



**Commissioner Investigations and Enforcement v Kidero (Income Tax Appeal E028 of 2020)
[2022] KEHC 52 (KLR) (Commercial and Tax) (4 February 2022) (Judgment)**

Neutral citation: [2022] KEHC 52 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E028 OF 2020**

DAS MAJANJA, J

FEBRUARY 4, 2022

BETWEEN

COMMISSIONER INVESTIGATIONS AND ENFORCEMENT APPELLANT

AND

EVANS ODHIAMBO KIDERO RESPONDENT

*(Being an appeal against the judgment of the Tax Appeals Tribunal
at Nairobi dated 6th March 2020 in Tax Appeal No. 11 of 2017)*

Failure to show that political campaign contributions were expended for campaign purposes leads to the contributions being considered as income and thereby chargeable to tax.

The matter involved a claim by a taxpayer that some money that was deemed to be taxable income was actually political campaign funds and also a loan obtained by the taxpayer. The court held that political campaign funds received by a taxpayer were not taxable as they were not intended for the personal benefit of the taxpayer. Under section 112 of the Evidence Act the burden of proving that such receipts were not part of taxable income was borne by the taxpayer as the receipt of such money and its purpose was within the taxpayer's peculiar knowledge. The taxpayer's burden of proof in that regard, was buttressed by the duty to maintain records. The records would assist in the ascertainment of the taxpayer's tax liability. The court further held that where a taxpayer failed to prove that some money was received as political campaign funds and expended as such, the money would be deemed to be taxable income. The court noted that records showing the names and telephone numbers of donors of the political campaign funds were inadequate as they did not show how much money was collected from each donor. The court also held that there was insufficient evidence showing that a certain sum of money held by the taxpayer was a loan.

Reported by Kakai Toili

Tax Law – taxes – taxable income – political campaign funds – whether political campaign funds received by a taxpayer were taxable – whether it was enough for a taxpayer to show that money received was campaign funds for it to be exempt from income tax – what was the effect of failure to keep records of transactions to assist in tax assessment – Income Tax Act (cap 470) section 54A.



***Jurisdiction** – jurisdiction of appellate courts – jurisdiction to interfere in matters of facts of a trial court or tribunal – when could an appellate court interfere in matters of facts decided on by a trial court or tribunal?*

Brief facts

The appellant (the Commissioner) conducted an audit of the respondent's financial and business affairs for the income period of January 2011 to December 2015 and communicated its findings to the respondent in which the Commissioner assessed the respondent's tax liability at KES 680,903,503.00 inclusive of penalties and interest. The respondent formally objected to the findings and the Commissioner responded through an objection decision dated December 21, 2016 in which it reviewed the respondent's tax liability to KES 427,269,795.00 inclusive of penalties and interest.

The Commissioner disallowed the sum of KES. 423,000,000.00, which the respondent stated were political campaign contributions on the ground that the respondent did not provide a breakdown of how and when those funds were banked in his personal account, EK Center account as well as the MPESA till number. That in the absence of that breakdown, it was not possible for the Commissioner to assume that all those monies were deposited in the respondent's account for it to deduct the same.

The Commissioner also brought to charge KES 74,000,000.00 on account of one of the properties of the respondent, Vista Investments Limited, on the ground that it was not possible to determine its source of funding and was therefore taxed as an undeclared source of income. The respondent explained that it was a KES 62,000,000.00 loan received from Family Bank Limited through his lawyers and KES 14,000,000.00 shareholder loan from Gem Apartment Limited in which he was a shareholder. The Commissioner rejected that explanation because he did not provide documents in support of the shareholder's loan. Aggrieved by the Commissioner's decision, the respondent filed an appeal at the Tax Appeals Tribunal (the Tribunal) which was allowed. Being dissatisfied with that decision, the Commissioner filed the instant appeals.

Issues

- i. Whether it was enough for a taxpayer to show that money received was campaign funds for it to be exempt from income tax.
- ii. When could an appellate court interfere in matters of facts decided on by a trial court or tribunal?
- iii. Whether political campaign funds received by a taxpayer were taxable.
- iv. What was the effect of failure to keep records of transactions to assist in tax assessment?

Held

1. The interpretation or construction of the Constitution, statute or regulations made thereunder or their application to the sets of facts established by the trial court amounted to matters of law. The court's engagement with the facts was limited to background and context and to satisfy itself, when the issue was raised, whether the conclusions of the trial court were based on the evidence on record or whether they were so perverse that no reasonable tribunal would have arrived at them. The court could not be drawn into considerations of the credibility of witnesses or which witnesses were more believable than others; by law that was the province of the trial court.
2. The court would only intervene in matters of facts where the conclusions of the tribunal were not supported by any evidence. In carrying out that duty, the court was entitled to scrutinize all the evidence on record and to satisfy itself of the correctness of the tribunal's decision in line with the statutory prescriptions.
3. In the absence of clear words from the statute, political campaign funds received by a taxpayer were not taxable. The political campaigns were a means of expression and participation in the fundamental act of democracy and such funds were not intended for the personal benefit of the taxpayer. It was for the latter reason that the taxpayer had to demonstrate that the money received by him as political campaign funds were declared and used as such. Any sum not declared as political campaign funds and used for political campaign purposes would ultimately be considered income and therefore taxable.



4. In line with section 56(1) of the Tax Procedures Act (TPA), the taxpayer bore the burden of proving that assessment made by the Commissioner was incorrect. That also fit in with the principles of the law of evidence that he who asserted had to prove encapsulated in sections 107 of the Evidence Act. In addition, the receipt of such political campaign funds and their use was a matter within the taxpayer's peculiar knowledge hence under section 112 of the Evidence Act, the taxpayer bore the burden of proving that the receipts were not taxable income.
5. The burden imposed on the taxpayer did not exist in a vacuum, it was also buttressed by the obligation on the taxpayer to maintain records. Section 54A of the Income Tax Act (ITA) was augmented by section 23(1)(B) of the TPA which imposed a duty on the taxpayer to keep records required under any law so as to enable the person's tax liability to be readily ascertained.
6. The duty imposed on the taxpayer to keep records and the provisions on the burden of proof all went to support the Kenyan tax collection regime which was centered on a system of self-assessment. That system relied on the taxpayer making full and good faith disclosures in their tax declaration and affairs and hence it empowered the Commissioner to demand documents from time to time when investigating the affairs of a taxpayer. Whether the taxpayer had provided sufficient evidence to meet the threshold of proof required to discharge its burden depended on the nature of the subject or transaction and the circumstances of the case bearing in mind the duty placed on the taxpayer to keep records.
7. Section 3 of the ITA imposed a charge on tax on income accrued in and derived from Kenya. To determine whether money received by the taxpayer was income, the Commissioner was entitled to seek information and use it in order to establish whether money in the hands of the taxpayer constituted income subject to tax. If the Commissioner was satisfied that the money constituted taxable income, the burden was on the taxpayer to show otherwise.
8. All that was necessary was for the appellant to prove that the impugned amount was indeed campaign funds as declared. That was consistent with the principles of the burden of proof and duty of the taxpayer to keep appropriate records. It was not enough to show that the money received was campaign funds but that the money was expended for political campaign purposes. If the taxpayer did not show that the money was received as political campaign contributions and then expended for political campaign purposes, then it had to be considered income and thereby chargeable to tax.
9. It did not matter whether there were campaign finance rules or regulations that provided for the keeping of records for that purpose, it was the obligation of the taxpayer to keep records that enabled the Commissioner to assess his tax liability. The enactment of Contributions and Spending Limits for Political Parties and Candidates for Purposes of the General Elections Schedules to be held on August 9, 2022, Gazette Notice No. 8024 dated August 9, 2021 and subsequent regulations would assist in that regard but that issue had to be approached from the position of the law as it existed in the ITA and TPA.
10. The list provided by the respondent showed names and telephone numbers of persons who the respondent alleged, contributed to his political campaign. It did not show how much the respondent collected from each donor much less that he collected KES 423,000,000.00 from the people named on the lists. One of the key activities of a political campaign was to fundraise and one would expect that in the ordinary course of its business, it would at least keep records of its donors.
11. The Tribunal accepted the respondent's submission that when fundraising in Kenya or *harambee*, people were called upon to give voluntary contributions often from their taxed income without any records of the same and furthermore, there was no requirement for the taxpayer to produce each and every record. The Tribunal's finding was inconsistent with the taxpayer's obligation to maintain records, particularly where it was clear that the respondent was commingling his personal funds and political campaign funds.



12. Whether the taxpayer had discharged the burden of proof depended on the facts and circumstances. The Commissioner requested for proof that the money received was political campaign donations. That was not a case where the respondent was being asked to account for its spending where it was understandable that some forms of spending could not be documented. In the lists provided, the respondent took the trouble to list the names of prospective donors and their telephone numbers. It showed that the respondent called each of the persons on the list hence it was difficult to accept that he was unable to document the contributions from each donor.
13. The Commissioner requested the respondent for specific documents related to payment made by cheque to EK Centre and through the MPESA till number. Such payments would be clearly documented given the channel of donations which the respondent admitted he received payments. In addition, the Commissioner requested a breakdown of how much money the respondent received per month but that was not provided. Yet, on the other hand, the respondent provided a single-page summary statement of income and expenditure for the entire period of the campaign. Such a summary had to have been made from some primary documents which the respondent ought to have produced to support his case.
14. The respondent failed to discharge his burden as the evidence on record could not support the conclusion reached by the Tribunal. Consequently, the Tribunal erred in imposing on the Commissioner the burden of disproving the respondent's contention that the KES 423,000,000.00 was election campaign contributions when he had not provided sufficient evidence to surmount his obligation to establish the source of income.
15. Apart from article 201 of the Constitution, article 27 of the Constitution protected the right of equality and prohibited discrimination. There was no basis for the allegation of discrimination. The Commissioner exercised discretionary authority to conduct an in-depth audit of individual taxpayers. There was no suggestion that the Commissioner did not act within its power to conduct an audit of the respondent. A review of the record and evidence showed the Commissioner acted fairly, granted and accorded the respondent an opportunity to present his case and respond to queries. Indeed, in some instances, the Commissioner accepted the respondent's explanation and certain matters were settled. Since no basis for discrimination had been established, there was no basis for the Commissioner to justify its treatment of the respondent.
16. The letter from the Family Bank Ltd dated December 20, 2016 showed and confirmed that a loan was advanced to Gem Apartments by Family Bank and the loan proceeds were forwarded to the advocates. The second letter which the respondent relied on was the letter from the advocates which only confirmed that the advocates received money on account of Gem Apartments and in accordance with the client's instructions paid out the money to the respondent in the four instalments. A careful reading of that letter did not state that money was paid to the respondent on account of a loan to enable him purchase shares in Vista Limited. Further, no explanation was forthcoming from the respondent about the variance in the two figures and the lack of documentation to support the loan.
17. Under section 54A of the ITA, the taxpayer had a duty to maintain records to support its transactions. Those records were those expected in the ordinary course of business. In the letter dated December 1, 2016, the Commissioner requested the respondent to provide loan agreements to show that the KES 74,000,000.00 received from the advocates was received as a loan. The respondent did not produce any document showing that it had taken a loan and purchased shares in a company. It also did not proffer an explanation why the loan amount advanced by the related party through Family Bank was less than the amount ultimately transferred to his account by the advocates.
18. It was not an answer to a request for documents to state that a contract loan agreement was not one required to be in writing under the Law of Contract Act. In the same vein, a party purchasing shares in company would execute a share transfer, pay stamp duty on the share transfer, obtain a share certificate and be registered as a shareholder which would be evidenced by a CR-12.



19. The discharge of the burden of proof would depend on the nature of the transaction and the facts of the case. It was the respondent who was under audit and it was him who took out a loan to purchase shares and received KES 74,000,000.00 transferred to his account by the advocates. He therefore had to discharge the burden of showing that he took out a loan to purchase shares or otherwise take the risk of the money received being charged to tax as the Commissioner did. The Tribunal erred in coming to the conclusion that the Commissioner should have addressed its demand to Vista Investments Limited.
20. The issue of penalties was raised in the submissions before the Tribunal as it was not a ground of appeal in the memorandum of appeal dated January 20, 2017. Consequently, in the statement of facts dated February 17, 2017, the Commissioner did not deal with the issue of penalties substantively. That was contrary to section 13(6) of the Tax Appeal Tribunals Act, 2013 which provided that, the appellant would, unless the Tribunal ordered otherwise, be limited to the grounds stated in the appeal or the documents to which the appeal related.
21. In the letter dated October 4, 2016 setting out the tax investigation findings, the Commissioner claimed penalties. In its objection to the consequential assessments, which also demanded penalties, the respondent did not raise any complaint about the penalties hence when the Commissioner confirmed the assessments in its decision dated December 21, 2016, the respondent did not deal with issue of penalties in its appeal. The Tribunal erred in adjudicating on a matter which was not the subject of the appeal.
22. The respondent failed to discharge his burden as the evidence on record could not support the conclusions reached by the Tribunal. Consequently, the Tribunal erred in imposing on the Commissioner the burden of disproving the respondent's contention that the KES 423,000,000.00 was election campaign contributions when he had not provided sufficient evidence to surmount his obligation to establish that source of income.
23. The respondent failed to discharge the burden of showing that he received the sum of KES 74,000,000.00 as a loan to first purchase a property and then purchase shares as the same was without supporting evidence. The respondent was not discriminated against and the Tribunal erred in adjudicating on the issue of the Commissioner levying penalties when a criminal case was ongoing against the respondent as that was an issue that was not the subject of the appeal.

Appeal allowed.

Orders

- i. *The judgment of the Tax Appeals Tribunal dated March 6, 2017 was set aside.*
- ii. *The Commissioner's objection decision dated December 21, 2016 was affirmed.*
- iii. *Each party to bear its costs.*

Citations

Cases

Kenya

1. *Commissioner of Income Tax v Kencell Communications Limited (Now Airtel Kenya Limited)* Income Tax Appeal 272 of 2015; [2016] KEHC 1539 (KLR) - (Explained)
2. *Macharia, Mbutia v Annah Mutua Ndwiga & another* Civil Appeal 297 of 2015; [2017] KECA 290 (KLR) - (Explained)
3. *Mati, John Munuve v Returning Officer Mwingi North Constituency & 2 others* Election Appeal 5 of 2018; [2018] KECA 700 (KLR) - (Explained)
4. *Munya, Gatirau Peter v Dickson Mwenda & 2 others* Application No 5 of 2014; [2014] eKLR - (Explained)
5. *Primarosa Flowers Limited v Commissioner of Domestic Taxes* Income Tax Appeal 19 of 2017; [2019] KEHC 9431 (KLR) - (Explained)



6. *Republic v Minister of Finance & 2 others ex parte Kenneth Kiplagat* Miscellaneous Civil Application 364 of 2018; [2018] KEHC 9584 (KLR) - (Explained)

South Africa

Prinsloo v Van der Linde and Another (CCT4/96) [1997] ZACC 5; 1997 (6) BCLR 759; 1997 (3) SA 1012 - (Explained)

United Kingdom

Regent Oil Co Ltd v Strick (Inspector of Taxes) [1966] AC 295; [1965] 3 WLR 636; [1965] 3 All ER 174 - (Explained)

India

1. *Commissioner of Income Tax v Desi Prasad Vishwanath Prasad* 1969 72 ITR 194 SC - (Applied)
2. *Govindarajulu Mudaliar v Commissioner of Income Tax* AIR 1959 SC 248; 1958 34 ITR 807 SC - (Applied)
3. *Hero Cycles (P) Ltd v Commissioner of Income-Tax (Central) Ludhiana* Civil Appeal 514 of 2008 - (Applied)
4. *Kale Khan Mohammad Hanif v Commissioner of Income Tax* 1963 50 ITR 1 SC - (Applied)

United States

William O'Dwyer v Commissioner of Internal Revenue 266 F 2d 575 (4th Cir 1959) - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 27,47, 201(b)(i)- (Interpreted)
2. Evidence Act (cap 80) sections 107, 112- (Interpreted)
3. Income Tax Act (cap 470) sections 3(2); 54A(1)- (Cited)
4. Kenya Revenue Authority Act (cap 469) In general- (Cited)
5. Law of Contract Act (cap 23) section 2- (Interpreted)
6. Tax Appeals Tribunal Act (cap 469A) section 13(6)- (Interpreted)
7. Tax Procedures Act (cap 469B) sections 56(1); 23(1)(B)- (Interpreted)

Advocates

Ms Leparashao for the appellant

Mr Obuya for the respondent

JUDGMENT

Introduction and Background

1. The appellant (“the Commissioner”) is challenging the decision of the Tax Appeals Tribunal (“the Tribunal”) dated March 6, 2020 where it allowed the respondent’s appeal against the Commissioner’s Objection Decision dated December 21, 2016. Apart from the Memorandum of Appeal dated April 16, 2020, the Commissioner relies on its written submissions. The respondent opposes the appeal and relies on his Statement of Facts dated August 12, 2020 together with his written submissions.
2. The facts giving rise to this appeal are as follows. The Commissioner conducted an audit of the respondent’s financial and business affairs for the income period of January 2011 to December 2015 and communicated its findings to the respondent in a letter dated October 4, 2016 in which the Commissioner assessed the respondent’s tax liability at Kes 680,903,503.00 inclusive of penalties and interest. The respondent formally objected to the findings by the letter dated October 26, 2016. The Commissioner responded by the Objection Decision dated December 21, 2016 in which it reviewed the respondent’s tax liability to Kes 427,269,795.00 inclusive of penalties and interest. The



Commissioner disallowed the sum of Kes 423,000,000.00, which the respondent stated were political campaign contributions on the ground that the respondent did not provide a breakdown of how and when these funds were banked in his personal account, EK Center account as well as the MPESA till number. That in the absence of this breakdown, it was not possible for the Commissioner to assume that all these monies were deposited in the Respondent's account for it to deduct the same.

3. The Commissioner also brought to charge Kes 74,000,000.00 on account of one of the properties of the respondent, Vista Investments Limited, on the ground that it was not possible to determine its source of funding and was therefore taxed as an undeclared source of income. The respondent explained that this was a Kes 62,000,000.00 loan received from Family Bank Limited through his lawyers and Kes 14,000,000.00 shareholder's loan from Gem Apartment Limited in which he was a shareholder. The Commissioner rejected the respondent's explanation because he did not provide documents in support of the shareholder's loan.
4. Aggrieved and dissatisfied by the Commissioner's decision above, the respondent filed an appeal at the Tribunal. In its Judgment dated March 6, 2020, the Tribunal allowed the appeal. Being dissatisfied with this decision, the Commissioner now appeals.
5. Although the Commissioner has raised several grounds in its memorandum of appeal and framed several issues for determination in its submissions, I propose to condense the issues for determination under the two heads which the Commissioner demanded tax from the respondent as the other issues are subsidiary as follows;
 - a. Whether the Commissioner was justified in bringing to charge Kes 423,000,000.00 alleged to be political campaign funds.
 - b. Whether USD 750,000.00 loan to the respondent from a related party to purchase property should be brought to charge.
 - c. Whether the Commissioner could impose penalties on the Respondent.
6. Before I deal with each issue, it is important to recall that the jurisdiction of this court hearing an appeal from the Tribunal is circumscribed by section 56 of the [TPA](#) which provides as follows:

56.

- (1) In any proceedings under this part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.
- (2) An appeal to the High Court or to the Court of Appeal shall be on a question of law only.
- (3) In an appeal by a taxpayer to the Tribunal, High Court or Court of Appeal in relation to an appealable decision, the taxpayer shall rely on the grounds stated in the objection to which the decision relates unless the Tribunal or court allows the person to add new grounds. [Emphasis mine]

7. Following the Supreme Court decision in [Gatirau Peter Munya v Dickson Mwenda Kitbinji and 2 others](#) [2014] eKLR, 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.” [Emphasis mine]

8. It thus clear that this court will only intervene in matters of facts where the conclusions of the Tribunal are not supported by any evidence. In carrying out this duty, the court is entitled to scrutinize all the evidence on record and to satisfy itself of the correctness of the Tribunal’s decision in line with the statutory prescriptions.

Whether political campaign contributions are chargeable to tax

9. Before the Tribunal, the Commissioner agreed with the respondent that funds raised for political party campaigns are not chargeable to tax. The Respondent claimed that he had received Kes423,000,000.00 as political campaign funds which are not chargeable to tax.
10. Following the audit findings, the respondent in response thereto through his agent’s letter dated October 26, 2016, explained that his gubernatorial campaign was funded by well-wishers. He produced a list of invitees to several fundraising initiatives, a sample invitation card and observed that, “With the fact that campaign funding and expenditure laws or any other guidelines by then were not in existence, we have however attached detailed receipts and expenditure marked as Appendix 19.” The respondent’s agent also observed that, “Please note that campaign proceeds do not constitute additional income chargeable to Tax under the *Income Tax Act* (cap 470) or any other relevant law.”
11. Contained in the said appendix were the lists referred to containing the names and numbers and telephone numbers of various contributors. As regards expenditure, the respondent produced a single page document titled Statement of Receipts and Expenditure showing that Kes423,000,000.00 was received and expended on various items; Campaign center operating costs, party activities expense, office rent for 36 months, research and poll tracking costs, nominations, media and publicity expenses, publicity material, agents travel reimbursements, election monitoring costs, capital expenditure, motor running costs - fuel, motor running costs -repairs and communication and entertainment costs.
12. In a follow up request dated November 22, 2016, the Commissioner requested the respondent to provide a monthly breakdown of the funds received highlighting where and when the funds were banked. A further request was issued on December 19, 2016, in which the Commissioner requested for an annual breakdown of campaign receipts of Kes 423,000,000.00 and documentation of deposits of the cheques that were payable through EK Center and the MPESA till number.
13. In the Objection Decision, the Commissioner explained that it brought the Kes 423,000,000.00 to charge because the respondent had not provided a breakdown of how, when and where the monies received were banked. It stated that, “In the absence of this breakdown, it is not possible for us to assume that all these monies were deposited in your account for us to deduct the same.”
14. The Tribunal held the respondent had discharged its burden of proof by showing the source of the funds and that it was up to the Commissioner, who was conducting investigations, to follow up on the sources of funds through the contacts furnished since it had the tools to investigate and authenticate the respondent’s claims.



15. Before this court, the Commissioner's case is that the respondent did not provide the necessary documents to show that political campaign funds were separate from his personal account. It contends that in the absence of documentary evidence that the amounts in question were campaign funds and were used solely for the purpose of carrying out campaigns, it was entitled to treat this amount as income attributable to the respondent hence taxable.
16. The Commissioner complains that the documents produced by the respondent which included a number of lists with telephone numbers and invitation cards do not explain or show anything other than basic telephone contacts and the sample invitation card are not proof of campaign funds. It points out that while the respondent directed his invitees to pay money either his Foundation Center, EK Centre by way of cheque, by Mpesa buy Goods Till No 8**5 and through his account via cheque, the Commissioner submits that the respondent failed to demonstrate how much money out of the Kes 423,000,000.00 was deposited in his personal account and how much was paid to EK Centre.
17. The Commissioner justifies its decision to bring to charge the amount deposited in respondent's personal account since it cannot distinguish personal income and campaign funds. It points out there was no transfer from the respondent's personal account to another account designated for campaign funds. The Commissioner states that the respondent admitted to the Tribunal that the proceeds of various fundraisers were deposited together with other business proceeds to his personal accounts therefore he was not able to separate individual income deposited to his account and the EK Centre bank accounts. The Commissioner submits that following this admission and in accordance with section 56 of the TPA, the burden of proof is on the respondent to show that the disputed money is political campaign funds and not money from other sources of income. The Commissioner relies on several decisions that support its position on burden of proof; *William O'Dwyer and Sloan O'Dwyer v Commissioner of Internal Revenue*, 266 F.2d 575 a decision of the 4th Circuit US Court of Appeals and the following India Supreme Court decisions; A *Govindarajulu Mudaliar v Commissioner of Income Tax* AIR 1959 SC 248, 1958 34 ITR 807 SC; *Commissioner of Income Tax v Desi Prasad Vishwanath Prasad* 1969 72 ITR 194 SC and *Kale Khan Mohammad Hanif v Commissioner of Income Tax* 1963 50 ITR 1 SC.
18. The Commissioner also submits that under section 56(1) of the *TPA*, the burden is on the taxpayer to prove that tax decision is incorrect by producing records. It adds that under the *Evidence Act* (cap 80 of the Laws of Kenya) where any person alleges a particular fact it is upon them to prove it before the Commissioner confirms the assessments. The Commissioner maintains that the respondent was given ample time and opportunity to clarify the sources of income and provide necessary documentation, which he did not.
19. In answer to the Commissioner, the respondent submits that the Commissioner failed to adhere to section 3(2) of the ITA which requires income tax to be based on gains or profits and that in this instance, the Commissioner relied solely on bank statement entries which identified Kes 423,000,000.00 in determining his income and ignored all the explanations and documents advanced by him to demonstrate that the money were campaign contributions. The respondent submits that the assertion that he did not provide a schedule of entries is not true because he had all the entries in a detailed analysis and that out of all the entries, the Commissioner brought to charge: the political campaign funds.
20. The respondent submits that the Commissioner did not tender any proof that the moneys in question were not campaign funds and that the Tribunal in its decision rightly found at that the initial burden of proof lies with the taxpayer but shifts to the Commissioner in case it wants to establish that the taxpayer is wrong as was held in *Mbutia Macharia v Annah Mutua Ndwiga & another* Civil Appeal No 297



- of 2015 [2017] eKLR. In this case, the respondent states he discharged his burden by producing a list of campaign contributors complete with telephone contacts and amounts. Further, he also produced a campaign receipt and expenditure schedule therefore, the onus was on the Commissioner to challenge specific entries to show that the moneys were indeed not campaign donations.
21. The respondent submits that the Commissioner did not tender any evidence to disprove this position and only insisted on bringing the funds to charge without any proof that the moneys were profits contrary to section 3 of the ITA which provides that for any amount to be taxable as income it must fall under the same section. The respondent further submits that the Commissioner's position contravenes the provisions of section 15 of the *ITA*, which allows for deduction of expenses incurred wholly and exclusively in the production of the income. In his view, the section applies to all sources of income without any restriction and that in his case, there was no income that had accrued to him to warrant bringing to charge political campaign funds.
 22. The respondent explains that it is common knowledge that political campaigns especially for the gubernatorial seat of Nairobi is capital intensive and not all expenses can be supported by receipts eg mobilization of crowds to attend political rallies. The Respondent adds that the Commissioner failed to take cognizance of the circumstances and context in which political campaigns in Kenya operate and instead shut its eyes on the obvious fact that campaign funds deposited in the account are more often expended in cash and not receipted and it is on this basis that the respondent produced a campaign funds receipt and expenditure statement to support the campaign expenditure. The respondent cited the case of *Commissioner of Income Tax v Kencell Communications Limited (Now Airtel Kenya Limited)* ML ITA No. 272 of 2015 [2016] eKLR where reference was made to *Regent Oil Co Ltd v Strich (Inspector of Taxes)* [1966] AC 295 where the court therein advocated for the application of the commonsense approach rather than the strict application of the law. The respondent also cites *Primarosa Flowers Limited v Commissioner of Domestic Taxes* ML ITA No 19 of 2017 [2019] eKLR where reference was made to the Supreme Court of India in *Hero Cycles (P) Ltd vs Commissioner of Income-tax (Central) Ludhiana* [2015] 63 Taxmann.com 308 [SC]
 23. The respondent contends that prior to that, there was no legislative framework on campaign financing until 2013 when the Elections Campaigns Financing Act which was passed and which does not also require record keeping or taxation of campaign donations. The respondent thus supports the Tribunal's finding that campaign donations are in fact not income for the purpose of taxation, therefore, the inclusion of the Kes. 423,000,000.00 in the respondent's bank account is taxable income was erroneous.
 24. I am not called upon to decide whether political campaign funds are taxable as both parties agreed as much and the Tribunal held that in the absence of the clear words from the statute, political campaign funds received by a taxpayer are not taxable. The reason is not hard to see or discern. First, the political campaigns are a means of expression and participation in the fundamental act of democracy and second, such funds are not intended for the personal benefit of the tax payer. It is for the latter reason that the taxpayer must demonstrate that the money received by him as political campaign funds were declared and used as such. Any sum not declared as political campaign funds and used for political campaign purposes will ultimately be considered income and therefore taxable.
 25. The issue in this appeal is whether and to what extent the taxpayer is able to demonstrate that the money it received was campaign contribution. In line with section 56(1) of the TPA, the tax payer bears the burden of proving that assessment made by the Commissioner is incorrect. This also fits in with the principles of the law of evidence that he who asserts must prove encapsulated in sections 107 of the *Evidence Act* which provides, inter alia, that whoever desires any court to give judgment as to any legal right dependent on the existence of facts which he asserts, must prove those facts exist. In addition,



the receipt of such political campaign funds and their use is a matter within the taxpayer's peculiar knowledge hence under section 112 of the *Evidence Act*, the taxpayer bears the burden proving that the receipts are not taxable income.

26. But the burden imposed on the taxpayer does not exist in a vacuum, it also buttressed by the obligation on the taxpayer to maintain records. Section 54A of the *ITA* provides that:

54A(1) A person carrying on a business shall keep records of all receipts and expenses, goods purchased and sold and accounts, books, deed, contracts and vouchers which in the opinion of the Commissioner, are adequate.

(2) For purposes of this section, the carrying on business includes any activity giving rise to income other than employment income.

(3) Any person who contravenes the provisions of sub-section (1) shall be liable to such penalty not exceeding twenty thousand shillings as the Commissioner may deem fit.

The aforesaid provision is augmented by section 23(1)(B) of the *TPA* which imposes a duty on the taxpayer to keep records required under any law so as to enable the person's tax liability to be readily ascertained.

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.

28. The respondent complained that the Commission failed to comply with the section 3(2) of the *ITA* which requires income tax to be based on gains or profits. It assails the decision of the Commissioner to rely solely on bank statement entries in determining incomes and ignored all the explanations and documents advanced by the Respondent. It is correct to state that section 3 of the *ITA* imposes charge on tax on income accrued in and derived from Kenya but whether money received by the taxpayer is income, the Commissioner is entitled to seek information and use it in order to establish whether money in the hands of the taxpayer constitutes income subject to tax. If the Commissioner is satisfied that the money constitutes taxable income, the burden is on the taxpayer to show otherwise.

29. Turning to the issue at hand, I agree with the Tribunal's finding that, "All that was necessary then was for the appellant to prove that the impugned amount was indeed campaign funds as declared." This finding is consistent with the principles of the burden of proof and duty of the taxpayer to keep appropriate records as I have laid out above. I would however go further and state that it is not enough to show that the money was received was campaign funds but that the money was expended for political campaign purposes, a point emphasized and neatly illustrated by the case cited by counsel of the Commissioner, *William O'Dwyer v Commissioner of Internal Revenue*, 266 F.2d 575 where the United States Court of Appeal of the Fourth Circuit observed as follows in a case concerning campaign finance:

39 ... However, the evidence strongly supports the view that Crane intended the payment as a political or campaign contribution. If it were such and were



in fact used for such purposes, then it would not constitute taxable income. On the other hand, if petitioner retained the money or diverted it to his own personal use, it would be taxable income to him. * * *. Petitioner himself was the one person who could throw the most light on this matter. Yet he deliberately chose not to take the witness stand and subject himself to cross-examination. This is a circumstance that cannot be lightly ignored. The burden of proof was upon him....

59 'The Tax Court had no information or evidence before it as to the source or nature of either deposit, but it was confronted with the presumption of correctness attaching to the Commissioner's determination that this particular deposit represented taxable income. The Tax Court stated: 'The petitioners have not sustained their burden of overcoming this presumption. They introduced no evidence or testimony. They seemed content to rely upon the fact that the \$1500 was deposited in a joint bank account. In the absence of some evidence that the \$1500 did not represent taxable income, we must sustain the respondent's determination in this regard.'

60 All taxpayers had to do in order to overcome the presumption of correctness was to make some reasonable explanation as to the source and nature of the deposit in question. The presumption existed, the Commissioner's determination was prima facie correct and the burden was upon the taxpayers in the Tax Court to overcome this presumption. See *Hoefle v Commissioner*, 6 Cir., 1940, 114 F.2d 713." [Emphasis mine]

30. If the taxpayer does not show that the money was received as political campaign contributions and then expended for the political campaign purposes, then it must be considered income and thereby chargeable to tax. In my view, it does not matter whether there are campaign finance rules or regulations that provide for keeping of records for that purpose, it is the obligation of the taxpayer to keep records that enable the Commissioner assess his tax liability. Of course, the enactment of Contributions and Spending Limits for Political Parties and Candidates for Purposes of the General Elections Schedules to be held on August 9, 2022, Gazette Notice No 8024 dated August 9, 2021 and subsequent regulations would assist in that regard but this issue must be approached from the position of the law as it exists in the ITA and TPA.
31. Did the respondent discharge the burden of showing that the Kes 423,000,000.00 it received was political campaign contributions? In order to satisfy myself of the correctness of the Tribunal's decision, I have scrutinized the documents provided by the respondent in support of his position. The list provided by the respondent shows names and telephone numbers of persons who the respondent alleges contributed to his political campaign. It does not show how much the respondent collected from each donor much less that he collected Kes 423,000,000.00 from the people named on the lists.
32. One of the key activities of a political campaign is to fundraise and one would expect that in the ordinary course of its business, it would at least keep records of its donors. The Tribunal accepted the respondent's submission that when fundraising in Kenya or Harambee, people are called upon to give voluntary contributions often from their taxed income without any records of the same and furthermore, there is no requirement for the taxpayer to produce each and every record. The Tribunal's finding is inconsistent with the taxpayer's obligation to maintain records particularly where it is clear that the respondent was commingling his personal funds and political campaign funds. As I stated, whether the taxpayer has discharged the burden of proof depends of the facts and circumstances. The Commissioner requested for proof that the money received was political campaign donations. This is



not a case where the respondent is being asked to account for its spending where it is understandable that some forms of spending may not be documented. In the lists provided, the respondent took the trouble to list the names of prospective donors and their telephone numbers. It shows that the respondent called each of the persons on the said list hence it is difficult to accept that he was unable to document the contributions from each donor.

33. Further, the Commissioner requested the respondent for specific documents related to payment made by cheque to EK Centre and through the MPESA till number. Such payments would be clearly documented given the channel of donations which the Respondent admits he received payments. In addition, the Commissioner requested a breakdown of how much money the respondent received per month but this was not provided. Yet, on the other hand, the Respondent provided a single page summary statement of income and expenditure for the entire period of the campaign. Such a summary must have been made from some primary documents which the respondent ought to have produced to support his case. Can it therefore be said that in light of the taxpayer's duty to maintain documents, the evidence of the of lists of names and contacts provided and the matters I have outlined above that the Respondent discharged the burden of showing that the assessment was incorrect?
34. I have come to the conclusion that the respondent failed to discharge his burden as the evidence on record could not support such a conclusion reached by the Tribunal. Consequently, the Tribunal erred in imposing on the Commissioner the burden of disproving the respondent's contention that the Kes 423,000,000.00 was election campaign contributions when he had not provided sufficient evidence to surmount his obligation to establish the source of income.
35. Having upheld the Commissioner's assessment, I think it is only proper and for completeness to deal with the respondent's submissions that he was subjected to discrimination. He accuses the Commissioner of discrimination by selectively targeting him for taxation of campaign contribution to the exclusion of other presidential or gubernatorial candidates. He submits that article 201 of the Constitution which guide all aspects of public finance in Kenya provides, at article 201(b)(i), that the public finance system shall promote an equitable society; particularly the burden of taxation be shared fairly. He further submits that the Commissioner failed to rationally justify why this clear discriminatory treatment of the respondent was undertaken while no other political aspirant was subjected to taxation of political campaign funds. He cites the decision of Prinsloo v Van der Linde [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) cited in the case of Republic v Minister of Finance & 2 others ex parte Kenneth Kiplagat NRB JR Misc Civil Application No 364 of 2007 [2018] eKLR to demonstrate that he has been subjected to discrimination.
36. The Commissioner denies that it has discriminated against the respondent. It states that the respondent has not demonstrated or proved discrimination and that at all times the Commissioner acted in accordance with its statutory mandate conferred by the Kenya Revenue Authority Act, 1995. It submits that at all times, it accorded the respondent a fair administrative process as required by article 47 of the Constitution in all aspects. It explains that it wrote to the respondent several times calling for records and did inform the respondent of the additional assessments, allowed the respondent an opportunity to file a notice of objection and took into consideration the same, where in assessments were amended based on some additional documents provided.
37. Apart from article 201 of the Constitution cited by the respondent, article 27 protects the right of equality and prohibits discrimination. Having reviewed the evidence, I do not find any basis for the allegation of discrimination. The Commissioner exercised discretionary authority to conduct in-depth audit of individual taxpayers. There is no suggestion that the Commissioner did not act within its power to conduct an audit of the respondent. A review of the record and evidence shows the Commissioner acted fairly, granted and accorded the respondent an opportunity to present his



case and respond to queries. Indeed, in some instances, the Commissioner accepted the respondent's explanation and certain matters were settled. Since no basis for discrimination has been established, there is no basis for the Commissioner to justify its treatment of the respondent.

Whether loan to the respondent from a related party to purchase property should be brought to charge

38. The Commissioner rejected the respondent's explanation on the ground that he failed to provide documentation between him and the vendor of the property in order to ascertain whether the same funds issued by Family Bank purchased the Vista Investment Limited shares as indicated. It further stated that the respondent provided figures which did not tally. The first figure of USD 750,000.00 (being Kes 62,804,175.00 in dollar rates in 2012) was the loan from Family Bank to Gem Apartments Limited remitted to the firm of advocates was less than the sum of Kes 74,000,000.00 being the amount paid to the respondent by the firm of Advocates in four installments. In the absence of an explanation and evidence, the Commissioner took the position that this was not a loan as alleged but income from an unspecified source and therefore subject to tax. It also stated that the respondent did provide documents to show that there was a shareholder's loan or that indeed the respondent purchased shares.
39. The Tribunal held that there was no requirement under section 2 of the *Law of Contract Act* that the contract between Gem Apartments Limited to be in writing and that the two amounts should have been considered together and their taxability addressed by considering the accounts of Vista Investments Limited whose shares were being purchased as it is a separate entity. The Tribunal also concluded that, "no explanation was given why the appellant should bear tax liability of Vista Investments and no reasons were given to justify piercing of the corporate veil. [The] Tribunal was therefore of the view that the respondent should have addressed its demand to Vista Investments and not the appellant."
40. The issue for resolution is whether the respondent furnished sufficient evidence to satisfy the Commissioner that the transaction was actually a loan. The Commissioner submits that the amount of Kes 75,000,000.00 was brought to charge after the respondent failed to clarify whether this amount related to the same loan of USD 750,000 (approx Kes 62,000,000.00) despite being called upon to do so. Further that the respondent did not provide sufficient evidence to support the transaction. The respondent contends that it provided sufficient evidence by way of the letter from Family Bank dated 20th December 2016 and the letter from TripleOKLaw Advocates dated August 8, 2016.
41. As I have stated previously, the burden is on the taxpayer to furnish sufficient evidence to show that the assessment was wrong. When called upon to produce evidence, the respondent produced two letters. The letter from the Family Bank Ltd dated December 20, 2016 shows and confirms that a loan was advanced to Gem Apartments by Family Bank and the loan proceeds forwarded to the Advocates. The second letter which the respondent relies on to support his position is the letter from the Advocates which only confirms that the Advocates received money on account of Gem Apartments and in accordance with the client's instructions paid out the money to the respondent in the four instalments. A careful reading of that letter does not state that money was paid to the respondent on account of a loan to enable him purchase shares in Vista Limited. Further, no explanation was forthcoming from the respondent about the variance in the two figures and the lack of documentation to support the loan.
42. As I stated earlier, under section 54A of the *ITA*, the taxpayer has a duty to maintain records to support its transactions. These records are those expected in the ordinary course of business. In the letter dated December 1, 2016, the Commissioner requested the respondent to provide loan agreements to show that the Kes 74,000,000.00 received from the Advocates was received as a loan. The respondent did not produce any document showing that it had taken a loan and purchased shares in a company. It also did



not proffer an explanation why the loan amount advanced by the related party through Family Bank was less than the amount ultimately transferred to his account by the Advocates.

43. In my view, it is not an answer to a request for documents to state that a contract loan agreement is not one required to be in writing under the Law of Contract Act. In the same vein, a party purchasing shares in company will execute a share transfer, pay stamp duty on the share transfer, obtain a share certificate to and be registered as a shareholder which may be evidenced by a CR-12.
44. The discharge of the burden of proof will depend of course on the nature of the transaction and the facts of the case. In this case, I am unable to accept the conclusion of the Tribunal that the respondent discharged the burden of showing that he received the sum of Kes74,000,000.00 as a loan first to purchase a property and then to purchase shares without supporting evidence. Nor is the burden discharged by stating that the respondent is a separate person from the Company and that the Commissioner should look to the Company. It is the respondent who was under audit and it is him who took out a loan to purchase shares and received Kes74,000,000.00 transferred to his account by the Advocates. He therefore must discharge the burden of showing that he took out a loan to purchase shares or otherwise take the risk of the money received being charged to tax as the Commissioner did.
45. I therefore find and hold that the Tribunal therefore erred in coming to the conclusion that the Commissioner should have addressed its demand to Vista Investments Limited. I accordingly reverse the Tribunal and affirm the Commissioners assessment to that extent.

Whether Penalties levied on the respondent violate sections 80 and 89(3) of the TPA

46. The Tribunal ruled that the imposition of a penalty of Kes 50,954,655.00 for the period 2011 – 2015 while there is a pending prosecution against the respondent in Nairobi Criminal Case No 32 of 2018, *Republic v Evans Odhiambo Kidero* over the same income amounts to double jeopardy. It relied on sections 80 of the [TPA](#) which, in essence provides that a person shall not be subject to both the imposition of a penalty and the prosecution of an offence in respect of the same act or omission in relation to a tax law and section 89(3) thereof which provides that a person shall be liable to a penalty only when the Commissioner notifies in writing that person of a demand for the penalty setting out the amount of the penalty payable and the due date for the payment being a date that is at least 30 days after the date of the notification.
47. Apart from stating that the respondent has not been subjected to any prosecution on his personal income, the Commissioner submits that the issue of double jeopardy was neither a ground of the objection nor a ground of the appeal and was introduced at the submission stage before the Tribunal hence it should not have been considered.
48. The Commissioner is correct to submit that the issue of penalties was raised in the submissions before the Tribunal as it was not a ground of appeal in the memorandum of appeal dated January 20, 2017. Consequently, in the Statement of Facts dated February 17, 2017, the Commissioner did not deal with the issue of penalties substantively. This was contrary to section 13(6) of the [Tax Appeal Tribunals Act, 2013](#) which provides that, “The appellant shall, unless the Tribunal orders otherwise, be limited to the grounds stated in the appeal or the documents to which the appeal relates.”
49. It is also worth pointing out that in the letter dated October 4, 2016 setting out the Tax Investigation Findings, the Commissioner claimed penalties. In its Objection to the consequential assessments, which also demanded penalties, the respondent did not raise any complaint about the penalties hence when the Commissioner confirmed the assessments in its decision dated December 21, 2016, the respondent did not deal with issue of penalties in its appeal.



50. I therefore hold that the Tribunal erred in adjudicating on a matter which was not subject of the appeal.

Conclusion and Disposition

51. In sum and for the reasons I have elucidated above, I agree with the Commissioner that the respondent failed to discharge his burden as the evidence on record could not support the conclusions reached by the Tribunal. Consequently, the Tribunal erred in imposing on the Commissioner the burden of disproving the respondent's contention that the Kes423,000,000.00 was election campaign contributions when he had not provided sufficient evidence to surmount his obligation to establish this source of income.

52. I also find that that the respondent failed to discharge the burden of showing that he received the sum of KES 74,000,000.00 as a loan to first purchase a property and then purchase shares as the same is without supporting evidence. It is also my finding that the respondent was not discriminated against and that the the Tribunal erred in adjudicating on the issue of the Commissioner levying penalties when a criminal case was ongoing against the respondent as this was an issue that was not subject of the appeal.

53. The appeal succeeds and is allowed. I therefore make the following orders:

- a. The judgment of the Tax Appeals Tribunal dated March 6, 2017 be and is hereby set aside.
- b. The Commissioner's Objection decision dated December 21, 2016 is affirmed.
- c. Each party shall bear its costs.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY 2022.

D. S. MAJANJA

JUDGE

Ms Leparashao, Advocate instructed by Kenya Revenue Authority for the Appellant

Mr Obuya instructed by TripleOKLaw LLP Advocates for the Respondent

