



Gemini Properties Limited v Commissioner of Investigation and Enforcement (Income Tax Appeal E056 of 2022) [2024] KEHC 908 (KLR) (Commercial and Tax) (19 January 2024) (Judgment)

Neutral citation: [2024] KEHC 908 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E056 OF 2022
MN MWANGI, J
JANUARY 19, 2024**

BETWEEN

GEMINI PROPERTIES LIMITED APPELLANT

AND

**COMMISSIONER OF INVESTIGATION AND
ENFORCEMENT RESPONDENT**

*(Being an appeal from the judgment of the Tax Appeals Tribunal
in Appeal No. 156 of 2021 delivered on 14th April, 2022)*

JUDGMENT

1. The appellant is a limited liability company incorporated in Kenya and it owns a commercial property under the name New Muthaiga Mall.
2. The respondent is appointed under the [Kenya Revenue Authority Act](#) and is responsible for the control and management of the Domestic Taxes Department and accounting for tax due under the [Income Tax Act](#).
3. The respondent issued the appellant with a Notice of Tax Investigations dated March 24, 2015 and requested the appellant to provide records.
4. The respondent then issued a tax assessment vide a letter dated September 11, 2020 demanding taxes of Ksh.33,454,648.00 plus penalties and interest relating to VAT and Corporation Tax.
5. The appellant forwarded some documents to the respondent on December 21, 2020, which led the respondent to revise its assessment and subsequently delivered an objection decision on February 19, 2021, demanding taxes amounting to Ksh.18,374,779.00 comprising VAT of Ksh.12,861,926.00 and Ksh.5,512,853.00 in Corporation Tax.



6. The appellant lodged an appeal against the objection decision in the Tax Appeals Tribunal (hereinafter referred to as the Tribunal) where judgment was delivered in favour of the respondent on April 11, 2022.
7. Aggrieved by the Tribunal's judgment, the appellant filed the present appeal vide a Notice of Appeal dated May 13, 2022 and a Memorandum of Appeal dated May 18, 2022.
8. In the said Memorandum of Appeal, the appellant appealed against part of the Tribunal's judgment on the following grounds:
 - i. That the Honourable Tribunal erred in law in treating non-revenue items including loan transactions, intercompany and interbank transfers and reversal as captured in the appellant's bank statements as revenue items leading to the incorrect imposition of Corporation Taxes on those items contrary to the provisions of Section 3(2) of the *Income Tax Act*, Cap 470 Laws of Kenya;
 - ii. That the Honourable Tribunal erred in law in considering the non-revenue items such as loan transactions, reversals and intercompany and interbank transfers as revenue items leading to the overestimation of the revenues. The appellant thereafter erroneously treated these amounts as income from sales subject to VAT and yet the same were not subject to VAT under the *Value Added Tax Act*, 2013;
 - iii. That the Honourable Tribunal erred in law in determining that the appellant had failed to declare its Value Added Tax liability for the year 2012 to 2016 (*sic*) in respect to VAT on Third-Party Disbursements and yet Section 13(5) of the *VAT Act* outlines that such Third-Party disbursements should not be included in the taxable value;
 - iv. That the Honourable Tribunal erred in law in assuming that all bank deposits to the appellant's accounts equated to income chargeable to Corporate Tax.
9. Based on the above grounds of appeal, the appellant prays to have its appeal allowed and be awarded the costs of the appeal.

Appellant's submissions

10. In regard to the issue of VAT assessments/demands made by the respondent based on the grounds set out under the Memorandum of Appeal, Ms Kageha, the appellant's Counsel submitted that the loan amounts that were included and treated as revenue items by the respondent were disbursed to the appellant from various banks for purposes of financing its business operations and did not constitute taxable income as interpreted under Section 3(2) of the *Income Tax Act*, and could not attract Corporate Tax. Counsel relied on the case of *Republic v Kenya Revenue Authority ex parte Jaffer Mujtab Mohammed* [2015] eKLR, to support the allegation that the respondent's actions were arbitrary as it failed to take into account that the loan advancements made to the appellant was non-taxable income since the appellant was paying back the loans with interest to the lender(s).
11. In so far as tenants' deposits held by the appellant were concerned, Counsel stated that the appellant as an owner of a commercial property receives and holds rent deposits from tenants but the said deposits were classified as taxable income by the respondent, and that the appellant produced the documents that were reasonably within its possession. Counsel relied on the case of *Shreeji Enterprises Ltd v Commissioner of Investigations and Enforcement*, Tax Appeal Nos. 58 and 186 of 2019, which was cited with approval in *Baitul Investments Ltd v Commissioner of Investigations and Enforcement*, a decision of the Tribunal.



12. It was contended that the respondent regarded intercompany bank transfers as revenue items for the purpose of applying Corporation Tax, thereby double taxing and counting twice the amounts in various bank accounts, yet the transfers had already been charged on tax in the company's books. Ms Kageha contended that despite being provided with supporting documents, workings and entries as per the bank statements demonstrating the nature of the bank transfers, the respondent still charged the said items to Corporation Tax. She relied on the case of *Republic v Commissioner of Domestic Taxes Large Taxpayers Office exparte Barclays Bank of Kenya Ltd* [2012] eKLR, where Judge Majanja held that Kenya Revenue Authority has the duty of identifying the items that attract tax liability especially where there are objections to such categorization and state with clarity its claim and state how the transaction falls within the terms of Section 35(1)(a) of the *Income Tax Act*.
13. In regard to reversals, returned and unpaid cheques, the appellant's Counsel submitted that the amounts captured in the said transactions were treated as revenue to be subjected to tax.
14. It was contended that the respondent treated non-revenue as revenue leading to overestimation of revenue and regarded the said amounts as income from sales subject to VAT.
15. Counsel contended that the respondent treated third party disbursements as attracting VAT contrary to Section 13(5) of the *VAT Act*, despite supporting documents being provided by the appellant, such as the expenses met by the appellant on behalf of its tenants which are reimbursed but do not constitute income. She asserted that a strict interpretation of Section 13(5) of the *Value Added Tax Act* explicitly excludes third party disbursements from taxable value. Ms Kageha relied on the case of *Cape Brandy Syndicate v Inland Revenue Commissioner* (1921) 1 KB 64 which was cited with approval in the case of *Keroche Industries Limited v Kenya Revenue Authority & 5 others* [2007] eKLR.
16. It was contended that the respondent erroneously treated all bank deposits as income that attracted Corporation Tax thereby computing additional tax liability for the appellant for items that did not fall under Section 3 of the *Income Tax Act*.

Respondent's submissions

17. In opposition to the appeal, the respondent filed a statement of facts dated March 10, 2023 and written submissions dated March 24, 2023.
18. Mr. Shijenje, the respondent's Counsel contended that the Tribunal duly addressed itself on the issue of its assessment of Corporation Tax and VAT based on the analysis of the appellant's bank accounts and the Tribunal was right in finding that the respondent's objection decision considered the issues raised by the appellant through the objection lodged against the tax assessment.
19. The respondent's Counsel expressed the view that the Tribunal duly addressed itself on the provisions of Section 54A(1) of the *Income Tax Act*, Sections 17 and 13(5) of the *VAT Act* and the relevant principles governing the provision of documents and third party disbursements in determining the appeal. The respondent stated that the Tribunal duly proceeded in finding that the appellant failed to provide other documents it ought to have kept as provided under the aforementioned provisions of the law.
20. Mr. Shijenje further stated that the Tribunal looked into the documents attached by the appellant to its submissions and was justified in finding that the appellant failed to prove that the respondent's assessments were incorrect. He stressed that the appellant failed to provide the relevant documents in support of its appeal leading the Tribunal to dismiss the appeal and uphold the respondent's objection decision dated 1February 9, 2021. He relied on the case of *Union Insurance Co. of Kenya Ltd v Ramzan Abdul Dhanji* Civil Application No. 179 of 1988, to show that the appellant herein was given an ample



opportunity to support its objection and its Appeal at the Tribunal with relevant documents to rebut the respondent's averments that it had considered non-income entries in its bank accounts, but it failed to do so. That the Tribunal in arriving at its decision to dismiss the appeal observed that it must guard itself against the danger of being led away by sympathy.

21. The respondent prays to have the appeal dismissed and for the Tribunal's judgment to be upheld.

Analysis and Determination.

22. This Court has duly considered the rival submissions filed by the parties' respective Counsel. The Court has also analyzed the Tribunal's judgment dated April 14, 2022.
23. The grounds of appeal can be condensed into one broad issue for determination-

i. Whether the Respondent's Objection Decision dated 19th February, 2021 Confirming Taxes of Ksh.18,374,779.00 is Merited.

24. Section 56(2) of the [Tax Procedures Act](#), provides that an Appeal to the High Court from the decision of the Tax Appeals Tribunal or to the Court of Appeal shall be on questions of law only.
25. The dispute between the parties began when the respondent carried out an investigation on the appellant's bank statements wherein it found that the appellant had received rental income from its properties but the same had been under-declared for tax purposes.
26. The respondent issued an initial tax assessment dated September 11, 2020 demanding taxes from the appellant to the tune of Ksh.33,454,648.00 in respect to VAT and Corporation Tax. After the appellant objected to the assessment and forwarded documents as requested by the respondent, an objection decision was issued whereby the respondent demanded a reduced figure of Ksh.18,374,779.00 being VAT and Corporation Tax.
27. The appellant's main contention is that some amount of money in its bank accounts were not revenue and should not have been subjected to tax. It submitted that the said amounts included loan deposits, tenant deposits, interbank transfers, intercompany transfers, returned or cancelled cheques, reversed transactions and third party disbursements.
28. The respondent's objection decision is found on pages 59-62 of the appellant's Record of Appeal. In the objection decision, the Commissioner noted that the appellant's objection to the assessment had been duly considered before reaching a conclusion on the taxes to be demanded from the appellant.
29. In the objection decision, the respondent made adjustments to its earlier assessments on loan deposits, tenant deposits, interbank transfers, intercompany transfers, reversed transactions and third party disbursements, where the appellant had provided supporting documentation to explain the variances between the bank deposits and the sources of income that the appellant disclosed, but where the appellant failed to provide such documentation, the respondent did not make any adjustments.
30. For instance, on tenant deposits, the respondent found that the documents provided by the appellant while objecting to the assessment were not admissible as they were printouts without any signatures or stamps, hence they lacked authenticity. Further, the respondent noted that it had requested for proof such as rent agreements which were not provided. On third party disbursements, the respondent found that the appellant had not given sufficient evidence of a disbursement to a third party as an agent of his client in order to have such a disbursement excluded from taxable value under Section 13(5) of the [VAT Act](#).



31. Having analyzed the objection decision, I agree with the findings of the Tribunal that the respondent did consider the issues raised in the appellant's objection together with the documents provided by the appellant. The respondent was however not satisfied with the sufficiency of the supporting documents provided by the appellant in support of its assertions.
32. Section 54A(1) of the *Income Tax Act* provides thus:
- “(1) A person carrying on a business shall keep records of all receipts and expenses, goods purchased and sold and accounts, books, deeds, contracts and vouchers which in the opinion of the Commissioner are adequate for the purpose of computing tax.”
33. On third party disbursements, Section 13(5) of the *VAT Act* provides the following-
- “In calculating the value of any services for the purposes of subsection (1), there shall be included any incidental costs incurred by the supplier of the services in the course of making the supply to the client:
- Provided that, if the Commissioner is satisfied that the supplier has merely made a disbursement to a third party as an agent of his client, then such disbursement shall be excluded from the taxable value.” (emphasis added).
34. From the above provisions, the appellant had the obligation to keep records of its business which may be necessary in computation of taxes. It also had the obligation to prove third party disbursements from such documentation. Since the appellant failed to provide such supporting documentation to prove that the items in the objection decision that had been subjected to tax were non-revenue items that ought to have been exempted from VAT and Corporation Tax, the Tribunal could not have made a finding in the appellant's favour.
35. Tax laws place the evidential burden of proof on the Tax Payer. In *Republic v Kenya Revenue Authority; Proto Energy Limited (Ex parte)* (Judicial Review Application E023 of 2021) [2022] KEHC 5 (KLR), the Court made the following observation in that regard -
- “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.
- 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.”
36. The appellant herein made various allegations but failed to prove as required under Sections 107 and 109 of the *Evidence Act*. It ought to have provided tenancy agreements to prove that some of



the money in its bank account were security deposits from its tenants and that it was also receiving reimbursement from the said tenants, which amounts should not have taxed. Having failed to do so, it left the respondent with no option but to issue a tax demand for the amounts that were not supported by documentary evidence.

37. This Court therefore finds that the respondent's objection decision dated February 19, 2021 confirming taxes of Ksh.18,374,779.00 is merited and that the Tribunal arrived at a sound judgment dated April 14, 2022. In the result, this appeal is dismissed with costs being awarded to the respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JANUARY, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Omolo h/b for Mr. Mamuye for the Appellant

Ms. Shijenje for the Respondent

Ms B. Wokabi – Court Assistant.

