



REPUBLIC OF KENYA



**Saleh Mohammed Trust v Commissioner of Domestic Taxes (Income Tax Appeal E221 of 2023)  
[2025] KEHC 2169 (KLR) (Commercial and Tax) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2169 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E221 OF 2023  
RC RUTTO, J  
FEBRUARY 14, 2025**

**BETWEEN**

**SALEH MOHAMMED TRUST ..... APPELLANT**

**AND**

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

*(Being an Appeal against the Judgment delivered on 10th November 2023 at  
the Tax appeals Tribunal in Tax Appeals Tribunal Case No. 1545 of 2022)*

**JUDGMENT**

1. This appeal arises from a judgment delivered by the Tax Appeal Tribunal No. 1545 of 2022. In the said dispute, the Appellant was dissatisfied with the decision of the Respondent which rejected the Applicant's application for renewal of the Exemption Certificate issued to it on 27<sup>th</sup> January 2014 and was to expire on 27<sup>th</sup> January 2019.
2. At the Tax Appeal Tribunal, the Respondent filed among others a Preliminary Objection challenging the Tribunal's jurisdiction to entertain the appeal. The Respondent argued that the decision to reject the Appellant's application for renewal was not an "appealable decision" and that the appeal was premature.
3. The Tax Appeal Tribunal agreed with the Respondent's position that the decision to decline the Applicant's request for renewal of the Exemption Certificate was not an appealable decision. It proceeded to dismiss the Applicant's appeal in its entirety, deeming it to have been prematurely filed.
4. The Appellant being aggrieved with the entire judgment, lodged this appeal setting out the following summarised grounds of appeal: - The Tribunal erred in law and in fact in its judgment by; rejecting and finding that the Appellant's application for tax exemption was not an appealable decision as defined



under Section 3 as read with Section 52 of the [Tax Procedures Act](#) 2015; by failing to be bound by precedents; by holding that the Appellant’s application for tax exemption was a “tax decision” without any lawful basis whatsoever; by holding that it did NOT have jurisdiction to hear and determine the Appellant’s appeal as no valid objection was lodged as provided for under Section 51 of the [Tax Procedures Act](#); by striking out the Appellant’s appeal from the Respondent’s decision; by failing to determine the substantive dispute between the Appellant and the Respondent, that is, whether the Appellant’s tax exemption application met the threshold outlined under the provisions of Section 13 as read with paragraph 10 of the First Schedule to the [Income Tax Act](#); by failing to determine whether the Respondent breached the Appellant’s legitimate expectation by failing to renew the Appellant’s expired tax exemption; by failing to consider the Appellant’s supporting evidence provided in support of the Applicant’s appeal before the Tribunal; by misapprehending, misapplying and/or incorrectly applying the provisions of Sections 3 and 52 of the [Tax Procedures Act](#) as well as Section 12 of the [Tax Appeals Tribunal Act](#) as well as Section 13, as read with Paragraph 10 of the First Schedule to the [Income Tax Act](#) to the facts before the Tribunal.

5. The Appellant prayed that the Appeal be allowed, the judgment of the Tax Appeals Tribunal dated 10<sup>th</sup> November 2023 be set aside and substituted with a decree allowing the Appellant’s application for a tax exemption certificate dated 18<sup>th</sup> September 2018. In the alternative that the appeal, be remitted back to the Tax Appeal Tribunal for substantive hearing on its merits by the Tax Appeals Tribunal as sought in the Memorandum of Appeal and Statement of Facts dated 1<sup>st</sup> April 2022 filed at the Tax Appeals Tribunal.
6. The Appellant also sought that it be deemed to have enjoyed a tax exemption in the period between the making of the Appellant’s application for a tax exemption certificate dated 18<sup>th</sup> September 2018 until final determination is rendered on the application for exemption. They prayed for costs of the appeal.
7. The appeal was heard by way of written submissions and oral highlights. The Appellant’s submissions are dated 11<sup>th</sup> July 2024 while the Respondent’s submissions are dated 23<sup>rd</sup> September 2024.
8. Counsel for the appellant orally highlighted the written submissions and elaborated on the grounds of appeal which were summed up to three issues as follows; firstly, whether the Tribunal erred in law in holding that it did not have jurisdiction to hear and determine the appeal that was before it on merit. Secondly, whether the Appellant’s tax exemption application met the threshold outlined under the provisions of Section 13 read together with Paragraph 10 of the First Schedule to [Income Tax Act](#), CAP 470 (ITA) and lastly, whether the Appellant continues to enjoy tax exemption pending the determination of this dispute.
9. The Appellant stated that it submitted an application for the extension of an Exemption Certificate on 18<sup>th</sup> September 2018, as the certificate was set to expire on 27<sup>th</sup> January 2019. The application was rejected, prompting the Appellant to appeal to the Tax Appeal Tribunal. The Tribunal delivered judgment striking out the appeal for want of jurisdiction, holding that the decision in question was not appealable.
10. The Appellant submitted that the Tax Appeal Tribunal (TAT) failed to consider the definition of an ‘appealable decision’ under Section 3 of the [Tax Procedures Act](#). It was their submission that the Rejection was not a tax decision as misconstrued but an appealable decision falling “under any other decision made under a tax law”. They urged that this phrase be given its plain meaning. In support of its position, the Appellant relied on the cases of *Krystalline Salt Limited v Kenya Revenue Authority* [2019] eKLR and *Pius Mungai Nganga v Kenya Revenue Authority & 4 others* [2018] eKLR.



11. The Appellant further argued that the rejection of its application for the extension of the exemption was not an assessment as defined in section 3 of the *Tax Procedures Act* (TPA). That the rejection was not issued under Sections 15, 17, 18, 31(2), or 48 of the TPA as it was stated to have been issued under paragraph 10 of the First Schedule to the ITA. It was further stated that it was not a refund decision or a demand for penalty since no refund was being sought or penalty being demanded.
12. It was the Appellant's submission that, a rejection decision is appealable decision and the Tribunal has jurisdiction to first hear and determine the same in line with the doctrine of exhaustion.
13. On the second issue, the Appellant submitted that, based on all the documents provided, it had complied with the provisions of Paragraph 10 of the First Schedule to the *Income Tax Act*, as its income-generating activity consisted of rental income from two premises, all income generated was applied toward advancing its objective of supporting the education of needy students and ensuring that the properties could be redeveloped without the need for costly borrowing. This, in turn, would generate more income for charitable purposes. The Appellant emphasized that it does not rely on borrowing but solely depends on rental income.
14. Lastly, the Appellant submitted that the rejection offended the principle of legitimate expectation because its operations and expenditure remained consistent between the previous exemption and the date it lodged its subsequent exemption application thus it should continue to enjoy tax exemption status and not be subject to any tax demands by the Respondent. In support of its position, the Appellant relied on the case of *Law Society of Kenya (LSK) v Attorney General & 2 others* [2022] eKLR.
15. Furthermore, the Appellant argued that the cases relied upon by the Respondent were not relevant to the present appeal, as judicial review primarily concerns procedural matters. It contended that the case of *Republic v Commissioner of Domestic Taxes & Another ex parte Kenton College Trust* [2013] eKLR was decided before the enactment of the *Tax Appeals Tribunal Act* and, therefore, no alternative legal remedy was available at the time. The Appellant further asserted that, in the referenced case, the parties were challenging procedural aspects, whereas in the present appeal, procedural issues are not in contention.
16. The Appellant concluded its submissions by stating that both parties agree that, once the issue of jurisdiction is determined, the matter should be referred to the Tax Appeals Tribunal (TAT) for determination on its merits.
17. This appeal was strenuously opposed by the Respondent who relied on its statement of facts and submissions. It set out three issues for determination namely; whether the decision dated 18<sup>th</sup> March 2022 constitutes an appealable decision; whether the Appellant's application met the threshold outlined under the provisions of Paragraph 10 of the First Schedule to the ITA and whether the Respondent breached a legitimate expectation by failing to automatically renew the expired exemption.
18. On the first issue the Respondent submitted that the decision to reject the application for extension of the exemption does not constitute an appealable decision within the meaning of Section 3(1) of the *Tax Procedures Act* and is not of the nature or kind of an objection decision. The Respondent argued that the appropriate forum for the Appellant to challenge the exercise of this discretion was through a judicial review court. In support of this position, the Respondent relied on the case of *Republic v Commissioner of Domestic Taxes & Another ex parte Kenton College Trust* [2013] eKLR.
19. The respondent also urges the court to employ the *ejusdem generis* interpretation rule when interpreting "any other decision made under a tax law". That the statute must be looked at



using slightly difference lenses. Reference was made to the case of Cape Brandy Syndicate vs I.R. Commissioners (1921) and Mount Kenya Bottlers Ltd & 3 Others vs Attorney General NRB CA Civil Appeal No 164 of 2023.

20. On the second issue on whether the Appellant met the threshold under Paragraph 10 of the First Schedule to the ITAt—the Respondent submitted that, pursuant to Section 26 of the Act, the granting of an exemption is subject to the Commissioner’s satisfaction and is therefore not automatic. The Respondent argued that, in determining whether an exemption should be granted, it was established that the Appellant allocated only a small percentage of its income for the relief of public distress in the form of grants to needy children. The Respondent further submitted that the amounts applied, when computed as a percentage of the total rental income received, amounted to 7%, 8%, 9%, 13%, 21%, and 22% for the years 2014, 2015, 2016, 2017, 2018, and 2019, respectively. As a result, the Respondent contended that the Appellant did not fully comply with the requirement of the term ‘solely’ as stipulated under Paragraph 10 of the First Schedule, which led to the rejection of the application.
21. On the issue of legitimate expectation, the Respondent urged that the appellant is not automatically and unconditionally entitled to the exemption. Further that where there is a breach, there can be no legitimate expectation. It was further argued that the Appellant’s situation changed during the five years in which it enjoyed the exemption certificate. To buttress this argument reference was made to the Supreme Court decision in Communication Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 others. In conclusion, the Respondent submitted that the appeal should be dismissed and the decision of the Tax Appeals Tribunal (TAT) upheld.

### **Analysis and Determination**

22. Section 56(2) of the [Tax Procedures Act](#) (TPA), provides that “An appeal to the High Court or to the Court of Appeal shall be on a question of law only”. Guided by this provision, and the authority of Peter Gichuki King’ara Vs IEBC & 2 Others, Nyeri Civil Appeal No. 31 Of 2013, (Court of Appeal) (Visram, Koome & Odek, JJA) on what constitutes a point of law, and having considered the record of appeal, both written and oral submissions and authorities cited, the issues arising for determination are;
  - a. Whether the decision dated 18<sup>th</sup> March 2022 was an appealable decision under section 3 of the [Tax Procedures Act](#).
  - b. Whether the Appellant’s application met the threshold outlined under the provisions of Section 13 read together with Paragraph 10 of the First Schedule to the [Income Tax Act](#) Cap 470
23. The Appellant position is that the decision of the respondent rejecting its application for renewal of the exemption certificate was an appealable decision under section 3 of the [Tax Procedures Act](#) as it fell under the category “under any other decision made under a tax law”. In support of the Tribunal’s decision, the Respondent’s position is that the impugned decision was not an objection decision, since no tax assessment had been issued and no notice of objection had been lodged. According to the Respondent, the Appellant is challenging the Respondent’s actions as being unlawful and arbitrary, and, therefore, the proper forum for contesting the exercise of the Respondent’s discretion was through a judicial review process in court.
24. The Tribunal, in dismissing the Appellant’s appeal before, it stated:-
  - “71. The Tribunal notes that the communication by the Respondent to which the Appellant lodged its Appeal at the Tribunal was an email from the Respondent informing the Appellant that its application for tax exemption was rejected



on the basis that it did not conform to the requirements under Paragraph 10. In relation to the provisions of the TPA laid out above, this email was a tax decision by the Commissioner.

72. From the chronology of events, the Appellant failed to follow due process as it appealed a tax decision by the Respondent rejecting its application for exemption in response to which it should have lodged a valid objection as per Section 51 of the TPA. The Tribunal concludes therefore that the decision forming the basis of the Appellant's appeal to this Tribunal was not an appealable decision as defined under Section 2 of the TPA."
25. The resolution of this appeal is dependent on the meaning and definition of what constitutes an appealable decision, in contradistinction with a tax decision. Section 3(1) of the Tax Appeal Tribunal Act provides definitions for both terms. An appealable decision is:
- Appealable decision" means an objection decision and any other decision made under a tax law other than—
- a. a tax decision; or
  - b. a decision made in the course of making a tax decision;
26. A tax decision is means;
- (a) an assessment;
  - (b) a determination under section 17(2) of the amount of tax payable or that will become payable by a taxpayer;
  - (c) a determination of the amount that a tax representative, appointed person, director or controlling member is liable for under section 15, section 17 and section 18;
  - (d) a decision on an application by a self-assessment taxpayer under section 31(2);
  - (e) deleted by [Act No. 4 of 2023](#), s. 49 (a);
  - (f) a decision under section 48 requiring repayment of a refund; or
  - (g) a demand for a penalty or late payment interest;
27. From the definition of an appealable decision, provided for in the Tax Appeal Tribunal Act, it is clear that the categorization is into two categories, it encompasses either an objection decision or any other decision made under a tax law. Both parties agree that the impugned decision by the Respondent is not an objection decision. Thus, the contentious issue is whether or not it falls under, the second part of the TAT Act which explicitly states that it pertains to 'any other decision made under a tax law.'
28. Section 2 of the TAT Act defines "tax law" to means— (a) the [Income Tax Act](#) (Cap. 470); (b) the [Excise Duty Act](#) (Cap. 472); or (c) the Value Added Tax (Cap. 476); (d) the East African Community Customs Management Act, 2004; (e) any other tax legislation administered by the Commissioner. This definition has also been adopted by section 2 of the [Tax Procedures Act](#) save that it has included the Regulations or other subsidiary legislation made under it or the [Income Tax Act](#), [Value Added Tax Act](#), and [Excise Duty Act](#).
29. From the above, definitions the meaning of 'tax law' is broad and includes, the [Income Tax Act](#). In this instance, the [Income Tax Act](#) is the principal Act which the impugned decision was based on.



Specifically, the implementation and interpretation of the provisions of section 13 as read together with Paragraph 10 of the First Schedule to the *Income Tax Act* (Cap 470). Therefore, based on this descriptive definition, the interpretation of the impugned decision falls within the scope of an appealable decision as defined by 'any other decision made under a tax law'.

30. It is not in dispute that the Appellant had made a specific request for renewal of Exemption Certificate. This request was rejected as communicated in the email. This in my view does not also amount to a decision made in the course of making a tax decision but is in itself a decision made under the tax law.
31. Turning to the meaning of a tax decision, Part (a) defines it as an assessment. An assessment is further defined under Section 3(1) of the *Tax Procedures Act* as a self-assessment, default assessment, advance assessment, or amended assessment, and includes any other assessment made under a tax law. Parts (b), (c), (d), (e), (f), and (g) further clarify the specific provisions that would constitute a tax decision. It is important to note that, given the express definition of a tax decision, the impugned decision in the present case does not fall under any of the categories outlined in the definition of a tax decision.
32. In holding that the impugned decision is a tax decision, the Tribunal did not provide or categorize which specific part of the definition of a tax decision the impugned decision falls under, thereby failing to justify its classification as a tax decision.
33. This court notes that the categorization of the impugned decision as either an appealable decision or a tax decision has been guided by the adoption of the plain meaning rule interpretation of the statute. While there are numerous rules for interpreting a statute, in my view, and without diminishing the importance of other rules, the most significant rule is the plain meaning rule. The starting point for interpreting a statute is giving meaning to the words.
34. I am guided by the decision of the Supreme court in the case of *Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others* where the court appreciated the ordinary interpretation of a statute stated, “One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation. In interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it.”
35. I am further persuaded by the Appellant’s cited authority, that is, the case of *Krystalline Salt Limited v Kenya Revenue Authority* [2019] eKLR where the court in ordinarily interpreting statute stated;  

“Second, whether the decision is an appealable decision within the above provision. As stated above, the act defines an appealable decision “as an objection decision and any other decision made under a tax law other than— (a) a tax decision; or (b) a decision made in the course of making a tax decision. The words “any other decision under the tax laws” is significant. The impugned notice falls under the above definition. To hold otherwise would amount to intellectual dishonesty given the clarity of the provision.”
36. It is, therefore, this court’s position that in the absence of an express legislative intention to the contrary, the language must ordinarily be taken as conclusive thus, the impugned decision issued on 18<sup>th</sup> March 2022 falls under the category of an appealable decision.
37. Following from the above, the next question to be address is which was the appropriate forum to hear and determine the appealable decision. Section 52 (1) is express on this. It states:  

52. Appeal of appealable decision to the Tribunal



- (1) A person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the [Tax Appeals Tribunal Act](#) (Cap. 469A).
38. To this end, the Tax Appeal Tribunal is the appropriate forum for the hearing and determination of an appealable decision before any appeal arises from it. Its mandate should be looked at broadly as established under section 3 of the TAT Act to “hear appeals filed against any tax decision made by the Commissioner.”
39. The Respondent submitted that since the Appellant was challenging the Respondent's action as unlawful and arbitrary, the correct forum for such a challenge would be a judicial review court. While one might be inclined to agree with the Respondent's viewpoint, it should be noted that the Tax Appeal Tribunal is the primary forum for seeking redress of the Respondent's decision before the matter is escalated to a judicial review court. Section 9(2)(1) of the [Fair Administrative Action Act](#) stipulates that the High Court or a subordinate court shall not review an administrative action or decision under the Act unless the mechanisms, including internal mechanisms for appeal or review, and all remedies available under any other written law have been exhausted.
40. In this regard, the Tax Appeal Tribunal is vested with the requisite jurisdiction to hear an appealable decision.
41. In light of the foregoing, and not to prejudice either of the parties I will refrain from addressing the second issue, having already made a determination regarding the nature of the impugned decision and the appropriate forum to hear and determine the substantive issues arising from it.
42. In conclusion and for the reasons set out above, this appeal is allowed as follows: -
- a. The Judgment of the Tax Appeals Tribunal dated 10<sup>th</sup> November 2023 is hereby set aside.
  - b. The appeal filed before the Tax Appeal Tribunal should be substantively heard, including a determination on whether the Appellant would have been deemed to have enjoyed tax exemption during the period between the filing of the Appellant's application for a tax exemption certificate dated 18th September 2018 and the final determination of the appeal
  - c. Each party to bear its own costs

Orders accordingly.

**RHODA RUTTO**

**JUDGE**

**DELIVERED, DATED AND SIGNED THIS 14<sup>TH</sup> DAY OF FEBRUARY 2025**

For Appellants:

For Respondent:

Court Assistant:

