Sagini v Commissioner of Domestic Taxes (Income Tax Appeal E295 of 2024)
[2025] KEHC 13329 (KLR) (Commercial and Tax) (26 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13329 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E295 OF 2024

CM KARIUKI, J

SEPTEMBER 26, 2025

BETWEEN

MARGARET ROSE SAGINI ..... APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the Tax Appeals Tribunal delivered on 25th October 2024, in Nairobi TAT Appeal No. E029 of 2024)

JUDGMENT

Background

1. The Commissioner of Domestic Taxes/Respondent objected to the Appellant's Application for exemption from Capital Gains Tax (CGT) on the gains from the sale of properties L.R 28068/616 and L.R 28068/617 on the grounds that the Appellant failed to satisfy the three conditions for exempting gains from sale of immovable properties as stipulated under Paragraph 36(d) (ii) of the First Schedule to the *Income Tax Act* CAP 470.

2. The said conditions are as follows: The use of the immovable property should be agricultural. The acreage of the property must be less than 50 acres; and the immovable property must be situated outside a municipality, gazetted township, or an area that has been declared by the Minister, by Notice in the gazette to be an urban area.

3. While dismissing the Appeal, the Tax Appeals Tribunal held that the Appellant sufficiently proved the first two conditions only and failed to adequately prove the 3rd condition.

4. Being aggrieved by the said verdict the appellant lodged instant appeal and raised 3 grounds;

i. The Honourable Tribunal erred in fact and law by holding that the Appellant did not satisfy all the conditions for exemption of Capital Gains Tax under Paragraph 36(d)(ii) of the First Schedule to the *Income Tax Act* Cap 470 despite the Appellant adducing evidence showing the usage of the subject properties was agricultural, the acreage was less than 50 acres and that the properties were situated outside the Naivasha Municipality.

ii. The Honourable Tribunal erred in fact and law by holding that the letter from the Naivasha Municipal Manager confirming that the subject properties were located outside the Naivasha Municipality was not sufficient evidence as to the location of the properties.

iii. The Honourable Tribunal erred in fact and law by holding that the rate applied by the Collector of Stamp Duty was conclusive evidence that the subject properties were within the Naivasha Municipality.

iv. The Honourable Tribunal erred in fact and law by holding that the properties were subject to Capital Gains Tax and thereby upholding the objection decision dated 30th November 2023.

5. The Appellant set out her case in her Statement of Facts dated and filed on 11th January 2024 in which she stated as follows:

> "She was the proprietor of the Properties having acquired them from the Agricultural Development Corporation in the year 2013. The use of the Properties was purely agricultural and remained so until the time of the transfer from the Appellant to the current owners who continue to use the land for agricultural purposes."

6. The Appellant stated that she had to procure consents from the Land Control Board as required under the *Land Control Act*, CAP 302 of the Laws of Kenya (hereinafter "LCA").

7. That upon conclusion of the sale transaction, the Appellant applied for exemption from payment of CGT under paragraph 36 (d) (ii) of the First Schedule to the ITA and the acknowledgement receipts were processed on 15th November 2022. The Respondent's officers called the Appellant upon her making the application with the aim of viewing the properties to ascertain that the same qualified for exemption. According to the Appellant, the visit did not occur.

8. On 13th March 2023 the Appellant received an electronic mail from an official of the Respondent informing her that she had defaulted in paying taxes outstanding in her ledger and requiring her to make the payments immediately. Upon checking her i-Tax ledger, she noted that the Respondent had assessed the CGT for the Properties at Kshs. 328,300.00 and Kshs.385,000.00 respectively.

9. The Appellant objected, attaching all the necessary supporting documents to the said objections in a bid to demonstrate that the properties in question are indeed agricultural land measuring less than 50 acres situated outside a municipality and/or gazetted township.

10. That the Respondent relied on extraneous factors by misdirecting itself that the assessment of stamp duty on transfers at 4% of the transfer value implied that that the parcels of land are situated within the municipality or gazetted township. This is not usually the case as the parcels of land are indeed located approximately 60 kilometers from Naivasha Township not withstanding their assessment at 4%.

11. The Respondent failed to take into consideration all the above evidence and also without any reason declined to visit the properties to ascertain if they indeed were agricultural for the purposes of the ITA but instead fully disallowed the objection vide its decision on 30th November 2023.

12. The Appellant averred that the sale of the properties fully qualified for exemption, and the Respondent erroneously misinterpreted the facts and the law. It was therefore improper, unfair and unprocedural for the Respondent to arbitrarily demand CGT without any legal basis to do so.

Respondent's Case

13. The Respondent's case was as set out in its Statement of Facts dated 14th February 2024 and filed on 16th February 2024. Pursuant to the Ruling delivered on 26th July 2024 the Respondent was to file a supplementary Statement of Facts, 3 days after being served with the additional documents that the Appellant had requested to file. The Respondent filed its supplementary Statement of Facts on 20th August 2024, beyond the timelines as directed by the Tribunal and accordingly the same was expunged from the record.

14. The Appellant was assessed with additional CGT and advised of the same through a letter dated 21st March 2023 in respect of the period of July 2022 in the sum of Kshs. 713,000.00 on account of information available to it of transfers of the Properties to Florapura Limited for the sum of Kshs 14,266,000.00 and additionally, she failed to remit CGT.

15. The Appellant was dissatisfied with the said additional assessments and made a late objection against the said assessments. The Respondent reviewed the Appellant's objection and requested the Appellant to provide documentation in support of her objection vide a letter dated 18th October 2023.The Respondent confirmed the assessment of the sum of Kshs. 713,300.00 being the principal sum of the tax assessed along inclusive of resultant penalties and interest.

16. The Respondent refuted each and every allegation by the Appellant contained in her Memorandum of Appeal and Statement of Facts. The Respondent reviewed the availed valuation documents and available information including the stamp duty records on i-Tax of the sale of land that indicated that stamp duty was computed on the said transfer at 4% as opposed to 2% of the sale value; indicative that the parcels of land are located within the municipality or gazetted townships.

17. The Respondent was therefore justified at arriving at the decision that the exemption claimed by the Appellant was not merited and rightly interpreted the provisions of Paragraph 36 (d) (ii) of the First Schedule of the ITA. In any event, the Respondent stated that the Appellant failed to discharge her burden of proving that the assessments were excessive or improper in line with the provisions of Section 56(1) of the *Tax Procedures Act*, CAP 469B of the Laws of Kenya (hereinafter "TPA") and Section 30 of the *Tax Appeals Tribunal Act*, CAP 469A of the Laws of Kenya (hereinafter "TATA").

18. The Respondent stated that the Appeal was unmeritorious because the assessments and the subsequent invalidation decision is proper and duly anchored in law as earlier stated. and there was therefore no basis to set aside the assessments.

Courts Directions

19. The court directed parties to canvass appeal via submissions.

Appellant submissions

20. The appellant submitted that, the bone of contention was whether the said parcels of land are situated outside the Naivasha Municipality or any other gazetted township.

21. The Appellant put forth as her evidence an official letter dated 16th January, 2024 from the Municipality of Naivasha indicating that, at the behest of the Appellant, a technical team visited the

properties in question which are located in Ndabibi Area and upon the said visit and with reference to the Naivasha Integrated Strategic Urban Development Plan (ISUDP) of 2014-2034, the technical team was able to establish that the properties are NOT within Naivasha Municipality.

22. The said letter is signed off by the Municipal Manager, Naivasha Municipality whose office is established under Section 28 of the *Urban Areas and Cities Act*, 2011 and is tasked with among others keeping a comprehensive data base and implementing the Municipality's Integrated Development Plan.

23. It will therefore be safe to conclude that no one would be better placed to answer the question as to whether the two parcels of land are within the Naivasha Municipality other than the Municipal Manager.

24. By adducing evidence from the Naivasha Municipality confirming that the two parcels of land were located outside the Naivasha Municipality, the appellant argue that she discharged her burden of proof as required under Section 56(1) of the *Tax Procedures Act*, 2015. And that once the Naivasha Municipality confirmed that the two parcels of land were located outside the Naivasha Municipality, it was incumbent upon the Respondent to give evidence in rebuttal. The letter dated 16th January 2024, and its contents was never discredited by the Respondent.

25. The Respondent submitted that it only relied on the rate at which the Stamp Duty for the two parcels of land was assessed. That once the Collector of Stamp Duty assessed the stamp duty payable at 4% then it was conclusive evidence that the parcels of land were located within a municipality.

26. The appellant submit that the Collector of Stamp Duty misdirected themselves in assessing tax payable at 4% whereas the two parcels of land were agricultural and outside the Naivasha Municipality. It was NOT the duty of the Appellant to point out that error at the time as the said tax invoice was raised and paid by the then Purchasers FLORAPURA.

27. Further it is contended that, the only reason the Collector of Stamp Duty assessed the two parcels of land at 4% is because that has been the practice for every leasehold property, agricultural or not. There is no legal basis for this, and the above practice can always be challenged by a taxpayer should they wish to.

28. Appellant further argues that the above ground cannot be considered in isolation without taking into account the other factors. The Consent to transfer from the Land Control Board as well as the letter from the Naivasha Municipality was evidence enough as to the usage, and location of the two parcels of land.

29. In sum, the Appellant contends that, she has discharged her burden of proof and satisfied all the three conditions set out under paragraph 36(d) (ii) of the First Schedule to the *Income Tax Act* CAP 470 for exemption from Capital Gains Tax. The Appeal is therefore merited.

30. She relies on Halsbury's Laws of England, 4th edition, Volume 17 at paragraph 14 states as follows:

> "……..The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence…"

Respondent's Submissions

31. The Respondent's submitted on the only issue for determination namely: - Whether the Appellant has discharged the burden of proof that the transaction in issue was exempted from CGT pursuant to the provisions of paragraph 36 (d) (ii) of the First Schedule of the *Income Tax Act*.

32. In Kenya, gains made from transfer of capital are subject to a tax known as Capital Gains Tax (CGT). Section 3 of the *Income Tax Act* provides as follows.

> Subject to, and in accordance with, this Act, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya.
>
> Subject to this Act, income upon which tax is chargeable under this Act is income in respect of—
>
> (f) Gains accruing in the circumstances prescribed in, and computed in accordance with, the Eighth Schedule.

33. The Respondent obtained information that the Appellant had transferred two parcels of land being LR. 28068/616 and LR. 28068/617, measuring 2.227Ha & 1.899Ha parcels to Florapura Limited for a sum of KES 14,266,000/- but failed to declare and remit Capital Gains Tax (CGT) on the said transactions. Owing to the failure by the Appellant to declare and remit CGT on the sale of land the Respondent proceeded to issue default assessments in the sum of Kshs. 713,000/- as provided for under Section 29 of the *Tax Procedures Act*, 2015.

34. The Respondent is empowered by Section 29 of the *Tax Procedures Act* to raise a default assessment where a taxpayer has failed to submit a tax return for a reporting period. The said provision states as follows.

> " 29(1) Where a taxpayer has failed to submit a tax return for a reporting period in accordance with the provisions of a tax law, the Commissioner may, based on such information as may be available and to the best of his or her judgement, make an assessment (referred to as a "default assessment") of—
>
> a. the amount of the deficit in the case of a deficit carried forward under the *Income Tax Act* (Cap. 470) for the period.
>
> b. the amount of the excess in the case of an excess of input tax carried forward under the *Value Added Tax Act*, 2013 (No. 35 of 2013), for the period; or
>
> c. the tax (including a nil amount) payable by the taxpayer for the period in any other case".

35. In the instant case, the Appellant does not deny having transferred property and having made an income. The Appellant however alleges that their income in question is exempted from CGT pursuant to the provisions of Paragraph 36(d)(ii) of the First Schedule of the *Income Tax Act*. Paragraph 36(d) (ii) of the First Schedule of the *Income Tax Act*, Cap 470 provides exemption for: -

i. "(d) Property (being land) transferred by an individual where-

ii. agricultural property having an area of less than fifty acres where that property is situated outside a municipality, gazette township or an area that is declared by the Minister, by notice in the Gazette to be an urban area for purposes of this Act."

36. In order for a gain from the sale of an immovable property to qualify for exemption pursuant to paragraph 36 (d) (ii) of the First Schedule to the ITA, the following 3 conditions must all be met:

i. The use of the immovable property should be agricultural,

ii. The acreage of the property must be less than 50 acres; and

iii. The immovable property must be situated outside a municipality, gazetted township or an area that has been declared by the Minister, by notice in the Gazette to be an urban area.

37. There is no dispute with regards to the acreage of the property. The Appellant however failed to provide documentary evidence that the land was agricultural and that the same was outside the municipality or gazetted townships to warrant exemption qualification under paragraph 36 (d) (ii).

38. Whereas the Appellant alleges that the Respondent misdirected in facts and in law on its findings that they did not qualify for the Capital Gains Tax (CGT) exemption, the Respondent avers that no documentary evidence was provided by the Appellant in support of their claim that the pieces of land are located outside the Municipality or gazette townships and that they are agricultural land, warranting exemption qualification.

39. The Respondent reviewed the availed valuation documents and available information including the stamp duty records on i-tax of the sale of land that indicated that stamp duty was computed on the said transfer at the rate of 4% as opposed to 2% of the sale value; indicative that the parcels of land are located within the municipality or gazetted townships.

40. Further and as correctly observed by the Tribunal, pursuant to paragraph 12A of the Schedule to the *Stamp Duty Act*, CAP 480 of the Laws of Kenya (hereinafter "SDA") the Collector of Stamp Duty whilst assessing stamp duty, is mandated to apply the rate of 4% if an immovable property is within a municipality and 2% if a property is outside a municipality.

41. In view of the stated provisions of the SDA, neither the use of the land (agricultural or commercial) nor the tenure (leasehold or freehold) determines the applicable rate of stamp duty. Pursuant to the schedule to the SDA, the location of an immovable property is the main factor in determining the applicable rate of Stamp Duty. In the instant Appeal, the Collector of Stamp Duty applied a rate of 4% as evidenced by the Transfers of interest in Land/ Form LRA33 which were adduced as evidence by the Appellant at the Tribunal. The rate applied by the Collector of Stamp Duty was indicative of the fact that the Properties were within a Municipality.

42. The Respondent was therefore justified at arriving at the decision that the exemption claimed by the Appellant was not merited and rightly interpreted the provisions of Paragraph 36 (d) (ii) of the First Schedule of the *Income Tax Act* Cap 470.

43. In any event, the Respondent states that the Appellant failed to discharge its burden to prove that the assessments were excessive or improper in line with the provisions of Section 56(1) of the *Tax Procedures Act* and Section 30 of the *Tax Appeals Tribunal Act*.

44. The Respondent relies on the following cases, Alfred Kioko Muteti v Timothy Miheso & another [2015] eKLR, Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another [2004] eKLR, Sheria

Sacco Limited vs. Commissioner of Domestic Taxes (2019) eKLR, and Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte) (Judicial Review Application E023 of 2021) [2022.

Issues Analysis and Determination

45. After going through the TAT proceedings and judgement, the pleadings and the record, plus the parties' submissions, I find the issues are; Whether the Appellant has discharged the burden of proof that the transaction in issue was exempted from CGT pursuant to the provisions of paragraph 36 (d) (ii) of the First Schedule of the *Income Tax Act*. And the costs.

46. The Appellant contends that, she has discharged her burden of proof and satisfied all the three conditions set out under paragraph 36(d) (ii) of the First Schedule to the *Income Tax Act* CAP 470 for exemption from Capital Gains Tax. The Appeal is therefore merited. On the contrary, the Respondent submits that it was justified at arriving at the decision that the exemption claimed by the Appellant was not merited and rightly interpreted the provisions of Paragraph 36 (d) (ii) of the First Schedule of the *Income Tax Act* Cap 470.In any event, the Respondent states that the Appellant failed to discharge its burden to prove that the assessments were excessive or improper in line with the provisions of Section 56(1) of the *Tax Procedures Act* and Section 30 of the *Tax Appeals Tribunal Act*.

47. In the instant case, the Appellant does not deny having transferred property and having made an income. The Appellant however alleges that their income in question is exempted from CGT pursuant to the provisions of Paragraph 36(d)(ii) of the First Schedule of the *Income Tax Act*. Paragraph 36(d) (ii) of the First Schedule of the *Income Tax Act*, Cap 470 provides exemption for: -

    i. "(d) Property (being land) transferred by an individual where-

    ii. agricultural property having an area of less than fifty acres, where that property is situated outside a municipality, gazetted township or an area that is declared by the Minister, by notice in the Gazette to be an urban area for purposes of this Act."

48. In order for a gain from the sale of an immovable property to qualify for exemption pursuant to paragraph 36 (d) (ii) of the First Schedule to the ITA, the following 3 conditions must all be met:

    i. The use of the immovable property should be agricultural,

    ii. The acreage of the property must be less than 50 acres; and

    iii. The immovable property must be situated outside a municipality, gazetted township or an area that has been declared by the Minister, by notice in the Gazette to be an urban area.

49. There is no dispute with regards to the acreage of the property. The Appellant however failed to provide documentary evidence that the land was agricultural and that the same was outside the municipality or gazetted townships to warrant exemption qualification under paragraph 36 (d) (ii).

50. Whereas the Appellant alleges that the Respondent misdirected in facts and in law on its findings that they did not qualify for the Capital Gains Tax (CGT) exemption, the Respondent avers that no documentary evidence was provided by the Appellant in support of their claim that the pieces of land are located outside the Municipality or gazette townships and that they are agricultural land, warranting exemption qualification.

51. The Respondent reviewed the availed valuation documents and available information including the stamp duty records on i-tax of the sale of land that indicated that stamp duty was computed on the

said transfer at the rate of 4% as opposed to 2% of the sale value; indicative that the parcels of land are located within the municipality or gazetted townships.

52. Further and as correctly observed by the Tribunal, pursuant to paragraph 12A of the Schedule to the *Stamp Duty Act*, CAP 480 of the Laws of Kenya (hereinafter "SDA") the Collector of Stamp Duty whilst assessing stamp duty, is mandated to apply the rate of 4% if an immovable property is within a municipality and 2% if a property is outside a municipality.

53. In view of the stated provisions of the SDA, neither the use of the land (agricultural or commercial) nor the tenure (leasehold or freehold) determines the applicable rate of stamp duty. Pursuant to the schedule to the SDA, the location of an immovable property is the main factor in determining the applicable rate of Stamp Duty. In the instant Appeal, the Collector of Stamp Duty applied a rate of 4% as evidenced by the Transfers of interest in Land/ Form LRA33 which were adduced as evidence by the Appellant at the Tribunal. The rate applied by the Collector of Stamp Duty was indicative of the fact that the Properties were within a Municipality.

54. The Respondent was therefore justified at arriving at the decision that the exemption claimed by the Appellant was not merited and rightly interpreted the provisions of Paragraph 36 (d) (ii) of the First Schedule of the *Income Tax Act* Cap 470.

55. In any event, the Appellant failed to discharge its burden to prove that the assessments were excessive or improper in line with the provisions of Section 56(1) of the *Tax Procedures Act* and Section 30 of the *Tax Appeals Tribunal Act*. In the case of Republic v Kenya Revenue Authority, Proto Energy Limited (Exparte) (Judicial Review Application E023 of 2021) [2022] the court stated that.

> (48) the most significant justification for placing the burden of proof on the taxpayer 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 taxpayers' evidence must meet this minimum threshold. [49] 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.

56. The Court therefore finds that the appeal lacks merit and thus makes the orders.

    i. The appeal is Dismissed with no orders as costs.

    ii. The court Upholds the Judgement of the Tax Appeals Tribunal delivered on 25th October 2024.

DATED AND DELIVERED AT NAROK VIA MICROSOFT TEAMS THIS 26TH DAY OF SEPTEMBER, 2025

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CHARLES KARIUKI

JUDGE