

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
INCOME TAX APPEAL NO. E001 OF 2025

**COMMISSIONER OF LEGAL SERVICES AND
BOARD**

COORDINATION.....APPELLANT

VERSUS

PAULA KENDI WERU.....RESPONDENT

JUDGMENT

Introduction

1. This is an appeal from the judgment of the Tax Appeals Tribunal (the Tribunal) delivered on 8th November 2024 in Tax Appeal No. E270 of 2024. By that judgment, the Tribunal allowed the Respondent’s appeal and set aside the Appellant’s Objection Decision dated 25th January 2024, which had upheld an additional Capital Gains Tax (CGT) assessment for the period January 2023 in the sum of Kshs. 3,860,701/=.
2. The Appellant, being dissatisfied, lodged the present appeal vide a Memorandum of Appeal dated 2nd January 2025. The grounds of appeal are that the Tribunal erred in law and fact by:
 - i. Relying on a provision of law determined to have been unconstitutional by the High Court;*

- ii. Departing from its earlier decision guided by the High Court decision in Law Society of Kenya v Kenya Revenue Authority & Another [2017] eKLR;*
 - iii. Relying on a subsequent amendment to the law and disregarding binding precedent; and*
 - iv. Determining that the Respondent had discharged her CGT obligation in compliance with the law.*
3. The appeal was canvassed by way of written submissions.

Background

4. The material facts are largely uncontested. The Respondent transferred LR No. 37/244/10 to the Nairobi Islamic Charitable WAKF Registered Trustees. It is not disputed that prior to 1st January 2023, CGT was chargeable at the rate of 5%. By virtue of Section 15 of the Finance Act, 2022, the rate was revised to 15% effective 1st January 2023.
5. The Respondent's case is that the transaction was completed on 3rd November 2022 when she received the full balance of the purchase price and relinquished all proprietary interest in the property. She self-assessed and paid CGT at 5% on 20th December 2022. The Appellant, upon review, issued a Notice of

Assessment dated 31st October 2023 assessing additional CGT on the basis that the registration of the transfer instrument was signed on 30th January 2023 and effected on 14th February 2023. The Appellant therefore applied the enhanced rate of 15%.

6. The Respondent objected. The Appellant rejected the objection by its Objection Decision dated 25th January 2024 and confirmed the additional assessment. The Respondent appealed to the Tribunal which allowed the appeal and held that the Respondent had discharged her CGT obligation in accordance with the law applicable at the time of the transaction.

Analysis and determination

7. This appeal is brought pursuant to Section 56(2) of the Tax Procedures Act, 2015, which limits the jurisdiction of this Court to questions of law only.
8. It is settled that this Court does not sit as a court of rehearing on facts. It will not interfere with findings of fact by the Tribunal unless such findings are based on no evidence, are perverse, or arise from a misdirection in law. (See **Commissioner of Domestic Taxes v Barclays Bank of Kenya Ltd [2018] eKLR**).
9. Section 56(1) of the Tax Procedures Act places the burden on the taxpayer to prove that a tax decision is incorrect
10. From the pleadings and submissions, the following issues arise:

- i. *Whether the Tribunal relied on an unconstitutional provision of law.*
- ii. *Whether the Tribunal erred in determining the applicable tax point for CGT.*
- iii. *Whether the Tribunal applied the enhanced 15% CGT rate retrospectively.*
- iv. *Whether the Tribunal erred in holding that the Respondent had discharged her CGT obligation.*

Whether the Tribunal relied on an unconstitutional provision of law

11. The Appellant contends that the Tribunal erred by relying on Paragraph 11A of the Eighth Schedule to the Income Tax Act, a provision declared unconstitutional in **Law Society of Kenya v Kenya Revenue Authority & Another [2017] eKLR**.

12. In that case, the High Court held that Paragraph 11A was unconstitutional to the extent that it required payment of CGT before registration of transfer. The Court declared:

“Paragraph 11A... is inconsistent with paragraph 2 of the Eighth Schedule as read with paragraph 6(1)(a) ... and is therefore unconstitutional, null and void.”

13. The Appellant argues that once declared unconstitutional, Paragraph 11A ceased to have legal effect and neither party could rely on it.
14. The Respondent maintains that the Tribunal did not enforce Paragraph 11A, rather it properly applied the charging provisions of the Act, and the Tribunal merely interpreted the tax point based on when the gain accrued and was realized.
15. The constitutional doctrine of invalidity means that a provision declared unconstitutional is void to the extent of inconsistency with the Constitution. However, the tribunal found that the High Court in the **LSK** case did not invalidate the entire Eighth Schedule. It addressed the **timing of payment** requirement. The charging framework remained intact, **Section 3(2)(f)** CGT is chargeable on gains accruing, **Paragraph 2** income chargeable is the gain accruing **on the transfer** and **Paragraph 6(1)(a)** transfer occurs when property is **sold, exchanged, conveyed or otherwise disposed of**.
16. The Tribunal did not impose CGT prior to realization. On the contrary, it held that the Respondent had realized the gain in November 2022 and paid the tax thereafter.
17. I therefore find no error of law in the Tribunal's approach. It did not revive or rely upon an

unconstitutional provision but applied the law as it stood after the *LSK* decision.

Whether the Tribunal erred in determining the applicable tax point for CGT

18. The Appellant asserts that CGT becomes payable upon registration of transfer. Since registration occurred in January/February 2023, the 15% rate applied. The Appellant's position is rooted in the reasoning in *LSK*, which emphasized payment '**upon registration**'.
19. Conversely, the Respondent contends that CGT is taxed on realized gain, that the gain accrued when the full purchase price was received on 3rd November 2022 and when he relinquished all beneficial interest at completion and that registration was merely a procedural formality.
20. **Section 3(2)(f)** provides that tax is chargeable on income in respect of gains accruing.
21. The operative word is "accruing." The Eighth Schedule defines the gain as accruing "on the transfer," and transfer includes sale or disposal.
22. The critical question therefore, is: **When did the Respondent dispose of the property?** Commercial law principles recognize that beneficial ownership may pass upon completion when consideration is paid, and documents exchanged, even if registration follows later.

23. The Tribunal found that full consideration was paid in November 2022, completion documents were delivered, and the vendor relinquished control.
24. Whether the accrual occurred upon completion in November 2022 or upon registration in January/February 2023 is a mixed question of fact and law. The Tribunal, as the primary fact-finder, determined that the gain accrued in 2022.
25. This Court cannot interfere with that factual finding unless it was based on no evidence. The record shows documentary proof of payment and completion in November 2022.
26. CGT is fundamentally a tax on realized capital gain. In **Halsbury's Laws of England**, capital gains accrue when - 'there is a disposal of a chargeable asset, and gain accrues to a person'.
27. A gain cannot accrue before the taxpayer is 'put in funds.' The Respondent was put in funds in November 2022. The Appellant's argument would result in this anomaly, gain realized, and funds received in 2022, tax rate changed in 2023, and a higher rate applied retrospectively to a realized 2022 gain. That would offend the constitutional principle of certainty in taxation.
28. I am not persuaded that the Tribunal misdirected itself in law in holding that the applicable rate was the one in force when the gain accrued and tax was paid.

Whether the Tribunal applied the enhanced 15% CGT rate retrospectively

29. The Appellant argues that the Tribunal improperly relied on amendments introduced by the Finance Act 2023.
30. The Tribunal's reasoning shows that it merely acknowledged that tax law evolves; it did not apply the 2023 amendment retrospectively to the Respondent's detriment.
31. The cardinal principle is that taxation statutes are construed strictly. In **Cape Brandy Syndicate v IRC [1921] 1 KB 64**, it was held:
- “In a taxing Act one has to look merely at what is clearly said.”***
32. There is no express statutory language making the 15% rate retrospective. Section 15 of the Finance Act 2022 expressly took effect on 1st January 2023. To apply a higher rate to a gain realized and taxed in 2022 would violate these principles. Article 210 of the Constitution requires that taxation be imposed strictly in accordance with legislation. A tax cannot be imposed by implication or by retroactive administrative interpretation.
33. The Appellant argues that the LSK decision bound the Tribunal to treat registration as the tax point. However, the LSK decision addressed **‘when payment may be required’** - not necessarily when accrual occurs. It struck down pre-registration payment as

unconstitutional. It did not hold that registration is the sole accrual trigger in all circumstances. The Tribunal interpreted LSK contextually, not rigidly. That approach is consistent with the doctrine that precedents must be applied to comparable facts.

34. The Tribunal correctly declined to apply the enhanced rate to a gain realized and taxed in 2022.

35. Article 201(b)(i) of the Constitution requires that the burden of taxation be shared fairly. The LSK case emphasized proportionality and rationality. Applying a higher rate after a transaction is completed and tax paid would undermine legitimate expectation; create fiscal uncertainty, and offend fairness principles. Taxation must not become punitive through retrospective administrative construction.

36. Having considered the record, the statutory framework, and the applicable jurisprudence, I find that the appeal raises no pure question of law warranting interference.

37. Consequently, I find the appeal is without merit and dispose as follows:.

a. The Appeal dated 2nd January 2025 is hereby dismissed.

b. The Judgment of the Tax Appeals Tribunal delivered on 8th November 2024 is upheld.

c. The Appellant shall bear the costs of this Appeal.

It is so ordered.

JUDGMENT delivered virtually, dated and signed
at **NAIROBI**

This **26th** day of **February** 2026.

P.M. MULWA
JUDGE

In the presence of:

Mr. Edgar Isutsa h/b for Mr. Wainaina for Appellant

Mr. Akhaabi for Respondent

Court Assistant: *Carlos*