

THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
TAX APPEAL NO. E059 OF 2025

HON. JUSTICE ALEEM VISRAM

22ND JANUARY, 2026

BETWEEN

**COMMISSIONER OF INVESTIGATION &
ENFORCEMENT.....APPELLANT**

AND

**ATHANAS MISIKO WAFULA
WAMUNYINYI.....RESPONDENT**

*(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated
17th January, 2025 in Tax Appeal No.E906 of 2023)*

JUDGMENT

Introduction and Background

1. The Respondent is an individual taxpayer of KRA PIN Number A00*****69T and is engaged in the business of farming and offers both residential and commercial rental spaces. The Appellant (“the Commissioner”) carried out an investigation into the tax affairs of the Respondent in relation to queries raised on the income that he had apparently received but failed to declare.

2. The Commissioner wrote to the Respondent's bankers and obtained bank statements for the period between 2016 and 2020 and carried out an analysis of the bank deposits received in the said banks to establish the total receipts therein. Upon adjustment of the salary, loans and SACCO receipts, the Commissioner issued a letter detailing the tax investigations findings dated 21st April, 2022, demanding taxes amounting to Kshs. 4,908,757.00/= for VAT and Income Tax for the periods 2016 to 2020. On 22nd December, 2022, the Commissioner proceeded to raise additional assessments in the Respondent's *iTax* portal for the same amount.
3. The Respondent wrote to the Commissioner through a letter dated 14th August, 2023, requesting to be allowed to file a Notice of Objection out of time to which the Commissioner responded on 23rd August, 2023, granting him 7 days to file their late objection. The Respondent objected to the assessments through his letter dated 28th August, 2023, and the Commissioner issued an Objection Decision on 24th October, 2023, partially accepted the objection, and accordingly vacated the additional assessments for Income Tax in its entirety but left the additional assessments for VAT of Kshs. 3,265,647.00/=.
4. Aggrieved with the above decision, the Respondent filed an appeal to the Tax Appeals Tribunal ("the Tribunal") on grounds that the Commissioner erred in raising additional assessments on residential rental income contrary to the provisions of the First

Schedule of the VAT Act(Chapter 476 of the Laws of Kenya), and that it erred by raising additional assessments for VAT on non-revenue items such as deposits received from tenants for both the commercial and residential rental income, contrary to the provisions of Section 5 of the VAT Act.

5. The Tribunal considered the appeal and rendered a judgment on 17th January, 2025, ***Wamunyinyi v Commissioner of Intelligence, Strategic Operations, Investigations and Enforcement [2025] KETAT 50 (KLR)***. It held that the Commissioner’s assessments of VAT for the tax periods before December 2017 were illegal and not justified because it had not pleaded, transacted and/or proved gross or wilful neglect, evasion or fraud on the part the Respondent as provided under Section 31(4)(a) of the Tax Procedures Act (Chapter 469B of the Laws of Kenya) (“the TPA”).
6. As to whether the Commissioner was justified in issuing additional VAT assessments for December 2017-2020, the Tribunal stated that it had analysed the Respondent’s assertion that the Commissioner subjected to VAT residential rental income which is exempt from VAT after examining the applicable law and the relevant documentation required to substantiate the claims. Based on the record of appeal, the Tribunal noted that the Respondent had presented a schedule showing the amounts of residential rental income for the years 2016, 2017, 2018, 2019 and 2020, and copies of tenancy agreements for his commercial and residential properties in support of his assertion.

7. The Tribunal stated that these tenancy agreements enumerated the amounts referred to as rent, the amounts referred to as refundable deposit and the biannual 10% increase in rent. The Commissioner averred in its Objection Decision that the Respondent had not provided tenancy agreements to enable it to adjust the amounts of residential rent in the banking analysis. The Tribunal however noted that the Commissioner, in response to the appeal, did not challenge that fact the tenancy agreements provided by the Appellant in the appeal were presented by the Appellant during the objection review.
8. The Tribunal referred to Section 51(8) of the TPA and concluded that the Commissioner did not consider the tenancy agreements presented by the Appellant in arriving at its Objection Decision which contravened the aforementioned provision, and in the course of that contravention, it prejudiced the Respondent. The Tribunal also referred to Paragraph 8 of Part II of the First Schedule to the VAT Act which expressly provides that renting of residential premises is an exempt supply, and accordingly, the Tribunal found that the Respondent discharged his burden of proof, as required under Section 56(1) of the TPA and Section 30 of the Tax Appeals Tribunal Act (Chapter 469A of the Laws of Kenya) (TATA) by presenting tenancy agreements, thus, establishing that part of the bank deposits for the periods of 2017, 2018, 2019 and 2020 related to rents for residential premises that are in fact exempt from VAT.

9. The Tribunal held that after the Respondent discharged his burden of proof, the Commissioner could have rebutted his evidence, however, it failed to do so in its response to the appeal, and as such, the Tribunal found that the Commissioner had erred in treating residential rental income as taxable and by assessing VAT on the residential rental income for the periods of 2017, 2018, 2019 and 2020.
10. The Tribunal further noted that the Respondent claimed in his pleadings and the schedule provided in his objection and in the appeal that the bank deposits that are refundable tenant deposits are Kshs. 855,800.00/= for the period of 2016 and Kshs. 655,600.00/= for the period of 2017. The Respondent asserted that the Commissioner erroneously charged VAT on the deposits, which the Appellant considered to be non-revenue items that are not subject to VAT. The Tribunal stated that it had analysed this argument and all the evidence adduced in this matter to determine the sufficiency of the documentation presented to substantiate his claim. In its consideration, the Tribunal stated that it had considered Section 5(1) of the VAT Act with regard to charge of VAT and noted that refundable tenant deposits, unless applied to meet commercial rent, are not taxable under the VAT Act as they are not consideration for a taxable supply and the Tribunal found that the Respondent had discharged its burden of proof to show that Kshs. 655,600.00.00/= related to refundable tenant deposits in the period of 2017. Based on the foregoing, the Tribunal found that the Commissioner erred in treating

refundable tenant deposits as payments for taxable supplies in the period of 2017 and assessing VAT on the refundable tenant deposits for the period of 2017.

11. As to whether the amounts admitted by the Respondent to tax payable are payable, the Tribunal noted that the Respondent in its Objection admitted that Kshs. 863,948.82/= of principal VAT is payable, comprising of Kshs. 391,435.85/= in 2018 and Kshs. 472,512.97/= in 2019. However, the Tribunal held that the Commissioner did not address this admission both in its Objection Decision and Statement of Facts and in the circumstances, the Tribunal thus found and held that it would only be fair that the Respondent is compelled to pay tax that he has admitted to be due and payable to the Commissioner being principal VAT of Kshs. 863,948.82/=.
12. In summary, the Tribunal partially allowed the appeal and the Objection Decision was varied to the extent that VAT in the sum of Kshs. 863,948.82/= admitted by the Respondent as the final tax payable was upheld.
13. The said decision by the Tribunal has precipitated the filing of the present appeal by the Commissioner which is grounded on the Memorandum of Appeal dated 24th March, 2025, as follows:

1) The Tribunal erred in law by holding that the Appellant did not contend or rebut the evidence that the tenancy agreement had been provided at objection review contrary to express findings of the Objection decision dated 24th October 2023 at paragraph 3.1.6 being the decision appealed

from and therefore disregarded the findings of the decision appealed from, a grave misapprehension of the law and therefore arriving at an erroneous conclusion.

2) The Tribunal erred in law by sitting as an objection reviewer to consider the probative value of the tenancy agreements not submitted at the objection review stage in contravention of the provisions of Section 56(3) of the Tax Procedures Act, 2015 and therefore arriving at an erroneous conclusion.

3) The Tribunal erred in law and in fact in failing to dispose of all the questions that were presented by the parties for determination and has left certain issues unresolved.

14. The Commissioner thus prays that its appeal be allowed, the decision of the Tribunal be set aside and the tax assessments issued on 21st April, 2022, be upheld and that an order be issued that the Respondent be compelled to provide evidence of the tenancy agreements to the Commissioner to ascertain correctness of the objection by the Respondent. The Respondent responded to the appeal through its Statement of Facts dated 15th July, 2025 and the appeal has been disposed by way of written submissions which I will briefly highlight below.

The Commissioner's submissions

15. The Commissioner submitted that the Tribunal made significant legal and factual errors, primarily regarding the introduction and evaluation of evidence during the appeal process. The Appellant argued that the Tribunal incorrectly acted as an

"objection reviewer" by considering the tenancy agreements that the Respondent allegedly failed to provide during the initial objection stage with the Commissioner.

16. The Commissioner submitted that under Section 56(3) of the TPA, a taxpayer must rely only on grounds stated in their initial objection and the Tribunal erred by allowing and validating new evidence not previously submitted. The Commissioner maintained that the burden of proof lies with the taxpayer to disprove a tax assessment and the Respondent failed this burden, and the Tribunal's finding, that the Commissioner did not rebut evidence, contradicts the Commissioner's explicit findings in the Objection Decision.

17. The Commissioner submitted that the Tribunal wrongly assumed the tenancy agreements had been provided at the objection review stage, a claim it explicitly denies.

The Respondent's submissions

18. The Respondent addressed the Commissioner's contentions by submitting that while the initial burden of proof was on the taxpayer, the burden shifts on a second appeal to the Court. That the Commissioner must now prove a specific error of law, as the Court is limited to questions of law and cannot re-evaluate factual findings unless they are shown to be perverse.

19. The Respondent asserted that tenancy agreements were indeed provided during the objection review stage during physical meetings and again before the Tribunal, and the

Respondent supported the Tribunal's finding that the Commissioner failed to specifically rebut the evidence of these agreements or to provide proof that they requested additional documents that were not delivered.

20. The Respondent submitted that he discharged his burden under Section 56(1) of the TPA by presenting these agreements, which established that the bank deposits in question were related to residential rental income. He restated that under Paragraph 8 of Part II of the First Schedule to the VAT Act, the supply of residential premises is an exempt supply, and that the tenancy agreements clearly demonstrated that the income was residential, and therefore not subject to VAT. The Respondent disputed the submission that the Tribunal acted improperly as an "objection reviewer", and he argued that the Tribunal properly conducted a rehearing, as mandated by law for a first appellate court, to reach a just decision.

21. The Respondent maintained that the Tribunal analyzed all issues placed before it and reached a just decision, dismissing the claim that issues were left unresolved. As such, he urges the Court to dismiss the appeal and uphold the Tribunal's judgment.

Analysis and Determination

22. I have considered the grounds on the face of the record and the submissions of the parties, which I have highlighted in summary above.

23. The parties agree in their submissions that as per Section 56(2) of the TPA, **An appeal to the High Court or to the Court of Appeal shall be on a question of law only (Emphasis mine).** This means that an appeal limited to matters of law does not permit the appellate court to substitute the Tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts [*See Mati v Returning Officer Mwingi North Constituency & 2 others [2018] KECA 700 (KLR)*]

24. Based on the parties' submissions, I deduce three issues for the Court's determination:-

- 1) *Whether the Tribunal erred in law by sitting as an "objection reviewer" to evaluate the probative value of tenancy agreements that were not submitted at the objection review stage, thereby contravening Section 56(3) of the TPA.*
- 2) *Whether the Tribunal erred by holding that the Commissioner did not contend or rebut the evidence regarding tenancy agreements, despite express findings in the Objection Decision.*
- 3) *Whether the Tribunal erred in law and fact by failing to resolve all questions presented by the parties, leaving certain critical issues unresolved.*

Role of the Tribunal

25. Section 56 (3) of the TPA provides as follows: -

General provisions relating to objections and appeals

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 only 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)

26. Further, Section 13 (6) of the TATA also provides that **the Appellant shall, unless the Tribunal orders otherwise, be limited to the grounds stated in the appeal or documents to which the decision relates (Emphasis mine)** meaning an Appellant cannot introduce additional documents beyond what is pleaded, but the Tribunal has jurisdiction to admit additional documents. The Commissioner insists that the tenancy agreements produced by the Respondent before the Tribunal were never furnished to it before the Objection Decision was made. However, the Tribunal held at paragraph 60 of its judgment that the Commissioner ***“...did not challenge that the tenancy agreements provided by the Appellant in this Appeal were presented by the Appellant during the Objection review.”***
27. Looking at the record, I find that this was a misapprehension of the evidence on the part of the Tribunal because the Commissioner, in its Objection Decision stated at paragraph 3.1.6 that it had requested the Respondent to provide tenancy agreements but the same were not provided. This suggests that as the date of the Objection Decision, the Commissioner was not in possession of the tenancy agreements. There is no documentary evidence on the Record showing that the Respondent submitted the tenancy agreements to the Commissioner before the Objection Decision was issued.

28. The agreements therefore appear to have been submitted as part of the Appellant's Statement of Facts and bundle of documentation before the Tribunal, and after the Objection Decision. The Commissioner accordingly had sight of the agreements for the first time at the appellate stage of proceedings.

29. In *Commissioner of Investigations & Enforcement v Doshi Enterprises Limited [2025] KEHC 4501 (KLR)*, the court, when presented with a similar situation held as follows:-

11.....These are documents which are said not to have been produced by the respondent during the objection stage. This court holds that in view of the legal position that the taxpayer has the burden of proving that the assessment is wrong, it is the duty of the taxpayer to provide to the Commissioner all the relevant documents in respect of the transactions in question. This should be done at the objection stage in the first instance. Producing the documents during the hearing before the tribunal attest to the fact that the respondent considered them to be relevant to the objection but doing so in my view amounted to transferring the mandate of assessment of tax which belongs to the Commissioner to the tribunal.

12. The mandate of the tribunal is to analyse evidence, documents, information and material produced to the Commissioner and the law and assess the correctness of the assessment. This is not to say that the tribunal has no powers to receive evidence but it must be noted that core evidence and materials must first be produced before the Commissioner during the

objection process. In that case, the Appellant should have been provided with the documents before the appeal was initiated or heard. Section 51(4) does not relieve the taxpayer of the responsibility of providing all the relevant documents and information, otherwise the objection would be deemed invalid.

.....

15. The tribunal should resist attempts of seeking documents which were not provided to the Commissioner during objection proceedings as in doing so, it will not be acting as an appellate tribunal but a trial one. The drafters of the Tax Appeals Tribunal Act must have foreseen situations where loopholes like the one in this matter may happen and that is in my view, the reason the law gave powers to the tribunal to refer matters back to the Commissioner for reconsideration. In view of this, I agree with the Appellant that the correct decision would have been exercise of the tribunal's powers under Section 29(2)(c) of the Tax Appeals Tribunal Act although the Appellant cited a nonexistent section 29(2)(c)(ii) of the Tax Procedures Act. (Emphasis mine)

30. The court emphasized that the burden of proof in tax disputes lies squarely with the taxpayer, who must present all relevant documentation to the Commissioner during the objection stage. The court cautioned that introducing documents for the first time before the Tribunal, though indicative of their relevance, amounts to shifting the statutory function of tax assessment from the Commissioner, to the Tribunal. This holding is directly relevant to the present case as established by the record because the Respondent failed to submit the tenancy agreements during the objection stage, and

sought to rely on the same only at the appellate stage. In line with the decision in *Doshi Enterprises(supra)*, the Tribunal ought to have declined to admit and rely on such evidence (See *Spread Marketing Consultancy Ltd v Commissioner of Domestic Taxes [2025] KEHC 11487 (KLR)*).

31. Guided by the above, I find that the Tribunal erred in law by admitting and relying on evidence that was not placed before the Commissioner at the objection stage. This error goes to the heart of the objection review process and undermines the Commissioner's statutory mandate to assess tax based on information provided by the taxpayer. Consequently, the proper course was not for the Tribunal to make a final determination based on the tenancy agreements, but rather, to ensure that the Commissioner was afforded the opportunity to review them as part of the objection process, in accordance with the law. My aforementioned finding renders the remaining issues for determination moot as the appeal has succeeded on this issue alone.

Conclusion and Disposition

32. In the upshot, I hereby order as follows:-

- a) **The Respondent shall, within thirty (30) days from the date of this judgment, provide to the Appellant all tenancy agreements, schedules, and any supporting documents relating to residential and commercial rental income, refundable deposits, and any other relevant transactions for the years under review.**

- b) Upon receipt of the said documents, the Appellant shall review the said documentation and reconsider the objection dated 28th August, 2023, in accordance with Section 51 of the Tax Procedures Act.
- c) The Appellant shall complete the review and issue a revised objection decision within sixty (60) days of receipt of the documents.
- d) Either party shall be at liberty to apply to the Tax Appeals Tribunal for appropriate directions thereafter, if necessary.
- e) Each party shall bear their own costs of this appeal.
- f) This decision is without prejudice to any other grounds of appeal, which may be ventilated in the event of a subsequent appeal.

Dated and delivered virtually via Microsoft Teams this 22nd day of January, 2026

ALEEM VISRAM, FCI Arb

JUDGE

In the presence of;

Court Assistant: Lispa

.....for Appellant
for Respondent