



**Commissioner of Investigations and Enforcement v Muasya t/  
a Solutions and Westpacks Ventures (Income Tax Appeal E111 of 2024)  
[2025] KEHC 8376 (KLR) (Commercial and Tax) (13 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8376 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E111 OF 2024**

**RC RUTTO, J**

**JUNE 13, 2025**

**BETWEEN**

**COMMISSIONER OF INVESTIGATIONS AND ENFORCEMENT APPELLANT**

**AND**

**VIVIAN NGENYI MUASYA T/A SOLUTIONS AND WESTPACKS  
VENTURES ..... RESPONDENT**

*(Being an Appeal against the judgment delivered on 22nd March 2024 at  
the Tax Appeals Tribunal in Tax Appeals Tribunal Case No. E190 of 2023)*

**JUDGMENT**

1. This appeal arises from a judgment delivered by the Tax Appeals Tribunal in Appeal No. E190 of 2023. In that matter, the Respondent was dissatisfied with an assessment on Income Tax and Value Added Tax (VAT) amounting to Kshs.11,251,935/=, arising from income received under the business name of Vivilinks Solutions. The Respondent contended that the Appellant disregarded her submissions to the effect that the said business, particularly dealings with the Kirinyaga County Government, was fraudulently registered and operated under her name by one Shawn Mwangi t/a Jewel Enterprises.
2. When the matter was before the Tax Appeals Tribunal, the Appellant contended that the Respondent registered for VAT on 1<sup>st</sup> May 2017 but only began filing returns in December 2018. It was further averred that the Respondent was non-compliant with her tax obligations in respect of both VAT and Income Tax, despite conducting business with the Kirinyaga County Government and failing to declare the corresponding income.
3. The Appellant stated that an investigation revealed, through an analysis of the Respondent's Cooperative Bank statements, that she had received income amounting to Kshs.31,906,366/=, which



was not disclosed in her tax returns. This income was deemed to constitute business income and was accordingly assessed under Section 3(3)(a)(i) of the [Income Tax Act](#) and Section 5 of the VAT Act. Following the issuance of the assessment, the Respondent lodged an objection dated 1<sup>st</sup> December 2022. However, the Appellant declared the objection invalid on 16<sup>th</sup> December 2022 for non-compliance with Section 51(3)(c) of the [Tax Procedures Act](#). The Respondent was consequently granted seven days to rectify the objection. Subsequently, on 23<sup>rd</sup> January 2023, the Respondent requested additional time to submit an appeal and propose a payment plan, which was submitted and approved on 30<sup>th</sup> January 2023. Nonetheless, on 20<sup>th</sup> March 2023, the Appellant issued its objection decision confirming the tax liability in the sum of Kshs. 11,251,935.10, exclusive of penalties and interest, as due and payable. This prompted the Respondent to move to the Tax Appeals Tribunal.

4. The Tax Appeals Tribunal identified three issues for determination: whether the Tribunal has jurisdiction to hear and determine the appeal; whether the Respondent erred in law and in act by issuing an assessment for year 2014 to 2016 and whether the additional income tax assessment for year 2017 and VAT assessment for December 2017 were justified. The Tribunal held that it has jurisdiction to determine the appeal before it, that the Appellant erred in law and in fact by issuing assessment for the years 2014 to 2016 for income tax and June 2017 for VAT which period was outside the statutory timelines of five years provided by law and finally, the Tribunal held that the Respondent herein did not discharge its burden of proof and the Appellant was therefore justified in issuing the Income Tax assessment for year 2017 and the VAT assessment for December 2017. In conclusion, the Tribunal varied the objection decision by the appellant herein in that the income tax assessments for the years 2014 to 2016 were vacated, the Appellant's VAT assessments for June 2017 was also vacated, income assessments for year 2017 was upheld and VAT assessment for December 2017 was upheld.
5. The Appellant being aggrieved with part of the judgment, lodged this appeal setting out the following grounds of appeal: that the Honourable Tribunal erred in law in adjudicating on an issue relating to the Income Tax assessments for the years 2014 to 2016 being contrary to Section 31 (4) (b) of the [Tax Procedures Act](#) 2015 which was not raised or pleaded by the parties; erred in law in adjudicating on an issue relating to Value Added Tax Assessments for the period June 2017 being contrary to Section 31 (4) (b) of the Tax Procedure Act 2015 which was not raised nor pleaded by the parties; erred in law in determining issues and grounds which were not in the Respondent's Notice of Objection, the Appellant's Objection Decision and the appeal documents without giving parties an opportunity to submit on the same contrary to Section 56 (3) of the [Tax Appeals Tribunal Act](#) 2013; erred in law in failing to afford the Appellant a reasonable opportunity as required under Section 26 of the [Tax Appeals Tribunal Act](#) 2013 to present his case and respond to the issue of the validity of the Income Tax Assessments for the years 2014 to 2016; erred in law in failing to afford the Appellant a reasonable opportunity as required under Section 26 of the [Tax Appeals Tribunal Act](#) 2013 to present his case and respond to the issue of validity of the Value Added Tax assessments for the period June 2017; erred in assuming the jurisdiction it did not have to consider issues or grounds not forming part of the objection decision and the appeal contrary to Sections 3 and 12 of the [Tax Appeals Tribunal Act](#) 2013; erred in raising issues suo moto that were neither pleaded nor forming part of the appeal and making a finding on the said issues without affording the parties an opportunity to be heard on these issues.
6. The Appellant prayed that the appeal be allowed; that the Income Tax assessments for the years 2014 to 2016, as confirmed in the Appellant's Objection Decision dated 30<sup>th</sup> March 2023, be upheld; and that the VAT assessments for the period of June 2017, as confirmed in the Objection Decision dated 1<sup>st</sup> November 2022, also be upheld. In the alternative, the Appellant prayed that the matter be referred back to the Tribunal for the parties to be heard on the issues on their merits. The Appellant further prayed for the costs of the appeal.



7. In response to the appeal, the Respondent filed a Statement of Facts dated 24<sup>th</sup> June 2024. She stated that, following her notice of objection to the assessment submitted on 29<sup>th</sup> November 2022, she sought to establish a formal payment plan with the Appellant for the settlement of Kshs.2,216,733/=. The proposed plan was approved on 30<sup>th</sup> January 2023; however, it was ultimately not implemented, as the Appellant alleged that the Respondent had failed to provide the necessary documentation to substantiate the plan. Consequently, an objection decision was issued on 20<sup>th</sup> March 2023, prompting the Respondent to lodge an appeal before the Tax Appeals Tribunal.
8. Pursuant to the court's directions, the Appeal was canvassed by written submissions. The Appellant's submissions are dated 30<sup>th</sup> October 2024 while the Respondent's submission are dated 24<sup>th</sup> September 2024.

### **Appellant's Submissions**

9. Counsel for the Appellant commenced the submissions by briefly outlining the background of the case and identifying a single issue for determination namely: whether the Tribunal erred in vacating the Income Tax assessments for the years 2014 to 2016 and the VAT assessments for the period of June 2017. In addressing this issue, Counsel argued that there was no dispute before the Tribunal regarding whether the said assessments were issued within the statutory timelines. It was submitted that the Tribunal assumed jurisdiction it did not possess by raising, considering, and determining an issue that was neither pleaded nor properly placed before it. Counsel contended that the question of whether the assessments were time-barred was not a pure point of law and that, even after framing this issue on its own motion, the Tribunal failed to afford the Appellant a reasonable opportunity to be heard and respond, thereby violating principles of fair hearing.
10. On the first ground, Counsel for the Appellant submitted that the Respondent, in her Memorandum of Appeal and Statement of Facts filed before the Tribunal on 3<sup>rd</sup> May 2023, raised only three issues for determination. It was argued that the issue of whether the assessments for the period of June 2017 were statutorily time-barred was not among them. Relying on the authority of *David Sironga Ole Tukai v Francis Arap Muge & 2 Others* [2014] eKLR, counsel submitted that, since the issue had not been raised by the parties, the Tribunal was precluded from raising and determining it suo moto. It was further contended that the Tribunal's conduct in this regard denied the Appellant the right to a fair hearing, and that the impugned finding should therefore be set aside.
11. On the second ground, Counsel for the Appellant relied on Section 3 of the *Tax Appeals Tribunal Act* that the Act strictly mandates the Tribunal to hear and determine appeals arising from tax decisions made by the Commissioner. It was argued that, since the issue of the time-barred assessment was not part of the objection decision, the Tribunal lacked jurisdiction to raise or determine the issue.
12. Further, Counsel contended that the Tribunal had no authority to amend either the Notice of Objection or the Objection Decision so as to include or pronounce itself on a matter that had not been placed before it by the parties. In doing so, the Tribunal effectively usurped the Respondent's statutory duty to clearly set out the grounds of objection or appeal, thereby violating Section 56(3) of the *Tax Procedures Act* and Section 13(6) of the *Tax Appeals Tribunal Act*. In support of this submission, the Appellant cited the case of *Mars Logistics Limited v Commissioner of Domestic Taxes* [2021] eKLR, where it was held that the Tribunal does not have jurisdiction to frame, consider, or determine an issue that was not raised by the parties.
13. On the third ground, the Appellant submitted that the assessments issued to the Respondent were made under Section 31 of the *Tax Procedures Act*, and therefore the provisions of Section 29, which relate to default assessments, were not applicable in the circumstances. Counsel argued that, pursuant



to Section 31(4) of the *Tax Procedures Act*, the computation of the five-year statutory limitation period is anchored on the date when a taxpayer submits a self-assessment return. Accordingly, for the Tribunal to determine whether the assessments fell within the permissible period, it was imperative for it to ascertain the exact date on which the Respondent submitted her self-assessment return which was not before the Tribunal. The Appellant therefore submitted that the Tribunal's finding on the limitation issue was speculative, as it was based on the assumption that the Respondent had submitted a return prior to October 2017.

14. On the fourth ground, Counsel for the Appellant submitted that the Appellant ought to have been afforded an opportunity to respond to the new issue that was framed, considered, and determined by the Tribunal without any input from the parties. It was contended that, by failing to grant such an opportunity, the Tribunal violated the Appellant's right to a fair hearing as guaranteed under Articles 47(1) and 50(1) of *the Constitution* of Kenya, as well as the right to fair administrative action under Section 4 of the *Fair Administrative Action Act*. The Appellant further submitted that the Tribunal's findings were erroneous and rendered in total disregard of the foregoing provisions. In support of this position, reliance was placed on the case of *Commissioner of Domestic Taxes v Ibugua Investments Company Limited* [2023] KEHC 26013 (KLR).
15. The Appellant concluded his submissions by praying that the orders sought in the Memorandum of Appeal amended on 28<sup>th</sup> May 2024 be granted.

### **Respondent's Submissions**

16. This appeal was opposed by the Respondent who raised only two issues for determination; that is whether a court of law can on its own motion determine a matter of law parties have not pleaded and whether determining a matter of law that was not pleaded implicitly amounted to denying the Appellant an opportunity to be heard.
17. Counsel for the Respondent commenced by outlining the background of the case and submitted that the Tribunal quashed the Income Tax assessments for the years 2014 to 2016 and the VAT assessment for June 2017 on the basis that they contravened Section 29(5) of the *Tax Procedures Act*. That provision prohibits the Commissioner from making tax assessments more than five years after the end of the reporting period to which the assessment relates. Counsel acknowledged that although the issue under Section 29(5) had not been raised in the pleadings or the correspondence exchanged between the parties, it nonetheless constituted a matter of law. It was further submitted that the Respondent had since paid the amounts upheld in respect of the Income Tax assessment for 2017 and the VAT assessment for December 2017. Counsel argued that the Tribunal acted properly in quashing the earlier assessments, as it is deemed to know the law and did not err in addressing a legal issue even though it had not been expressly pleaded.
18. On the first issue, Counsel for the Respondent submitted that the question of whether a court or tribunal can determine a matter of law that has not been pleaded has been addressed by the courts on several occasions. In this regard, reliance was placed on the decisions in *Kenya Agricultural and Livestock Research Organisation v Okoko & Another (Civil Appeal No. 36A of 2021)* [2022] KEHC 3302 (KLR) (delivered on 29<sup>th</sup> June 2022) and *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR.
19. On the second issue, the Respondent submitted that the Appellant was afforded a reasonable opportunity to present its case, inspect relevant documents, and make submissions during the proceedings. It was therefore contended that the Appellant's right to be heard was not violated.
20. The Respondent concluded by submitting that the Court upholds the Tribunal's decision.



## Analysis and Determination

21. Although the Appellant raises seven grounds in its Amended Memorandum of Appeal, it is the duty of the court to discern whether the issues raised are questions of law since this court's jurisdiction is limited by dint of Section 56(2) of the *Tax Procedures Act* (TPA), which provides that "An appeal to the High Court or to the Court of Appeal shall be on a question of law only." Thus, this court is not permitted to substitute its own conclusions for those of the Tribunal based on its own analysis of the facts. However, the court must ensure that the conclusions reached by the Tribunal are supported by the evidence on record and are not perverse as was held in the case of *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR. Also see the Court of Appeal case of *Peter Gichuki King'ara Vs IEBC & 2 Others, Nyeri Civil Appeal No. 31 Of 2013, (Court of Appeal)* (Visram, Koome & Odek, JJA); the Supreme Court case in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, Petition 2B of 2014* [2014] eKLR.
22. Based on the above authorities, and having considered the record of appeal and the written submissions and authorities cited, the only issue for determination is; Whether the Tribunal erred in holding that that the assessment for the years 2014 to 2016 for income tax and June 2017 for VAT was outside the statutory timelines.
23. The Tribunal held that the Respondent erred in law and in fact by issuing assessment for the years 2014 to 2016 for income tax and June 2017 for VAT which period was outside the statutory timelines of five years provided by law. The Tribunal held that;
  - " 123. The Tribunal noted the assessment was made on 7<sup>th</sup> November 2022. Since the law allowed the Respondent to assess the taxpayer for a period of not more than 5 years, the earliest the Respondent should have gone back to was October 2017 for VAT and the year 2017 income tax as it did not allege or prove "wilful neglect, evasion or fraud: by the taxpayer."
24. The crux of the Appellant's case is that the Tribunal determined an issue not placed before it, specifically the statutory time limitation under Section 29(5) and Section 31(4) of the *Tax Procedures Act*, without these issues being raised in the objection, objection decision, or appeal documents. The Appellant submitted that it issued assessments under Section 31 (4) (b) (i) of the *Tax Procedures Act* and not Section 29 of the *Tax Procedures Act*. That further, the computation of statutory limitation of five years is pegged on the date of submitting a self-assessment return by a taxpayer which the exact date ought to be ascertained making the issue a factual one and not a point of law. The Appellant contended that they were not given the opportunity to present evidence regarding this matter.
25. It is well settled that points of law can be raised at any time during the proceedings and as such this court will not belabour on it. Statutory limitation is recognized as a matter of law that goes to the justiciability of a matter. If it is found that the assessment by the appellant was out of time, the Tribunal lacks jurisdiction to determine the time barred issues on merit.
26. In the present circumstances, however, I do agree with the Appellant's position. The Tribunal, upon identifying that the assessment was time barred, ought to have invited the parties to be heard in view of the provisions of Section 31(4)(b)(i) of the *Tax Procedures Act*. The court finds that while the issue was a question of law, it required an assessment of evidence to determine the date that the self-assessment return by the taxpayer was submitted before concluding that it was time barred. Therefore, while the Tribunal was justified in raising the statutory timeline issue suo moto, the error arose when it proceeded



to make a determination without granting the parties an opportunity to be heard as there was no sufficient material on record to conclusively determine the issue.

27. I am guided by the Court of Appeal’s holding in the case of David Sirona Ole Tukai v Francis Arap Muge & 2 others [2014] KECA 155 (KLR) where the court stated that;

“It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other’s case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.

The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.”

28. Based on the above the court finds merit in the appeal and makes the following orders;

- a. The finding that the assessment for the years 2014 to 2016 for income tax and June 2017 for VAT is outside the statutory timelines of five years is set aside and the matter is remitted back to the Tax Appeals Tribunal for determination on validity of the assessments, upon hearing the parties.
- b. Each party shall bear its own costs of the appeal.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 13<sup>TH</sup> DAY OF JUNE 2025**

**RHODA RUTTO**

**JUDGE**

In the presence of;

.....for Appellant

.....for Respondent

Sam Court Assistant

