



Bhatt v Commissioner of Legal Services and Board Coordination (Income Tax Appeal E182 of 2023) [2025] KEHC 9983 (KLR) (Commercial and Tax) (4 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9983 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E182 OF 2023**

RC RUTTO, J

JULY 4, 2025

BETWEEN

JOY VIPINCHANDRA BHATT APPELLANT

AND

**COMMISSIONER OF LEGAL SERVICES AND BOARD
COORDINATION RESPONDENT**

*(Being an Appeal against the judgment delivered on 13th June 2024 at the
Tax Appeals Tribunal in Tax Appeals Tribunal Case No. E707 of 2023)*

JUDGMENT

1. This appeal arises from a judgment delivered by the Tax Appeals Tribunal in Appeal No. E707 of 2023. In the said matter, the Appellant was dissatisfied with the assessment of Capital Gains Tax, as set out in the Respondent's objection decision dated 12th September 2023.
2. Before the Tribunal, the Appellant contended that the Respondent's decision perpetuated uncertainty in the collection of Capital Gains Tax (CGT), contrary to established principles of taxation. The Appellant further argued that the Respondent had flagrantly disregarded the legislated tax point for CGT as provided under the *Income Tax Act*, and failed to distinguish or appreciate the factual and contextual differences between the present case and *Law Society of Kenya v Kenya Revenue Authority & Another* [2017] eKLR. Additionally, the Appellant asserted that the Respondent erred in imposing regulatory requirements that are exclusively applicable under the *Banking Act* to Mayfair CIB Bank Limited, and not to the Appellant in their capacity as a shareholder.
3. The Respondent on the other hand asserted that it had noted the Appellant remitted CGT at the rate of 5% following the transfer of 40,000 shares held in Mayfair CIB Bank Limited, whereas the applicable rate in 2023 was 15%.



4. The Tax Appeals Tribunal identified three issues for determination: whether the tax point for CGT was upon the sale or the registration of the Appellant's shares; whether the applicable CGT rate was 5% or 15%; and whether the Respondent's objection decision dated 12th September 2023 was justified.
5. The Tribunal held that the tax point for CGT was the moment when approvals from the Cabinet Secretary for the National Treasury and the Central Bank of Kenya (CBK) were obtained to enable the sale of shares, and not the point of registration as alleged by the Appellant. It further held that the applicable CGT rate in the instant case was 15%, and not 5%, on the basis that the requisite approvals necessary to give effect to the sale were granted on 30th January 2023, whereas the 15% rate became effective on 1st January 2023. Lastly, the Tribunal found that the Respondent had acted within the law in assessing CGT at Kshs.5,597,000/=, but held that the total payable amount should exclude the sum of Kshs.2,798,500/=, which had already been paid by the Appellant at the 5% rate. In conclusion, the Tribunal partially allowed the appeal and varied the Respondent's objection decision dated 12th September 2023, to the extent that the previously paid amount of Kshs.2,798,500/= was to be deducted from the total assessment, with the remaining balance upheld as due and payable by the Appellant.
6. The Appellant being aggrieved with the part of the judgment, lodged this appeal setting out the following grounds of appeal that the Commissioner of Domestic Taxes assessments upheld by the Respondent are a nullity and an untenable proposition when confronted by Article 210 (1) of *the Constitution* of Kenya; the respondent's decision perpetuates uncertainty in collection of Capital Gains Tax contrary to the fundamental principles of taxation; the Respondent erred in law when it flagrantly flouted the legislative tax point of Capital Gains Tax as provided for under the *Income Tax Act*; the Respondent failed to distinguish and appreciate the facts and context that were peculiar to the Law Society of Kenya versus Kenya Revenue Authority & Another (supra) from those in the Appellant's case; the Respondent erred in law and fact when it imposed on the Appellant regulatory requirements that were exclusively (pursuant to the *Banking Act* Cap 144 Laws of Kenya) directed to Mayfair CIB Bank limited and not the Appellant as a shareholder; the Respondent erred in law and fact when it upheld the Commissioner of Domestic Taxes assessments on the strength of a newspaper publication instead of relying on the express and unequivocal provisions of the *Income Tax Act* and that the objection decision did not speak to merits of the Appellant's grounds of objection.
7. The Appellant prayed that the appeal be allowed, the judgment of the Tax Appeals Tribunal delivered on 13th June 2024 in Tax Appeal No. E707 of 2023 and the assessment of Kshs.5, 597, 000/= be set aside, the court makes a declaration that the Appellant ought to have paid Capital Gains Tax at the rate of 5% with respect to the sale of his shares in Mayfair Bank Limited, the court makes a declaration that the sum of Kshs2,798,500 paid by the Appellant was a full statement of the Capital Gains Tax payable with respect to the sale of the Appellant's shares in Mayfair Bank Limited and that no amounts are outstanding from the Appellant to Kenya Revenue Authority for purposes of Capital Gains Tax and that the costs of and incidental to the appeal be awarded to the Appellant.
8. In response to the appeal, the Respondent filed a Statement of Facts dated 15th October 2024. The Respondent stated that the Appellant had entered into a Share Purchase Agreement with the founding shareholders of Mayfair CIB Bank Limited for the sale and purchase of 49% of the shares. The Respondent further noted that the agreement expressly acknowledged that the intended transfer of shares would fail if the requisite approvals under the *Banking Act* were not obtained. The transaction was subject to the provisions of Section 9(1) and Section 13(4) of the *Banking Act*, which require the approval of the Central Bank of Kenya and the Cabinet Secretary for the National Treasury before the transfer of shares could be effected.



9. The Respondent indicated that the records of Mayfair CIB Bank reflected that the transaction would be deemed to have been concluded only upon receipt of the required approvals. The approvals were issued on 24th January 2023 by the Cabinet Secretary, National Treasury and on 30th January 2023 by the Central Bank of Kenya. The Respondent emphasized that the definition of transfer under the [Income Tax Act](#) is clear, and that the Appellant's assertion of legal uncertainty is unfounded, as the law on Capital Gains Tax is clearly set out.
10. Furthermore, the Respondent stated that the Finance Act, 2022 amended Section 34(1)(j) of the [Income Tax Act](#) to increase the Capital Gains Tax rate from 5% to 15%, effective 1st January 2023. The Respondent submitted that it is empowered to make additional assessments based on the available information and to the best of its judgment, pursuant to Section 31 of the [Tax Procedures Act](#). Accordingly, the Respondent prayed that the appeal be dismissed with costs and the judgment of the Tribunal be upheld.
11. The Appeal was canvassed by written submissions. The Appellant's submissions are dated 19th November 2024 while the Respondent's submissions are dated 26th November 2024.

Appellant's Submissions

12. The Appellant commenced the submissions by setting out the background and factual context of the matter. The Appellant asserted that the effective date of transfer of her interest in the bank was evidenced by an auditor's certificate dated 30th December 2022, issued by PricewaterhouseCoopers (PwC). The applicant identified a single issue for determination, that is, whether the Respondent's demand for additional Capital Gains Tax, based on the rate increase effective 1st January 2023, was lawful, fair, and consistent with the legal framework, the principles of legitimate expectation, and the constitutional guarantees of fair administrative action.
13. It was submitted that the Appellant was a shareholder in Mayfair CIB Bank Limited, holding a total of 40,000 shares registered in her name. This ownership was evidenced by two share certificates: Certificate No. 24 for 20,000 shares dated 5th March 2015, and Certificate No. 38 for another 20,000 shares dated 23rd March 2018. According to a Sale Agreement dated 23rd November 2022, the Appellant agreed to sell all her shares in Mayfair CIB Bank to Commercial International Bank. Further, it was submitted that the Sale Agreement was executed jointly with other shareholders of Mayfair CIB Bank and pertained to the sale of 49% of the bank's issued share capital. The Appellant's shareholding represented 0.98% of the total shares sold. She stated that the buyer, Commercial International Bank, paid a total of USD 40,000,000 to all the selling shareholders, from which her share of the proceeds amounted to USD 800,000 (equivalent to Kshs 42,400,000). The Appellant asserted that Capital Gains Tax was calculated in accordance with the relevant tax laws. She maintained that the only issue in dispute with the Respondent was the applicable Capital Gains Tax rate and the corresponding amount payable.
14. The Appellant submitted that after executing the Sale Agreement on 23rd November 2022, the share transfers were completed in December 2022. She then applied for CGT at the prevailing rate of 5%, and paid the assessed amount of Kshs.2,798,500 on 30th December 2022. Regarding the requisite regulatory approvals under the [Banking Act](#), the Appellant acknowledged that the necessary approvals were granted on 24th January 2023 and 30th January 2023.
15. The Appellant further submitted that Capital Gains Tax in Kenya has undergone several legislative amendments, particularly with respect to the determination of the tax point. She cited Section 3(2)(f) of the [Income Tax Act](#), which designates gains accruing from the transfer of property as taxable, and



Paragraph 2 of the Eighth Schedule, which specifies that such gains are to be computed based on the difference between the transfer value of the property and its adjusted cost as defined under Paragraph 8. The Appellant explained that in 2015, the Finance Act introduced Paragraph 11A to the Schedule, which altered the tax point by requiring that CGT be paid on or before the date of applying for the transfer of property at the relevant Lands Office. However, that provision was later challenged and declared unconstitutional in *Law Society of Kenya v Kenya Revenue Authority & Another* [2017] eKLR. Despite this judicial pronouncement, the said provision was not immediately repealed, and it was only formally amended through the Finance Act 2023, which now provides that CGT shall be payable upon registration of the transfer or upon receipt of the full purchase price by the vendor, whichever is earlier.

16. The Appellant contended that she voluntarily chose to pay CGT prior to the registration of the transfer. She submitted that this early payment was not only lawful but also a demonstration of her vigilance and commitment to tax compliance before the tax rate was increased from 5% to 15% on 1st January 2023. She argued that penalizing such timely compliance contradicts the spirit and purpose of the law and serves to discourage proactive tax behaviour, which should instead be encouraged. Relying on *De Smith, Woolf & Jowell's Judicial Review of Administrative Action*, 6th Ed., Sweet & Maxwell relied upon in *Republic v Kenya Revenue Authority ex parte Cooper K-Brands Limited* [2016] eKLR (Misc. Application No. 458 of 2013), the Appellant submitted that by accepting her payment under the then prevailing framework, the Respondent created a legitimate expectation that the payment would not later be invalidated or reassessed.
17. The Appellant urged the court to find that the Respondent's subsequent demand for additional taxes goes against the principle of legitimate expectation.

Respondent's Submissions

18. This appeal was strenuously opposed by the Respondent who identified two issues for determination; first, what was the tax point for Capital Gains Tax and second, whether the Respondent was wrong in issuing and confirming the assessment.
19. The Respondent submitted that part of the Appellant's submissions (Paragraphs 26 to 31 and Paragraphs 46 to 50) raised factual issues, which are contrary to Section 56(2) of the *Tax Procedures Act*. Relying on the case of *Golden Cara Investments Limited v Commissioner of Domestic Taxes (Tax Appeal No. E078 of 2023)* [2024], the Respondent argued that the Appellant cannot invite this Court to substitute the Tribunal's decision with its own conclusions based on an independent analysis or appreciation of the factual record.
20. On the first issue, the Respondent submitted that for Capital Gains Tax to accrue, a transfer of property must have taken place, and the rights of ownership passed from the seller to the buyer through an instrument of transfer. The Respondent argued that this instrument of transfer marks the tax point for Capital Gains Tax. Relying on Section 3(2)(f) and the Eighth Schedule of the *Income Tax Act*, the Respondent submitted that gains arising from the transfer of movable property such as shares, are only taxable when the rights of ownership have effectively passed from the seller to the buyer, which can only occur through a valid instrument of transfer.
21. The Respondent stated that the buyer entered into a Share Purchase Agreement dated 23rd November 2022 with the founding shareholders of Mayfair CIB Bank Limited for the sale and purchase of 49% of its issued share capital. The agreement provided that the entire 49% shareholding would be purchased cumulatively and simultaneously. The Respondent emphasized that the Appellant did not produce a separate Share Purchase Agreement between herself and the buyer, and as such, the



transaction was treated as a single, indivisible transaction to which the Appellant was a party. Given her 0.98% shareholding, the Appellant was individually regarded as one of the sellers and bound by the terms of the collective agreement. The Respondent further submitted that the agreement expressly stated that the intended transfer of shares would not proceed unless and until the necessary approvals under the *Banking Act* were obtained. As such, the agreement was conditional, with clearly stipulated preconditions that had to be met before ownership could be legally conveyed. Referring to Sections 9(1) and 13(4) of the *Banking Act*, the Respondent noted that approval from both the Central Bank of Kenya and the Cabinet Secretary for the National Treasury was mandatory. These approvals were granted on 23rd January 2023 and 24th January 2023, respectively.

22. The Respondent also referred to a press release by the Central Bank of Kenya dated 30th January 2023, which confirmed that the acquisition of shares in Mayfair CIB Bank Limited by Commercial International Bank became effective on 31st January 2023 the same date on which stamp duty payments were made. The Respondent argued that these facts demonstrate that the transfer occurred after the Capital Gains Tax rate had increased to 15%, and that the Appellant's actions were intended to avoid liability under the new rate. The Respondent reiterated that the Appellant was bound by the terms of the existing Share Purchase Agreement and could not claim exemption on the basis of having a minority shareholding.
23. On the second issue, the Respondent submitted that, in accordance with the *Tax Procedures Act*, it is mandated to verify the accuracy of any tax self-assessed by a taxpayer. Relying on Section 31 of the *Tax Procedures Act*, as well as the decisions in *Republic v Kenya Revenue Authority ex parte Bata Shoe Company (Kenya) Limited* [2014] eKLR and *Samura Engineering Limited & Others v Kenya Revenue Authority*, HC Petition No. 54 of 2011 [2012] eKLR, the Respondent argued that the Commissioner has both the mandate and jurisdiction to issue an additional tax assessment against the Appellant. Further, by invoking Section 56(1) of the *Tax Procedures Act* and the case of *Commissioner of Domestic Services v Galaxy Tools Limited* [2020] eKLR, the Respondent submitted that it is the taxpayer's responsibility to demonstrate compliance with tax procedures and the accuracy of their filed tax returns.
24. In conclusion, the Respondent urged the Court to affirm the judgment of the Tax Appeals Tribunal delivered on 13th June 2024, uphold the Respondent's objection decision dated 12th September 2023, and dismiss the appeal with costs.

Analysis and Determination

25. This court acknowledges that its jurisdiction is limited by 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." This means that the 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)
26. Based on the above authority, and upon reviewing the record of appeal, the written submissions and the cited authorities, the key issues for determination are; Whether the applicable tax point for Capital Gains Tax arose in 2022 or 2023 and consequently, whether the applicable CGT rate was 5% or 15%.
27. The dispute arose from the Respondent's decision to assess Capital Gains Tax at the rate of 15%, which came into effect in January 2023. This was in contrast to the Appellant's earlier self-assessment, which applied the 5% rate that was in force and applicable up to December 2022.



28. It is not in dispute that the Appellant entered into a Share Purchase Agreement and received consideration for the sale and transfer of shares. It is equally undisputed that the Appellant paid Capital Gains Tax amounting to Kshs.2,798,500/= at the rate of 5% on 30th December 2022. Additionally, it is undisputed that the necessary approvals under the *Banking Act* were granted on 24th and 30th January 2023. The Appellant argues that the share transfer was effectively completed in 2022, and that her Capital Gains Tax payment was made on time and in accordance with the law as it stood prior to 1st January 2023.
29. The core of the Appellant’s argument is that her self-assessed Capital Gains Tax was based on Paragraph 11A of the Eighth Schedule to the *Income Tax Act*, and that the transaction was materially and substantially completed by December 2022. On this basis, she contended that the transaction did not fall within the scope of the revised Capital Gains Tax rate that came into effect in January 2023. To support this position, the Appellant cited the case of Law Society of Kenya v Kenya Revenue Authority & Attorney General, where the High Court held that a taxable gain cannot arise unless a transfer of property has occurred. Conversely, if a loss is incurred, there is no expectation that tax would be payable upon the transfer of the property.
30. The Respondent however submitted that the sale was conditional upon the obtaining of statutory approvals in accordance with the *Banking Act*, and that the transaction only became effective once the requisite approvals were granted in January 2023. Consequently, the Respondent argued that the applicable Capital Gains Tax rate was 15%, as amended by the Finance Act 2022, which came into effect on 1st January 2023.
31. The charging clause in respect of the Capital Gains Tax is Section 3 (2) (f) of the *Income Tax Act* which provides that;
- “Subject to this Act, income upon which tax is chargeable under this Act is income in respect of gains accruing in the circumstances prescribed in, and computed in accordance with the Eighth Schedule.”
32. Paragraph 2 of the Eighth Schedule provides as follows;
- “the income in respect of which tax is chargeable under section 3 (2) (f) is the whole of a gain which accrues “on the transfer” of a property in Kenya.”
33. Paragraph 6 of the Eighth Schedule to the ITA provides as follows:
- “6. Meaning of transfer
- (1) Subject to this Schedule there is a transfer of property for the purposes of this Schedule—
- (a) where property is sold, exchanged, conveyed or otherwise disposed of in any manner whatever (including by way of gift), whether or not for consideration.”
34. It is this court’s view that paragraph 2 provides for the time when Capital Gains Tax becomes due which is upon the transfer of property, the meaning of “transfer” is clearly outlined under Paragraph 6 (1) (a) of the Eighth Schedule to the ITA.
35. In this case, the transfer of shares was conditional upon the issuance of the required regulatory approvals. While the Appellant maintains the position that the sale was concluded in 2022 when she



paid Capital Gains Tax she does not dispute that the necessary approvals under the Banking Act were granted in 2023. Nor does she contest the clause in the Sale Agreement which provided that the transfer would only be deemed effective upon receipt of those approvals.

36. It is therefore this court's finding that the legal and beneficial ownership of the shares only passed in 2023 after the regulatory approvals were granted. This position, as advanced by the Respondent, is crucial in determining the applicable tax point. Therefore, since the approvals were granted after 1st January 2023, the Respondent correctly applied the 15% CGT rate under the amended Income Tax Act.

37. It is also important to note that the issue on Paragraph 11A of the Eighth Schedule to the Income Tax Act has been settled. Paragraph 11A provides as below:

“The due date for tax payable in respect of property transferred under this Part shall be on or before the date of application for transfer of the property is made at the relevant Lands Office.”

38. Paragraph 11A of the Eighth Schedule of the ITA which has been relied upon by the Appellant, requires Capital Gains Tax to be paid upon presenting the transfer as opposed to upon registration of the transfer, the effect being that tax is payable before the transfer. In *Law Society of Kenya v The Kenya Revenue Authority and Another* Petition No. 39 of 2017, the High Court found this provision infringed on the vendors' and purchasers' right to property and declared the provision unconstitutional on 14th March 2017, to the extent that;

“it purports to impose an obligation on a taxpayer to pay Capital Gains Tax on or before presenting the transfer instrument for registration, instead of, upon registration of the transfer instrument in favour of the transferee.”

39. Paragraph 11A of the Eighth Schedule of the ITA does not apply in the present case because it was declared unconstitutional. Neither party can therefore place reliance on paragraph 11A of the Eighth Schedule to the ITA as it is in conflict with paragraphs 2 and 6 of the Eighth Schedule.

40. Based on the above, I see no reason to interfere with the Tribunal's finding which also took account of the CGT that had already been paid by the Appellant in consideration of what is due and payable. This appeal is hereby dismissed. Each party to bear its own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 4TH DAY OF JULY, 2025.

RHODA RUTTO

JUDGE

In the presence of;

..... For Appellant

.....For Respondent

