense to the extent of the gross salaries as filed via the PAYE returns. The Commissioner partially amended the corporation tax assessment to Kshs. 2,532,348.00 from Kshs. 3,399,719.00 and demanded VAT and Corporation Tax amounting to Kshs. 8,486,716.00.
7. The Appellant contested the Objection Decision by filing its appeal at the Tax Appeals Tribunal ("the Tribunal"). In the judgment rendered on 13.01.2023, the Tribunal identified one issue for determination, that is, whether the confirmed additional assessments were proper in law. The Tribunal agreed with the Commissioner that to prove that the Appellant paid wages to the persons referred in the sheet provided by the Appellant, it ought to have produced KRA records, bank statements and other tangible proof of payment. The Tribunal found that indeed the Commissioner was justified in resorting to the provisions of section 31 of the *Tax Procedures Act*, 2015 ("the TPA") and make a decision based on its best judgment and the information available to it. The Tribunal concluded that the Appellant failed to show that there were any payments made to employees and as such the income taxes charged were proper.
8. On VAT, the Tribunal also agreed with the Commissioner that if a person eligible for VAT fails to register then the Commissioner can register it and charge VAT in accordance with section 34(6) and (7) of the VAT Act, 2013. The Tribunal therefore found that the Commissioner acted lawfully in registering the Appellant for VAT but held that the action of backdating the VAT liabilities was



unlawful. Having been registered and notified of its VAT obligations on 09.02.2019 and the Appellant having failed to appeal that decision, the Tribunal held that the Appellant became liable to pay VAT as from the month of March hence the Appellant was liable to pay VAT prospectively from 01.03.2019. Consequently, the Tribunal partially allowed the appeal, upheld the Corporation Tax of Kshs. 3,399,719.00, limited the Appellant's VAT liability from 01.03.2019 and vacated the liability of the retrospective period before 01.03.2019.

9. The Appellant has now appealed to this court on the basis of the Memorandum of Appeal dated 08.02.2023. The Commissioner has responded to the appeal through its Statement of Facts dated 05.05.2022. The parties have also filed written submissions in which they take the positions summarized above hence I will not rehash the same but make relevant references in my analysis and determination below.

### **Analysis and Determination**

10. In determining this appeal, I am cognizant of the fact that this court is exercising appellate jurisdiction that is circumscribed by section 56(2) of the TPA which provides that "An appeal to the High Court or to the Court of Appeal shall be on a question of law only". As submitted by the Appellant, the Court of Appeal in *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR summarised what amounts to "matters of law" as follows:

(38) [T]he interpretation or construction of *the Constitution*, statute or regulations made thereunder or their application to the sets of facts established by the trial Court. As far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the trial court.

11. This means that an appeal limited to matters of law does not permit the appellate court to substitute the Tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts.
12. The Appellant mainly challenges the Tribunal's conclusion that the Appellant failed to produce documents and records to prove that the Commissioner's assessment was improper and invalid as guided by section 56(1) of the TPA which provides that "In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect." This position is echoed in section 30 of the *Tax Appeals Tribunal Act*, 2013 which provides as follows:

30. Burden of proof In a proceeding before the Tribunal, the appellant has 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.
13. In *Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte)* [2022] KEHC 5 (KLR) (24 January 2022) (Judgment), the court expounded on this principle by stating as follows:
    48. The most significant justification for placing the burden of proof on the tax payer is the practical consideration that the Commissioner cannot sustain the burden because he does not possess the needed evidence. Under the system of self-reporting tax liability, the taxpayer



possesses the evidence relevant to the determination of tax liability. It is simply fair to place the burden of persuasion on the taxpayer, given that he knows the facts relating to his liability, because the commissioner must rely on circumstantial evidence, most of it coming from the taxpayer and the taxpayer's records. The taxpayer must present a minimum amount of information necessary to support his position. This safety valve seems to place the burden of production on the taxpayer without relieving the Commissioner of the overall burden of proof. The tax payers' evidence must meet this minimum threshold.

49. A presumption of correctness arises from the Commissioner's determination/assessment. The presumption remains until the taxpayer produces competent and relevant evidence to support his/her position. When the taxpayer comes forward with such evidence, the presumption vanishes and the case must be decided upon the evidence presented.
14. The onus of proof may shift based on the stage of the proceedings and the actions taken by the parties. In *Commissioner of Investigations and Enforcement v Pearl Industries Limited* [2022] KEHC 51 (KLR) and *Commissioner of Domestic Taxes v Trical and Hard Limited* [2022] KEHC 9927 (KLR) the court described it like a pendulum swinging between the taxpayer and taxman at different points but more times than not swinging towards the taxpayer. This "pendulum of proof" swings at least twice and at most thrice; the first is when the Commissioner asserts its position and the tax payer is expected to disprove this position. Once the taxpayer states its position, the pendulum swings to the Commissioner who then reviews the position taken by the taxpayer. If it is determined that the position taken by the taxpayer is devoid of evidence or that the evidence is insufficient, incompetent and irrelevant, then the pendulum swings back to the taxpayer to prove that the Commissioner was wrong in its position and overall findings.
15. Therefore, in discharging this burden, the Appellant was required to provide such evidence as is required by law to prove that the assessments as issued by the Commissioner were incorrect or excessive by at least providing documents to prove its case. The necessity of documentation is underpinned by various provisions of our tax statutes. Section 59 (1) of the TPA provides that a tax payer shall produce records when required to do so by the Commissioner as follows:

#### 59. Production of records

- (1) For the purposes of obtaining full information in respect of the tax liability of any person or class of persons, or for any other purposes relating to a tax law, the Commissioner or an authorised officer may require any person, by notice in writing, to—
  - (a) produce for examination, at such time and place as may be specified in the notice, any documents (including in electronic format) that are in the person's custody or under the person's control relating to the tax liability of any person;
  - (b) furnish information relating to the tax liability of any person in the manner and by the time as specified in the notice; or
  - (c) attend, at the time and place specified in the notice, for the purpose of giving evidence in respect of any matter or transaction appearing to be relevant to the tax liability of any person.
16. Section 43 of the VAT Act, 2013 also provides for the maintenance of records as follows:

#### 43. Keeping of records



- (1) A person shall, for the purposes of this Act, keep in the course of his business, a full and true written record, whether in electronic form or otherwise, in English or Kiswahili of every transaction he makes and the record shall be kept in Kenya for a period of five years from the date of the last entry made therein.
  - (2) The records to be kept under subsection (1) shall include—
    - (a) copies of all tax invoices and simplified tax invoices issued in serial number order;
    - (b) copies of all credit and debit notes issued, in chronological order;
    - (c) purchase invoices, copies of customs entries, receipts for the payment of customs duty or tax, and credit and debit notes received, to be filed chronologically either by date of receipt or under each supplier's name;
    - (d) details of the amounts of tax charged on each supply made or received and in relation to all services to which section 10 applies, sufficient written evidence to identify the supplier and the recipient, and to show the nature and quantity of services supplied, the time of supply, the place of supply, the consideration for the supply, and the extent to which the supply has been used by the recipient for a particular purpose;
    - (e) tax account showing the totals of the output tax and the input tax in each period and a net total of the tax payable or the excess tax carried forward, as the case may be, at the end of each period;
    - (f) copies of stock records kept periodically as the Commissioner may determine;
    - (g) details of each supply of goods and services from the business premises, unless such details are available at the time of supply on invoices issued at, or before, that time; and
    - (h) such other accounts or records as may be specified, in writing, by the Commissioner.
  - (3) Every person required under subsection (1) to keep records shall, at all reasonable times, avail the records to an authorised officer for inspection and shall give the officer every facility necessary to inspect the records.
  - (4) For the purposes of this section, the Commissioner may, in accordance with the regulations, require any person to use an electronic tax register, of such type and description as may be prescribed, for the purpose of accessing information regarding any matter or transaction which may affect the tax liability of the person.
  - (5) A person who contravenes any of the provisions of this section commits an offence.
17. This position is fortified and reverberates through the ITA where section 54A requires a person carrying on a business to keep records adequate for the purpose of computing tax.
18. It is not in dispute that the Appellant did not produce the documents the Commissioner sought from it and the ones provided were deemed by the Commissioner and the Tribunal to be insufficient to prove the Commissioner's assessments as incorrect. Going through the record, I cannot fault these conclusions for a number of reasons. The Appellant, in claiming that the Corporation Tax assessment was as a result of the Commissioner rejecting its salaries and wages expenses did not provide actual and primary proof of these expenses. There was no proof of payments to these employees, the Appellant did not avail their KRA pins and failed to link the purported cash payments to the bank statement provided. The Appellant also provided a cash book that had only a credit side and no debit side. One



could therefore not blame the Commissioner for finding it impossible to confirm the said payments to the employees.

19. The Appellant was unable to demonstrate that the sales as declared in the Appellant's financial statements included rental income earned by its director. Without an elaborate explanation from the Appellant, the Commissioner could not tell the difference between the agency fees earned by the Appellant and rental income earned by its director in the bank statement meaning the Appellant's assertions remained unsupported.
20. In *Commissioner Investigations and Enforcement v Kidero* [2022] KEHC 52 (KLR) the court discussed the nature of proof and documentation required for the taxpayer to surmount the burden imposed on it. It held as follows:

27. The duty imposed on the taxpayer to keep records and the provisions on the burden of proof all go to support the Kenyan tax collection regime which is centered on a system of self-assessment. This system relies on the taxpayer making full and good faith disclosures in their tax declaration and affairs and hence empower the Commissioner to demand documents from time to time when investigating the affairs of a taxpayer. Whether the taxpayer has provided sufficient evidence to meet the threshold of proof required to discharge its burden must of course depend on the nature of the subject or transaction and the circumstances of the case bearing in mind the aforesaid duty placed on the taxpayer to keep records.

21. From the totality of the evidence on record, the was requested by the Commissioner to provide records and documents and having failed to produce the same or having produced insufficient and incomplete documents meant that it did not discharge the burden of proof placed on it and thus, it failed to prove that the Commissioner was wrong in its decision or that its assessments were excessive. As a result, the Commissioner could not be faulted for invoking section 31(1) of the TPA and using its best judgment to raise the additional assessments. In *Bemarc Limited v Commissioner of Domestic Taxes* [2022] KEHC 18123 (KLR) the court stated as follows regarding best judgment:

(29) Once the Appellant failed to provide the required documents, the Commissioner was entitled to use its best judgment to come up with the Appellant's tax liability on the basis of all the available documents from other sources available to the Commissioner. This is provided for under section 29 of the TPA which provides that the Commissioner may make a default assessment based on such information as may be available and to be in the best of his or her judgment. Counsel for the Commissioner referred the court to *Van Boeckel v Customs and Excise Commissioners* [1981] STC 290 where Woolf J., considered the meaning and application of 'best judgment', he stated as follows:

[T]he very use of the word 'judgment' makes it clear that the commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them ...

Secondly, clearly there must be some material before the commissioners on which they can base their judgment. If there is no material at all it would be impossible to form a judgment as to what tax is due.

Thirdly, it should be recognised, particularly bearing in mind the primary obligation of the taxpayer, to which I have made reference, of the taxpayer to make a return himself, that the commissioners should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgment, is due. In the very nature of things frequently the relevant information will be readily available to the taxpayer,



but it will be very difficult for the commissioners to obtain the information without carrying out exhaustive investigations. What the words ‘best of their judgment’ envisage, in my view, is that the commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them. [Emphasis mine]

22. The Commissioner used its best judgment in the circumstances and it has not been demonstrated that the process was arbitrary or unreasonable. Without supporting evidence, the Commissioner could not be expected to presume the Appellant’s expenses and lower its chargeable income (See Leah Njeri Njiru v Commissioner of Investigations and Enforcement Kenya Revenue Authority & another ML Tax Appeal No. E002 of 2020 [2021] eKLR).
23. In conclusion, I do not find any fault in law in the Tribunal’s judgment. It was reflective of the evidence on record and was supported by the applicable law. The bottom line being that the Appellant failed to discharge its legal burden of proof so as to upstage the Objection Decision.

### **Disposition**

24. The Appellant’s appeal is dismissed but with no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr Michael Onyango.

Ms Ng’anga instructed by for the Appellant.

Mr Wairire instructed by Kenya Revenue Authority for the Respondent.

