Guardian Bank Limited v Commissioner of Legal Services & Board Coordination (Commercial Appeal E022 of 2023) [2025] KEHC 15311 (KLR) (Commercial and Tax) (24 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15311 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL E022 OF 2023

MN MWANGI, J

OCTOBER 24, 2025

BETWEEN

GUARDIAN BANK LIMITED ..... APPELLANT

AND

THE COMMISSIONER OF LEGAL SERVICES & BOARD COORDINATION ..... RESPONDENT

RULING

1. The respondent filed a Notice of Motion application dated 7th February 2024 under the provisions of Section 80 of the *Civil Procedure Act*, Order 45 Rule 1 (b) of the Civil Procedure Rules, 2010, and all other enabling provisions of the law. The respondent prays for orders that this Court reviews and sets aside its Judgment/Orders delivered on 26th January 2024 in its entirety, and in place of the said Judgment, it issues an order upholding the decision of the Tax Appeals Tribunal.

2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Dave Mukabi, the Manager at the Large Taxpayer's office at the respondent's office. He averred that this Court in its Judgment delivered on 26th January 2024, allowed an Appeal on grounds that the Tribunal erred in finding that the respondent was justified in assessing VAT against the appellant, who was allegedly not registered for VAT. He stated that after the Judgment, the respondent conducted an internal review through its Business Transformation Office and ICT Department and discovered new and important evidence showing that the appellant had a VAT obligation since 2005, which was migrated to iTax in April 2015.

3. He further stated that in a separate 2019 Appeal before the Tribunal, the appellant itself admitted to charging and remitting 16% VAT on cheque book printing and custodial services, contrary to

its position before this Court. Mr. Mukabi claimed that the 2022 PIN certificate showing no VAT obligation resulted from a general clean up exercise by KRA to suspend dormant VAT accounts. He asserted that the information now being produced before this Court, was not within the respondent's knowledge at the time of the earlier proceedings and could not have been produced then. He deposed that the impugned Judgment is prejudicial to the respondent as it compels forfeiture of legitimately due taxes and contravenes Article 210 of *the Constitution*, which restricts waiver or variation of taxes except by law.

4. In opposition to the application, the appellant filed Grounds of Opposition dated 30th September 2024, raising the following grounds -

    i. That the application is misconceived in law as the Honourable Court is not vested with any jurisdiction in law to grant the reliefs sought in the application;

    ii. That the application does not lie in so far as it speaks to factual matters that do not fall for consideration at this stage of the proceedings by virtue of the provisions of Section 56 of the *Tax Procedures Act*, Cap. 469B Laws of Kenya; and

    iii. That at any rate, the application is in all but name an invitation to the Honourable Judge to sit on appeal of her own decision which is not tenable in law.

5. The appellant also filed a replying affidavit sworn on 2nd November 2024 by Mr. Joseph Wachira, a Senior Manager in the appellant's Management Office. Mr. Wachira averred that this Court lacks jurisdiction to review its own Judgment under the *Tax Procedures Act*, Cap 469B, which is a complete Code governing tax dispute proceedings. He asserted that under Section 56 of the said Act, the Court's jurisdiction is limited to questions of law only; thus the respondent's attempt to introduce new factual or evidentiary matters is legally untenable. He deposed that even if the Court had jurisdiction to entertain the application herein, the application lacks merits.

6. Mr. Wachira stated that the issue of whether or not the appellant was registered for VAT was a live and contested matter before both the Tribunal and this Court, and the respondent had every opportunity to present the evidence it now relies upon, but failed to do so. He contended that the alleged new evidence, and more specifically, the document marked as annexure DM-3, does not qualify as discovery of new and important matter unknown despite the exercise of due diligence at the time of the proceedings. He challenged the authenticity and reliability of the said document, noting that it does not constitute proof of registration under Section 34(5) of the VAT Act, as no tax registration certificate has been exhibited, and it bears unusual and unintelligible remarks inconsistent with system-generated PIN certificates.

7. He further stated that the said document claims a VAT registration date of 17th February 2005, yet tax certificates at that time were manually issued and no such manual certificate has been produced. He deposed that the said document inconsistently omits Excise duty obligations, which the appellant, as a licensed bank, is ordinarily subject to, thereby calling its veracity into serious question. Mr. Wachira refuted the respondent's reliance on the document annexed as DM-4, asserting that the referenced paragraph merely indicates that the appellant was charged VAT by its suppliers, not that the appellant was registered for, or was remitting VAT itself.

8. In a rejoinder, the respondent filed a further affidavit sworn on 21st February 2024 by Mr. Dave Mukabi, the Manager at the Large Taxpayer's office at the respondent. He maintained that this Honourable Court has jurisdiction to entertain the application herein for review under Sections 80, 1A & 1B of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules, 2010, which permit review where there is discovery of new and important evidence, a mistake or error apparent on

the face of the record, or any other sufficient reason. He averred that the instant application satisfies all three grounds.

9. Mr. Mukabi deposed that on 26th January 2024, this Court allowed the appellant's Appeal based on an alleged error on the face of the record, but clarified that the VAT assessment in dispute related to the period 2015 to 2020, not 2022. He explained that the PIN checker certificate relied upon by both the Court and the appellant related to the year 2022, a period that was not in contention before the Tribunal or the Court. He stated that the appellant's claim that the PIN certificate showing that the appellant had a VAT obligation from 2005 is insufficient proof of registration, and it is unfounded. He averred that in a 2019 Appeal, the appellant admitted to charging and remitting 16% VAT on cheque book printing and custodial services, which it could not have done without being duly registered for VAT.

10. Mr. Mukabi explained that the concerns raised over the appearance of the PIN Certificate and the omission of Excise duty obligations from the said Certificate are system configuration details/issues, common across institutions, as evidenced by similar PIN Certificates for ABSA, KCB, and Family Bank, since Excise duty is treated as a passive tax on iTax and it does not appear on the printed certificate. He deposed that retrieving manual certificates from 2005 is challenging due to archival limitations, but through system developers, the respondent retrieved relevant iTax records dating back to 2015, confirming the appellant's VAT registration. He questioned why the appellant failed to produce PIN Certificates for the assessment period being the years 2015–2020 if it truly lacked VAT obligations. He stated that the appellant only relied on the 2022 PIN checker after its VAT status had already been suspended.

11. The application herein was canvassed by way of written submissions. The respondent's submissions were filed on 26th February 2025 by Otieno Winnie Advocate, whereas the appellant's submissions were filed by the law firm of Mutua-Waweru & Company Advocates on 31st March 2025.

12. Ms Otieno, learned Counsel for the respondent, cited the provisions of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules, 2010, and submitted that the provisions thereunder empower the Court to review its own Judgment or order, on grounds of discovery of new and important evidence, mistake or error apparent on the face of the record, or any other sufficient reason. She further submitted that the dispute before the Tax Appeals Tribunal and this Court concerned VAT assessments for the period 2015-2020, and not 2022. Ms Otieno argued that this Court erroneously relied on a PIN checker certificate for 2022, a year that was not in contention, thereby resulting in an error apparent on the face of the record.

13. She explained that by 2022, the appellant's VAT obligation had been suspended due to non-compliance, following a clean-up exercise by the Kenya Revenue Authority, hence the 2022 certificate did not accurately reflect the appellant's tax status for the relevant period. Counsel maintained that the appropriate reference period should have been 2015-2020, during which the appellant was registered for VAT. She submitted that the appellant itself, in earlier pleadings before the Tribunal, admitted to becoming aware of its VAT registration in 2021, thus implying that the 2022 certificate showing no VAT obligation could not have accurately represented its position during the disputed period. She further submitted that new and important evidence has since been discovered, including a PIN certificate showing that the appellant had a VAT obligation from 2005, migrated to iTax in April 2015.

14. Additionally, that pleadings in a 2019 Appeal reveal that the respondent charged and remitted 16% VAT on cheque book printing and custodial services, proof that it was indeed registered for VAT at the time. She argued that the said evidence was not within the respondent's knowledge during the initial hearing, as the 2019 Appeal had been handled by different Counsel. To buttress her submissions, Ms

Otieno relied on the Court of Appeal cases of National Bank of Kenya Limited v Ndungu Njau [1997] KECA 71 (KLR) and Shanzu Investments Ltd v Commissioner of Lands [1993] KECA 36 (KLR). She submitted that the appellant misled the Court by selectively presenting documents that excluded its true VAT registration status, resulting in a miscarriage of justice and depriving the tax authority of taxes lawfully due.

15. Mr. Mutua, learned Counsel for the appellant, while conceding that this Honourable Court has jurisdiction to review its decisions under Rule 20 of the Tax Appeals Tribunal (Appeals to the High Court) Rules and Order 45 of the Civil Procedure Rules, 2010, submitted that the instant application is misconceived, devoid of merits, and amounts to an abuse of the Court process. He stated that under Order 45 Rule 1, of the Civil Procedure Rules, 2010, review may only be granted on three limited grounds being; discovery of new and important evidence not within the applicant's knowledge despite due diligence; error apparent on the face of the record; or any other sufficient reason. Counsel argued that the respondent's application is based solely on the alleged discovery of new evidence, its subsequent claim of an error apparent on the record was never pleaded, and cannot be properly raised through submissions.

16. Mr. Mutua submitted that under Section 56(2) of the *Tax Procedures Act*, appeals from the Tax Appeals Tribunal lie only on questions of law, meaning that attempts to introduce new factual evidence at the review stage are legally untenable. He further submitted that the respondent has not met the threshold under Order 45 Rule 3(2) of the Civil Procedure Rules, 2010, which demands strict proof that the alleged new evidence was not within its knowledge despite due diligence. He asserted that the respondent, being the tax authority, always had access to all VAT registration records and cannot credibly claim that it only discovered them after delivery of the Judgment. Counsel noted that while the respondent alleges VAT registration occurred on 17th February 2005, the certificate now produced is dated 15th April 2005, and no proper VAT registration certificate under Section 34(5) of the VAT Act has been provided. In addition, he submitted that the claim that the appellant was deregistered for non-compliance yet remitted VAT in 2019, is also contradictory and illogical.

17. Counsel contended that references to VAT invoicing for cheque book printing and custodial services are not new matters, as they were already part of the record before the Tribunal and this Court. He relied on the case of County Assembly of Kitui v Governor, Kitui County Government & another [2021] KEHC 4980 (KLR), and submitted that review cannot be used to introduce evidence that was always within the applicant's knowledge or to fill evidentiary gaps after an adverse Judgment. He argued that the respondent has failed to establish any valid grounds for review under Order 45 of the Civil Procedure Rules, 2010, as the instant application improperly seeks to reopen and re-litigate factual issues already determined. He prayed for the application to be dismissed with costs.

Analysis And Determination.

18. I have considered the application herein, the grounds on the face of it and the affidavits filed in support thereof. I have also considered the Grounds of Opposition and replying affidavit filed by the appellant, as well as the written submissions by Counsel for the parties. The issue that arises for determination is whether this Court should review and set aside its Judgment delivered on 26th January 2024.

19. Section 56(2) of the *Tax Procedures Act* does not restrict the Court's power to review its own decisions. Rule 20 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, stipulates that -

> The rules determining procedure in civil suits before the Court, to the extent to which those rules are not inconsistent with the Act or these Rules, shall apply to the tax appeal as if it were a civil suit

20. This Court therefore finds that its jurisdiction to review and/or set aside its Judgment delivered on 26th January 2024 under Order 45 of the Civil Procedure Rules, 2010, has been properly invoked. Order 45 Rule 1 of the Civil Procedure Rules, 2010, provides that -

Any person considering himself aggrieved-

a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.

21. The Court in the case of Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others [2021] KEHC 4068 (KLR) in dismissing an application for review held that -

... there are definite limits to the exercise of power of review. The rules prescribe the jurisdiction and scope of review. They limit review to the following grounds:

a. Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;

b. On account of some mistake or error apparent on the face of the record, or

c. For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.

22. The respondent's application is anchored on two main grounds; first, the existence of an error apparent on the face of the record, and second, the discovery of new and important evidence indicating that the appellant had a VAT obligation from 2005, which was subsequently migrated to iTax in April 2015.

23. The respondent contends that there is an error apparent on the face of this Court's Judgment delivered on 26th January 2024, arguing that the Court's finding that the appellant was not registered for VAT was based on a 2022 PIN checker certificate, a period that was never in issue before the Tribunal or this Court. The respondent claimed that the disputed VAT assessment pertained to the period between 2015 and 2020, not 2022. It asserted that this constitutes an error apparent on the face of the record, warranting a review of the said Judgment.

24. In the Judgment delivered by this Court on 26th January 2024, it is evident that one of the issues identified and determined by this Court was whether the appellant was registered for VAT obligation in the period under review. To ascertain whether there was an error apparent on the face of the record

to warrant being granted the Orders being sought herein, I find it fit to reproduce the relevant sections of the said Judgment, wherein this Court in detail addressed the said issue and held that -

> " Sub-section 5 on the other hand, which is couched in mandatory terms makes provision for issuance of a tax registration certificate to a Taxpayer upon registration. It is not disputed that the appellant was never issued with a tax registration certificate upon registration for VAT obligation, if at all it was ever registered.
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> In support of its assertion that the appellant was registered for VAT obligation, the respondent produced a copy of the appellant's non-individual taxpayer profile which shows that the appellant was registered for VAT obligation on February 17, 2005 and that the said information was rolled out on its iTax platform on April 1, 2015.
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> The appellant on the hand in proof of the fact that it is not registered for VAT obligation produced a copy of a PIN checker issued to it by KRA on January 18, 2022 which shows that its tax obligations are, Income tax-company, Income tax-PAYE, and Excise but it is not registered for VAT obligation. It is noteworthy that the respondent has not disputed the validity of the PIN checker produced by the appellant and the contents therein, nor has it claimed that the said document was not issued by them.
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> Notably, both the appellant's non-individual taxpayer profile and PIN checker relied on by the appellant are documents that were issued by the respondent. Therefore, since the said documents belong to the respondent, the said respondent bears the burden of clarifying whether or not the appellant is registered for VAT obligation.
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> ...
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> In view of the foregoing and the two documents issued by KRA giving different positions as to the status of the appellant's registration for VAT obligation, this Court is of the considered view that a tax registration certificate issued to the appellant upon registration for VAT obligation would help in ascertaining whether or not the appellant is registered for VAT obligation. Nothing would have been easier for the respondent than providing a copy of the said certificate in support of the assertion that the appellant is registered for VAT obligation. Other than the fact that the PIN checker issued on January 18, 2022, is the most recent document issued by the respondent showing the appellant's tax obligations, the absence of the tax registration certificate gives credence to the fact that the appellant was not registered for VAT obligation.
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> This Court disagrees with the respondent and the Tribunal, and finds that the appellant was not registered for VAT obligation for the period under review going by the PIN checker issued on January 18, 2022 thus it was not required to file monthly VAT returns for the period in issue. As a result, the issue of de-registration provided for under Section 36 of the VAT Act, 2013 does not arise."

25. From the Judgment rendered by this Court on 26th January 2024, I am not satisfied that any error apparent on the face of the record exists regarding the appellant's VAT registration status during the period under review. This issue was fully canvassed and determined on its merits. It is therefore my considered view that the instant application essentially seeks a reconsideration of factual and evidentiary matters, thereby amounting to an appeal disguised as a review, which is impermissible in law.

26. On the second issue on whether there is new and important evidence showing that the appellant had a VAT obligation since 2005, the respondent's case was that following the delivery of the impugned

Judgment, an internal review by its Business Transformation Office and ICT Department uncovered new and important evidence. That the review revealed that the appellant had a VAT obligation dating back to 2005, which was migrated to iTax in April 2015. The respondent stated that in a separate 2019 Appeal before the Tribunal, the appellant admitted to charging and remitting 16% VAT on cheque book printing and custodial services.

27. The respondent explained that the 2022 PIN Certificate showing no VAT obligation was a result of a general KRA system clean up aimed at suspending dormant VAT accounts. It maintained that this information was not within its knowledge at the time of the earlier proceedings and could not have been produced then. The respondent further contended that the impugned Judgment is prejudicial as it effectively compels the forfeiture of lawfully due taxes, contrary to Article 210 of *the Constitution*.

28. The appellant on the other hand averred that the issue of VAT registration was exhaustively litigated and that the respondent had ample opportunity to present the alleged evidence during the earlier proceedings. It argued that the purported new and important evidence is inconsistent, and that the VAT invoicing matters were already considered by both the Tribunal and this Court. The appellant further challenged the authenticity of the documents relied upon, particularly annexure No. DM-3, stating that it fails to meet the legal standard for new evidence, lacks a valid VAT registration certificate, contains irregular entries and omits Excise duty obligations expected of a licensed bank. The appellant added that annexure No. DM-4 merely indicates that the appellant was charged VAT by its suppliers, not that it was registered for, or was remitting VAT.

29. This Court is of the considered view that the VAT registration evidence now produced by the respondent was at all times within its possession and control, given that it is the custodian of all taxpayer registration records. The respondent's explanation that the said evidence was not within its knowledge before the impugned Judgment was delivered since the 2019 Appeal was handled by a different Advocate, has no probative value. This Court is of the finding that with the exercise of due diligence, the said evidence would have been readily available to the respondent during the earlier proceedings at the hearing of the Appeal.

30. The Supreme Court of India discussed the scope of review in the case of Ajit Kumar Rath v State of Orisa & others, 9 Supreme Court Cases 596, at Page 608 it held as follows-

> "...the power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it." (Emphasis added).

31. Courts have consistently held that a party cannot seek review of a decision, to fill evidentiary gaps left by its own negligence. This Court finds that the respondent's failure at an earlier stage to produce the document it now relies upon, cannot be recognized and acknowledged as new discovery.

32. In the circumstances, I am not satisfied that the evidence that the respondent now seeks to introduce constitutes new and important matter or evidence which, with the exercise of due diligence, was not within its knowledge or could not have been produced prior to the delivery of the impugned Judgment.

33. In the end, this Court finds that the respondent's application dated 7th February 2024 is not merited. It is hereby dismissed with costs to the appellant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF OCTOBER 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Otieno for the respondent/applicant

Mr. Mutua for the appellant/respondent

Ms B. Wokabi – Court Assistant.

NJOKI MWANGI, J.