



REPUBLIC OF KENYA



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Madison Insurance Kenya Limited v Commissioner of Domestic Taxes (Civil Appeal E361 of 2020) [2025] KECA 4 (KLR) (10 January 2025) (Judgment)

Neutral citation: [2025] KECA 4 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E361 OF 2020
HM OKWENGU, K M'INOTI & JM MATIVO, JJA
JANUARY 10, 2025**

BETWEEN

MADISON INSURANCE KENYA LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Nairobi, Commercial Tax Division, (L.W. Gitari, J.) dated 17th September, 2020 in HC Income Tax Appeal No. 27 of 2017)

JUDGMENT

1. This appeal arises from a dispute regarding tax assessment against Madison Insurance Company Limited (the appellant), by the Commissioner of Domestic Taxes (the respondent), during the year 2009. The dispute arises from the appellant's efforts to have its life insurance business losses incurred prior to 1st January, 2009 offset in its taxable income for the year 2009.
2. The dispute was originally referred to the Income Tax Appeals Tribunal which ruled against the appellant confirming that the assessment by the respondent was proper. Thereafter, the appellant's appeal to the High Court against the said decision was also dismissed and the tribunal's decision upheld.
3. In dismissing the said appeal, the learned Judge of the High Court (Gitari, J.), concurred with the parties on the issue for determination, which was, whether losses incurred in life insurance business prior to the repeal of Section 19(9) of the *Income Tax Act* (the ITA) and the amendment of Section 19(5) of the ITA by the Finance Act 2008, could be carried forward after 1st January, 2009.
4. The learned Judge found that before the repeal of Section 19(9) by the Finance Act 2008, there was no law in place that allowed the appellant's alleged tax losses from life insurance business, to be carried forward as allowable deductions under Section 15(4) of the ITA and that before the repeal of Section



- 19(9) of the ITA, the intention of Parliament was that Section 15(4) would not apply to losses suffered in insurance business, and so they could be offset to other insurance business in the year of income.
5. As to whether the appellant could carry forward losses suffered in life insurance business after the repeal of Section 19(9), and deduct them from the profits or gains made in the year 2009, the learned Judge pointed out that the ITA was clear, that under Section 19(9)(b), the profits reported by a company in its accounts required to be furnished in its return of income under Section 54 of ITA, provided the provisions of Section 15(4) shall not apply in respect of a loss arising out of life insurance business. The learned Judge concluded that the appellant could only offset the losses in the life insurance business in the particular year of income, and could not therefore purport to carry forward the losses suffered in the life insurance business in the year 2008 to the year 2009, as the law existing then prohibited in express terms the carrying forward of such losses. The learned Judge therefore dismissed the appeal.
6. Undeterred, the appellant moved to this Court and has filed a memorandum of appeal raising nine grounds as follows:
- i. That the learned Judge fundamentally erred in law and fact in dismissing the appellant's appeal, and holding that the ITA had no provision prior to coming into force of the Finance Act 2008 on 1/1/2009 allowing insurance companies to carry forward losses suffered in life insurance business.
 - ii. That the learned Judge disregarded the (now repealed) section 19(9)(a) of the *Income Tax Act* ('ITA') by basing her determination solely on section 19(9)(b) whereas section 19(9)(a) is provided as an alternative to section 19(9)(b) by dint of the use of the word 'or' between the two sections.
 - iii. That the Judge in her analysis of the effect of the repeal of section 19(9)(b), arrives (sic) at the wrong conclusion that the appellant would be applying the law in retrospect by offsetting the life losses arising in the year 2008 against income in 2009. The decision by the Judge is thus incorrect since the losses, whenever arising, would indeed be utilized in the tax computation for the year 2009 when the repeal of section 19(9) came into operation.
 - iv. That the learned Judge erroneously grounded her decision on a remark that was totally out of the scope of consideration and that was made obiter dictum by Justice Okwengu, in the High Court decision of *Geminia Insurance Limited Vs. Commissioner of Income Tax, HCC ITA 784 of 2004*.
 - v. That the learned Judge fundamentally misapprehended the provisions of Section 19 of the *Income Tax Act*, that provides guidelines for determination of profits for purposes of computation of taxes payable by insurance companies, more specifically the provisions of Sections 19(1), 19(2), 19(3), 19(5), 19(8) and 19(9) of the *Income Tax Act*.
 - vi. That the learned Judge erred in law by failing to take cognizance of provisions of Section 32(c) of the Finance Act, 2008 which effectively repealed Section 19(9) of the *Income Tax Act* which amendment subject to Section 1(d) of the said Finance Act came into force on 1st January, 2009.
 - vii. That the learned Judge erred in law and fact by failing to appreciate the impact of the repeal of Section 15(4) of the *Income Tax Act* was now applicable and losses incurred could not be offset against future profits of the Appellant.
 - viii. That the learned Judge fundamentally erred and acted unconstitutionally by contravening Article 210(1) of *the Constitution* of Kenya 2010 that expressly states that no tax may be imposed, waived or varied except as provided by legislation.



- ix. That the learned Judge fundamentally erred by confirming the assessment by the Commissioner which denies the appellant equal protection and benefit of the law contrary to Article 27(1) of *the Constitution* of Kenya 2010.”
7. Following a consent letter duly signed by the respective parties’ advocates, it was agreed that the appeal be determined on the basis of written submissions. The appellant who was represented by Atonga & Company Advocates, duly filed their written submissions that were dated 7th June, 2021, while the respondent who was represented by Johnson Sijenje Liyiaka Advocates, also filed their written submissions dated 19th July, 2021.
8. On the background to the appeal, the appellant submitted that the origin of the dispute was an actuarial report commissioned by it, for the income years 2007, 2008, 2009 and 2010, at the request of the respondent, for routine review, so as to establish whether the appellant had complied with a new provision - Section 19(5) of the ITA, that had then been introduced by the Finance Act 2008. Following the said actuarial report, the respondent raised an assessment totaling Kshs.41, 087,678 as corporate tax. This was objected to by the appellant, following which the respondent carried out an audit of the appellant’s operations, and issued the appellant with further assessment of Kshs.49,385,655 and Kshs.47,734,526/ for the years 2010 and 2011, respectively.
9. The appellant filed an appeal at the Tax Appeals Tribunal challenging the assessment by the respondent. The appeal, as we have already mentioned, was unsuccessful, the Tax Appeals Tribunal holding that the appellant was not entitled to offset the life insurance business tax losses incurred prior to 1st January, 2009, in its taxable income for the year 2009.
10. In support of the appeal before us, the appellant relying on Sections 19(1), 19(2), 19(3) and 19(5) of the ITA, submitted that Section 19(2) provided for the life insurance business of the company, being treated as separate from the general insurance business, and therefore required separate tax computation; while Section 19(8) of the Act provided that the taxable incomes from the two computations together with any other income of the company chargeable to tax, are consolidated to ascertain the total income of the company; and that there was no statutory limitation on carrying forward losses determined under Section 19(9)(a).
11. The appellant pointed out that the repealed Section 19(9) contains the disjunctive word ‘or’ at the end of paragraph 19(9)(a) and just before the beginning of paragraph 19(9)(b). This means that the computation done under paragraph 19(9)(a) are distinct from those done under paragraph 19(9)(b), and therefore the two sub paragraphs apply to two different and distinct formulas. The appellant relied on the Supreme Court decision in *Raila Amolo Odinga & another -vs- The Independent Electoral & Boundaries Commission & 4 others -vs- The Attorney General & Another*, Petition No. 1 of 2017 on the interpretation of the word ‘or’.
12. The appellant argued that although Section 19(9) was repealed by the Finance Act, Section 19(8) remained intact and is still in operation, and is therefore the only applicable provision for determining the taxable profits, and this is what the appellant applied. The appellant faulted the learned Judge for holding that Section 19(9)(a) and 19(9)(b) referred to one and the same gains and profits, maintaining that there is no separate Section 19(9)(a) and (b) that refers to gains or profits for a year of income.
13. The appellant argued that its tax computation for the years 2006 to 2008 were prepared based on Section 19(8) as required under Section 19(9)(a) and Sections 19(9) (b) before the repeal of Section 19(9) of the ITA, by the Finance Act of 2008. During that period, the appellant prepared two tax computations annually, one guided by Section 19(8) and a second one guided by Section 19(9)(b) of the ITA, and declared the higher of the two as its taxable income in accordance with Section 19(9)



- of ITA. It therefore argued that profits under Section 19(9)(a) and Sections 19(9)(b) were actually different in amounts, and the taxable amount was determined by the higher amount between the two. The appellant therefore faulted the trial Judge for failing to appreciate that its application was based on the fact that the repealed Section 19(9) provided that the taxable income of an insurance company, carrying on life business, would be the greater of any amount arrived at, after computation done using either of the formulas prescribed under Section 19(9)(a) or 19(9)(b).
14. The appellant maintained that under Section 15(4) of ITA, it was allowed to carry forward business loss for five years of income, as it was an allowable deduction in ascertaining the total income, for the year under computation, and the next four succeeding years of income. That is to say, that if in one year the application of Section 19(8) tax computation resulted in a loss, the appellant was entitled to include that previous year loss as an allowance deduction in the Section 19(8) tax computation, and this tax loss could be carried forward for the three more years but only for purposes of preparing Section 19(8) tax computation, which at the end of each year would be compared with Section 19(9)(b) tax computation to determine the taxable income of the appellant.
 15. As regards the taxable income after the repeal of Section 19(9), the appellant reiterated that this was to be determined from combining the taxable income from the life insurance business with that from the general insurance business, but Section 19(8) which was left intact was still operational. Therefore, the losses suffered by the appellant under Section 19(8) tax computation were carried forward in Section 19(8) tax computation because the provision limiting such carrying forward was Section 19(9)(b). The appellant urged the Court to find that the loss carried forward as per the computation prepared under Section 19(8) of ITA was available for deduction, and therefore the learned Judge erred in dismissing its appeal.
 16. The appellant pointed out that Section 19(9) of the ITA ceased to be applicable on 1st January, 2009, which meant that the appellant could carry forward accumulated losses in respect of life insurance business as the provision of the application of Section 15(4) of ITA as provided in Section 19(9) was no longer in force, and therefore the appellant should not be denied the right to carry forward losses on the basis of a provision that was no longer in force.
 17. The appellant urged the Court to consider the law as it was in the year 2009 which was that Section 15(a) of the ITA allowed it to carry forward losses accumulated in the previous years and offset them against any taxable profits in the year 2009. Further, that the effect of the legislative changes brought by Section 32 of the Finance Act 2008 was to remove the previous prohibition, that prevented insurance companies from carrying forward accumulated losses in respect to life insurance business, and it was not open to the respondent to administratively revive a repealed provision and arbitrarily impose it on the appellant.
 18. In support of these submissions, the appellant relied on case law including *Car Brandy Syndicate -vs- Inland Revenue Commissioners* [1920] 1KD 64; *Russel -vs- Scott* [1948] 2 All ER 5; *R -vs- Kenya Revenue Authority: Exparte Bata Shoe Company Limited (JR)* No. 36 of 2011; *Keroche Industries Limited -vs- Kenya Revenue Authority & 5 Others* [2007] 2KLR 240; *Commissioner of Income Tax -vs- Westmont Power K Limited* [2006] eKLR.
 19. The appellant faulted the learned Judge for following the decision in *Geminia Insurance -vs- Commissioner of Income Tax HCC ITA 784 of 2004* (the *Geminia* decision), and failing to appreciate that the learned Judge in that case arrived at the decision within the context of Section 19(4) of the ITA, which was still in force as at the date of the said decision. The appellant's position was that Section 19(9) of ITA had been repealed, therefore, the appellant was entitled to the full benefit of Section 15(4) of ITA. The appellant further faulted the learned Judge of the High Court for failing to find that the



- Geminia decision was distinguishable because the issue in the said decision was whether Section 19(8) allowed the consolidation of all the income of an insurance company, the issue in the appellant's case was whether the income from the life insurance business and general business should be consolidated in arriving at the taxable income of an insurance company.
20. The appellant therefore urged the Court to allow its appeal so as to enable it to offset the life insurance losses brought forward for the year of income for 2008 under Section 19(8) of the ITA, against the chargeable income for insurance business for 2009.
 21. In its written submissions, the respondent explained that there were two major classes of insurance; life insurance and general insurance, which are taxed separately and differently. General business insurance is taxed the way ordinary businesses are charged, while life insurance business is charged differently because it is money from policy holders. It was submitted that Section 19 of ITA which provides for the ascertainment of income for insurance companies, provides a breakdown relating to general insurance business and life insurance business, and gives a guide on taxation of life insurance business.
 22. The respondent submitted that prior to the enactment of the Finance Act 2008, Section 19(2) provided for separation of businesses in dealing with an insurer conducting both life insurance and general insurance; while Section 19(3) provided for determination of the gains or profits for a year of income from the general insurance business of a resident company; and Section 19(8) provided for aggregation of gains or profits from insurance business, both from life insurance and other classes of insurance, plus other income when ascertaining the total income of the company.
 23. Further, the respondent argued that this means that where there is a loss from life insurance business, such loss during aggregation can be adjusted in profits or gains, from the general insurance business and other incomes. In addition, that Section 19(9) provided that Section 15(4) regarding the ascertainment of total income, does not apply in a loss arising out of life insurance business, and this means that in so far as life insurance business is concerned, a company cannot carry forward a loss arising out of life insurance business, and no deductions could be claimed for such losses in subsequent years.
 24. In addition, the respondent posited that Section 19(9) is the determinant of the gains or profits of an insurance company that conducts life insurance business, where taxation is concerned. This means that an insurance company that also conducts life insurance business will pay taxes from its gains or profits determined pursuant to Section 19(9) of ITA, and thus Section 19 of ITA provided for a hybrid method of determining gains or profits of a life insurance business.
 25. The respondent argued that according to that system, companies had to compute using either the income minus expenditure or the surplus method and use whichever method resulted in greater gains or profits. The surplus method was the actuarial valuation; this position changed after 1st January, 2009, with the coming into force of Section 32 of the Finance Act 2008, which repealed Section 19(9) by replacing Section 19(5) with a new Section 19(5) and also introducing section 19(5)(A). The result of those changes were that from 1st January, 2009, life insurance taxation was no longer based on the higher of income less expenditure, and the surplus that were transferred for the benefit of the shareholders; and life insurance losses incurred from 1st January, 2009, could be carried forward for purposes of taxation as provided under Section 19(5)(A). Thus, when computing taxable gains of a composite insurer such as the appellant, as required under Section 19(8), the gains of the life insurance business from the new Section 19(5) and Section 19(5)(A) would be aggregated together with the gains of the general insurance business as determined under Section 19(3).
 26. In addition the respondent argued that the effect of the repeal of Section 19(9) of the ITA was that, losses from life insurance incurred from 1st January, 2009 could now be carried forward, beginning 1st



January as per Section 19(5)(A). The respondent argued that it was not possible for the appellant to have accumulated losses of Kshs.1, 017, 898,538 since any such losses incurred in any year of income, prior to the Finance Act 2008, would be extinguished at the end of year of income by operation of Section 19(9) of the ITA, and for tax purposes, as long as the company had gains or profits, pursuant to Section 19(9) the same company could not claim losses, as the Finance Act 2008, could not be implemented retrospectively.

27. The respondent urged the Court to differentiate between business profit and loss, and taxable profit and loss. The latter was meant for computation of payable taxes, while the former could be utilized by the appellant for other purposes. The respondent asserted that life insurance losses were statutorily barred from being carried forward as per the provisions of Section 19 of ITA, prior to the enactment of Finance Act 2008. The losses envisioned under life insurance business from 1st January, 2009 as provided for under Section 19(5A) of the ITA, was different from losses under Section 19 of the ITA before the Finance Act 2008 was amended, as these were losses emanating from an actuarial valuation of a life fund that results in a deficit and shareholders inject money into the life fund as opposed to the losses under the previous regime.
28. Regarding the appellant's alleged retrospective application of the law, the respondent submitted that contrary to the appellant's allegations, it is the appellant's interpretation and computation of its gains or profits for the 2009 year of income, that shows not only retrospective application of the law, but also a selective reading and understanding of the same; that the appellant's assertion that the law was meant to apply retrospectively, is ill informed and contrary to the rules of natural justice.
29. The respondent concluded that the Finance Act 2008, having provided that the operations of that Act was to take effect on 1st January, 2009, the Court should find that the losses from 2008 year of income, were not available to be carried forward to the year of income for 2009. The respondent therefore urged the Court to uphold the judgment of the High Court and dismiss the appellant's suit with costs.
30. We have carefully considered the appeal before us, which is a second appeal. Our remit in this appeal is clearly defined by Section 56(2) of the *Tax Procedures Act*, which provides that an appeal to the High Court or to the Court of Appeal shall be on a question of law only. As to what constitutes matters of law, this Court in *John Munuve Mati vs. Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR, stated as follows:
 - “(38) 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. 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.”
31. Upon appraising the parties diametrically opposed arguments, we find that the germane issue in this appeal, is whether the appellant was by law entitled to carry forward in its computation of tax due for the year 2009, losses in life insurance business incurred for the year 2008. Central to the determination of this issue is the question whether the amendments introduced by the Finance Act, 2009 whose effective date was 1st January 2009 could be applied retrospectively. Generally, the parties were in agreement on the position pertaining before the enactment of the Finance Act, 2008.



32. In summation, prior to the said amendment, section 19(9) of the ITA provided for the calculation of gains or profits in life insurance. Section 19(9)(a) provided that gains shall be determined under section 19(8) which provides for the consolidation of gains from life insurance business and any other income to ascertain the total income of the company for the purpose of taxation. Section 19(9)(b) provided that when calculating profit in relation to life insurance business in case there is a loss, the same shall not be an allowable deduction in calculating the total income for that year and the next four succeeding years meaning that losses arising out of life insurance shall not be factored in calculating the profits in the insurance business.
33. The import of the above provision is that prior to the aforementioned amendment, if a company had a loss in life insurance business, the same could not be factored in calculating the total income/gains from the insurance business for the year of income. After the amendment, Section 15(4) of the ITA applies, meaning that loss in the life insurance business is an allowable deduction in calculating the total income in the insurance business, for that year of income.
34. Section 32 of the Finance Act, 2008 amended Section 19 of the ITA by deleting subsection (5) and inserting the following new subsections-
5. The gains or profits for a year of income from the long term insurance business of a resident insurance company, whether mutual or proprietary, shall be the sum of the following –
 - a. the amount of the actuarial surplus recommended by the actuary to be transferable from the life fund for the benefit of the shareholders, whether or not it is actually transferred; and
 - b. any other amounts transferred from the life fund for the benefit of shareholders; and
 - c. thirty per centum of management expenses and commissions that are in excess of the maximum amounts allowed by the *Insurance Act*.
- (5A) Where the actuarial valuation of the life fund results in a deficit for a year of income and the shareholders are required to inject money into the life fund, the amount of money so transferred shall be treated as a negative transfer for the purposes of subsection (5)(a):
- Provided that the amount of the negative transfer shall be limited to the amount of actuarial surplus recommended by the actuary to be transferable from the life fund for the benefit of shareholders in previous years of income, whether or not it was actually transferred. (b) by deleting subsection (6) and inserting the following new subsections-
6. The gains or profits for a year of income from the long term insurance business of a non-resident insurance company, whether mutual or proprietary, shall be the sum of the following —
35. It is the appellant’s position that this Court should consider the law as it was in the year 2009 which was that Section 15(a) of the ITA allowed it to carry forward losses accumulated in the previous years and offset them against any taxable profits in the taxable year. Further, that the effect of the legislative changes brought by Section 32 of the Finance Act 2008 was to remove the previous prohibition that prevented insurance companies from carrying forward accumulated losses in respect to life insurance business, and it was not open to the respondent to administratively revive a repealed provision and arbitrarily impose it on the appellant.



36. In effect, the appellant is inviting this Court to apply the amendments introduced by Section 32 of Finance Act 2008 (which became effective on 1st January, 2009), retrospectively. To our mind, the general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation. In *Bellairs vs. Hodnett and Another*, 1978 (1) SA 1109 A (at 1148 F – G), the Supreme Court of Appeal of South Africa, stated that, not only is there a presumption against retrospective application of legislation, but:
- “even where a statutory provision is expressly stated to be retrospective in its operation it is an accepted rule that, in the absence of contrary intention appearing from the statute, it is not treated as affecting completed transactions ...”
37. No statute is to be construed as having retrospective operation which would have the effect of altering rights acquired and transactions completed under existing laws. The Privy Council in *Wijesuriya v Amit* [1965] All E.R. 701 at 703 held that:
- “It must be shown that the enacting words clearly cover the case to which it is sought to apply them. The court will no doubt prefer an interpretation which gives effect to the [provision], rather than one which denies it any efficacy, but it will not strain the language used, nor will it rewrite or adapt it to cover cases other than those to which it clearly applies.
- (See also *Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 Others* [2012] eKLR)
38. We have read the entire amendment introduced by Section 32 of the Finance Act, 2008. We are unable to locate any provision in the said enactment specifically permitting retrospective application of the amendments. Conversely, Section 1 (d) of the Finance Act, 2008 provides in clear terms that the commencement date for the amendments introduced to section 19 of the ITA was 1st January 2009. The appellant appears not to have appreciated the import of the said provision. The argument urging us to consider the law as it was in 2009, and apply it retrospectively is untenable. It is an invitation to this Court to unduly strain the language of the said provision to accommodate an unintended meaning/purpose which would be an affront to the well-established canons of statutory interpretation. Statutory provisions are to be construed purposively and in a contextual manner as courts are constrained by the language used in a statute. Hence, courts cannot impose a meaning that the statutory text is not reasonably capable of bearing. Accordingly, we decline the appellant’s invitation to apply the said provisions retrospectively. On this ground alone, this appeal collapses.
39. The other ground urged by the appellant is that the Tribunal and the High Court failed to appreciate that the *Geminia* decision was distinguishable from the facts in this appeal, and it would be very unfair and prejudicial to the appellant to follow the obiter dictum in the said decision, because the learned Judge in the said decision did not fully apply her mind to the issue whether losses should be carried forward by an insurance company. The appellant further argued that it is settled law that obiter dictum remarks are not a binding part of a judgment, and therefore, the High Court and the Tribunal erred by grounding their respective decisions on the remarks made by the Honorable Judge in the *Geminia* decision.
40. On its part, the respondent submitted that Section 32 of the Finance Act 2008 amended Section 19 of the *Income Tax Act* by repealing Section 19(9), replacing Section 19(5) with a new Section 19(5) and introducing Section 19(5A) all with an effective date of 1st January 2009. It is the respondent’s case that the deletion of Section 19(9) of *Income Tax Act* by Section 32 of the Finance Act 2008 with an



effective date of 1st January 2009 means that the provisions of that Section were no longer in place after 1st January 2009. Consequently, beginning 1st January 2009, life insurance taxation was no longer based on the higher of Income less Expenditure (I-E) and the surplus that were transferred for the benefit of shareholders; Life insurance losses incurred from 1st January 2009 could now be carried forward for purposes of taxation as provided for under Section 19(5A) of the *Income Tax Act*. Therefore, when computing taxable gains of a composite insurer such as the appellant, as required under section 19(8) the gains of the life insurance business from the new Section 19(5) and Section 19(5A) would be aggregated together with the gains of the general insurance business as determined under Section 19(3).

41. In our view, the answer to the above argument lies in the question whether the losses accumulated up to 31st December 2008 may be carried forward as per section 15(4) with effect from 1st January 2009 (after the repeal of section 19(9) of the ITA) and whether section 19(8) of the ITA is applicable to losses arising out of life insurance business. Section 15(4) of the ITA provides as follows:

4. Where the ascertainment of the total income of a person results in a deficit for a year of income, the amount of that deficit shall be an allowable deduction in ascertaining the total income of such person for that year and the next four succeeding years of income:

Provided that—

- i. any deficit for the year of income shall be regarded for the purposes of this subsection as having arisen entirely in that year of income;
- ii. in any case where the income of a married woman is deemed to be the income of her husband, the amount of any deficit in her total income existing at the date of her marriage shall be an allowable deduction in ascertaining the total income of her husband for that year and, insofar as such deficit has not already been deducted, next succeeding four years of income, to the extent of the amount of her income which is assessed on her husband in such years of income;

42. Section 19 (8) of the ITA stipulates:

The amount of the gains or profits from insurance business, both from life insurance and from other classes of insurance business, arrived at under this section shall be taken into account with any other income of the company charged to tax in ascertaining the total income of that company.

43. Section 19(9)(b) of the ITA which is of relevance, stipulates that Section 15(4) of ITA shall not apply “in respect of a loss arising out of life insurance business” to profits reported by a company which conducts insurance business, in its accounts, required to be furnished in its return of income under section 54 of ITA.

44. It is noteworthy that computation of gains and profits of an insurance company ought to be done in accordance with section 19 of the ITA. Looking at the said sections it is clear that how the gains or profits are arrived at is specified. Accordingly, we find and hold that under section 19(8) of ITA which provides for consolidation of gains or profit from insurance business and life insurance, there is no provision for offsetting losses arising out of life insurance business. Having read the orbiter dictum in the Geminia decision, we are persuaded that the reasoning in the said decision (at page 20-21) is sound, and indeed section 19(9)(b) of ITA only precluded the carrying forward of losses in respect of life insurance to the following year. Nothing precluded the appellant from offsetting losses suffered



by it in the life insurance business in accordance with section 19(8) of the ITA. The rider is that the offsetting had to relate to that particular year of income and not retrospectively.

45. Accordingly, we are satisfied that no losses in the life insurance business prior to 2009 would have been available to carry forward to the year 2009. It is also noteworthy that section 19(9) of ITA was repealed and replaced with new sections 19(5) and 19(5A) of ITA both of which had an effective date of 1st January 2009. As stated earlier, these provisions had no retrospective effect.
46. In conclusion, just like the trial judge and the Tax Appeals Tribunal, it is our finding that in the circumstances of this appeal, the respondent was justified in declining to allow the carrying forward of losses in respect of life insurance business prior to the year 2009, in calculating the taxable income for the insurance business since the repeal of section 19(9) of ITA only came into force on 1st January 2009. Accordingly, this appeal fails and we hereby dismiss it with costs.

DATED AND DELIVERED IN KISUMU THIS 10TH DAY OF JANUARY, 2025

HANNAH OKWENGU

.....

JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

