Kenya Revenue Authority v Ndegwa (Civil Appeal 65 of 2019)
[2025] KECA 510 (KLR) (21 March 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 65 OF 2019

K M'INOTI, F TUIYOTT & FA OCHIENG, JJA

MARCH 21, 2025

BETWEEN

KENYA REVENUE AUTHORITY ..... APPELLANT

AND

DAVID MWANGI NDEGWA ..... RESPONDENT

(Appeal from the judgment and decree of the High Court at Nairobi (Kasango, J.) dated 29th November 2018 in HCCC No. 541 of 2015)

JUDGMENT

1. The central question in this appeal is the correct interpretation of section 5 of the *Value Added Tax Act*, 2013 (VAT Act) as read with paragraph 8, Part II of the First Schedule of the same Act. Kasango, J. held that the latter provision was ambiguous; construed it strictly in favour of the respondent, David Mwangi Ndegwa; and concluded that no value added tax (VAT) was chargeable on the sale of land, whether the premises thereon were residential or commercial. Accordingly, the court ordered the appellant, the Kenya Revenue Authority, to refund the VAT that the respondent had paid upon purchase of a commercial premises.

2. On its part the appellant posits that paragraph 8 of Part II of the First Schedule to the VAT Act is clear and unambiguous and that the learned judge erred in failing to give effect to its plain and clear meaning. It is the appellant's contention that the said provision exempts from VAT only land and residential premises, but not commercial premises.

3. The brief background to the appeal is as follows. On 11th December 2013 the respondent purchased from Standard Chartered Bank Kenya Ltd. the property known as Kiambu Town Block 11/74 together with all the building erected and being thereon for Kshs. 70,000,050.00. The appellant demanded and the respondent paid under protest Kshs. 11,200,080.00, being 16% VAT of the purchase price.

4. On 30th October 2015 the respondent filed a suit against the appellant in the High Court at Nairobi seeking a declaration that no VAT was payable on the sale or purchase of land whether the buildings erected thereon were residential or commercial; an order for refund of the VAT that he had paid, together with interest; and costs of the suit. The suit was based on the respondent's contention that no VAT was chargeable under paragraph 8 of Part II of the First Schedule to the VAT Act on a transaction like the one he had been involved in.

5. On 11th January 2016 the appellant filed its defence in which it pleaded that VAT was payable and was lawfully levied on the respondent's transaction pursuant to the provisions of paragraph 8 of Part II of the First Schedule to the VAT Act. Accordingly, the appellant prayed for dismissal of the respondent's suit with costs.

6. The suit was heard by Kasango, J., who by the judgment impugned in this appeal held that the supply that was exempt from VAT under paragraph 8 of Part II of the First Schedule was land and residential premises. Adopting the definition of "land" in Article 260 of *the Constitution*, the learned judge further held that "land" includes what is on the surface of the earth and the airspace above the surface. Ultimately, the court concluded that the respondent purchased land, that is to say, what was on the surface of the earth, the subsurface rock and the airspace above the surface. Such transaction, the court found, was exempt from VAT under paragraph 8 of Part II of the First Schedule.

7. The court also found that paragraph *8* was not clear and unambiguous in light of the definition of land in *the Constitution*. Probably as a demonstration of the ambiguity, the court wondered whether under paragraph *8*, a premises which was partly residential and partly commercial would attract payment of VAT.

8. On the appellant's claim for refund of VAT, the court found that section 30 of the VAT Act was not applicable because it relates to VAT payments made in error, in respect of which a claim for refund must be made within 12 months. In the respondent's case, the court held that the payments were not made in error and that the respondent had, upon demand by the appellant, protested against payment of VAT. The court also found that it was the respondent, rather than the vendor, Standard Chartered Bank Kenya Ltd., who was entitled to refund of the VAT because the same was paid by him, though remitted to the appellant by the vendor.

9. Ultimately, the court allowed the respondent's suit and issues a declaration that VAT is not payable on a transaction for the sale or purchase of land, whether or not the buildings thereon are residential or commercial. The court further ordered the appellant to refund the Kshs. 11,200,080.00 paid by the appellant as VAT. Lastly, on costs the court directed each party to bear their own costs because the erroneous collection of VAT was occasioned by legislation which was open to more than one interpretation.

10. The appellant was aggrieved by the judgment of the High Court and preferred the present appeal, founded on 11 grounds, which at the hearing of the appeal its learned counsel, Mr. Chabala reduced to three issues, namely:

    i. whether the definition of land in *the Constitution* includes buildings as determined by the High Court;

    ii. whether paragraph 8 of Part II of the First Schedule to the VAT Act, 2013 is ambiguous regarding payment of VAT for the sale or letting of commercial buildings; and

    iii. whether the refund claimed by the respondent was payable.

11. Relying on submissions dated 18th December 2022, counsel for the appellant submitted, as regards the first issue, that the High Court erred in holding that the definition of land in *the Constitution* includes buildings. Counsel cited the *Land Act*, 2012, and submitted that "land" and "buildings" have separate and distinct meanings, so that "land" is as defined in section 260 of *the Constitution* while "buildings" are defined to mean any structure or erection of any kind whatsoever, whether permanent or temporary, moveable or immoveable and complete or incomplete.

12. It was further contended that the court must interpret a statute according to the intention of the legislature and that the words used in a statute are the best indictors of the intention of the legislature, so that if the words are precise and unambiguous, no more expounding is necessary. Counsel added that the ordinary meaning of land and buildings as used in the legislation and the Cambridge Dictionary did not mean one and the same thing as held by the High Court. In support of the submission counsel relied on the decision of this Court in Kenya Revenue Authority v. Universal Corporation Ltd. [2020] eKLR.

13. Counsel also submitted that by dint of Article 210 of *the Constitution*, imposition, waiver or variation of tax can only be provided by legislation and that in this case, no legislation has waved VAT on commercial buildings, meaning that it is payable. In support of the submission counsel cited Krystalline Salt Ltd. v. Kenya Revenue Authority [2019] eKLR.

14. Turning to the second issue on whether or not paragraph 8 of Part II of the First Schedule to the Act is ambiguous, the appellant submitted that there was no ambiguity because the VAT Act, as an exemption statute, has not exempted commercial buildings from VAT. It was contended that the Act treats land and buildings as different vatable goods and that whether a building was residential or commercial was a relevant consideration.

15. The appellant relied on the legislative history as regards payment of VAT on commercial buildings, starting with the year 2006 to demonstrate that under the VAT Act 2013, commercial buildings were not exempt from VAT. It was contended that the legislative history demonstrated that the legislature has always distinguished between land and buildings and also between residential and commercial buildings.

16. It was also contended that in the administration of the VAT Act, there was no challenge or ambiguity as regards mixed- use buildings, because there was established industry practice on apportionment consistent with the law, just like in the case of supplies made by financial institutions where some supplies are exempt from VAT while others are not. The appellant further submitted that it uses the Invoice Method and that the VAT Act has provisions for deduction of input tax on mixed (exempt and taxable) supplies.

17. In the appellant's view, the specific mention of residential premises in the provision under contestation and the definition provided therein, means that residential premises are apart and different from other premises and are specifically exempted from VAT. On the reasoning that mention of one thing by implication excludes the other, it was submitted that any other premises that are not so exempted like residential premises, are subject to VAT.

18. On the last issue regarding whether VAT refund was payable to the respondent, the appellant submitted that under section 30 of the VAT Act, 2013, where tax has been paid in error, a claim for refund must be made within 12 months from the date the tax became payable. It was contended that for such tax paid in error, the appellant has no power or discretion to refund when the claim is made outside the period prescribed by legislation. The appellant deployed the principle of strict construction of tax legislation as expounded in Kenya Revenue Authority v. Universal Corporation Ltd. (supra) as

well as the decision of the High Court in Republic v. Cabinet Secretary for Internal Security ex parte Gragory Oriaro Nyauchi & 4 Others [2017] eKLR, in support of the submission.

19. For those reasons the appellant urged the court to allow the appeal with costs.

20. The respondent, represented by Mr. Kangatta, learned counsel, opposed the appeal vide written submissions dated 24th October 2023, which he duly highlighted.

21. According to the respondent's analysis of the legislative history of the provision, "sale of land" was first exempted from VAT by the VAT Act 2013 and prior to that the renting, leasing, hiring or letting of land, residential buildings and non-residential buildings were all exempt from VAT. In 2007 "non-residential buildings" were removed from the list of VAT-exempted supplies thus making their renting, leasing, hiring or letting subject to VAT. In 2009, "sale of buildings" was exempt from VAT before the VAT Act, 2013.

22. The respondent submitted that after including "sale of land" among the VAT exempted supplies, Parliament did not see the need to specifically include "sale of buildings" in the list because the definition of "land" in *the Constitution* includes buildings thereon. Regarding the specific reference to "residential premises" in paragraph *8*, the appellant submitted that the words "land or residential premises" must be read together to mean the supply of land or residential premises are exempt from VAT. It was also contended that under paragraph *8* as regards residential premises, what is exempted from VAT is only supply by letting.

23. The respondent further contended that no distinction should be made between sale of land and sale of buildings standing thereon, and that "sale of buildings" is not a legal term. In the respondent's view, exempting sale of land from VAT but subjecting sale of buildings thereon to VAT is a legal absurdity because one cannot sell land without necessarily selling the buildings standing thereon.

24. Falling back on the definition of "land" in Article 260 of *the Constitution*, the respondent submitted that land is defined to include the surface of the earth, the subsurface rock, and the airspace above the surface which means that buildings on the surface of the earth are part of the land. In the respondent's view, land cannot be sold independent of the buildings standing thereon, and that it would result in confusion and chaos if the position urged by the appellant were applied to sale of mixed-use property.

25. Lastly, the respondent submitted that the respondent cannot levy taxes except as clearly stipulated in legislation and that in the event of ambiguity in the tax legislation, the ambiguity should be construed in favour of the tax payer.

26. As regards refund of the VAT, the respondent submitted that he paid the VAT of Kshs. 11, 200,008.00 that was levied on the transaction and that the amount was remitted to the appellant by Standard Chartered Bank Kenya Ltd. The appellant added that section 30 of the VAT ACT 2013 did not apply as regards refund because the amount was paid against his will and when no VAT was due or payable and therefore the time limitation set in that provision was not applicable. For the foregoing reasons, the respondent urged the Court to dismiss the appeal with costs.

27. We have carefully considered the record of appeal, the judgment of the High Court, the grounds of appeal, the terms of paragraph 8 of Part II of the First Schedule to the VAT Act, the written and oral submissions by the parties, as well as the authorities cited by the respective learned counsel. In our estimation, this appeal turns on the interpretation of paragraph 8 of Part II of the First Schedule to the Act, and the answers to the following questions. Does the term "land" in that Schedule mean one and the same thing as "premises", whether the premises be residential or commercial? What is the implication of the specific mention of "land" and "residential premises" in the provision? What is the implication of the fact that "commercial premises" are not mentioned in the provision, while

"residential premises" are expressly exempted from VAT, by an exempting statute? Is paragraph 8 of Part II of the First Schedule to the Act ambiguous as regards the meaning of "land", "residential premises" and "commercial premises" so as to justify a strict construction, whose effect is to void levy of VAT on a transaction which is not expressly exempted?

28. In interpreting the impugned provision and in answer to the above questions, we must bear in mind the applicable principles that should guide us in interpretation of the relevant provisions. The purpose of interpreting a statute is to establish the intention of the legislature in enacting the statute or provision in question. In Kenya Airports Authority v. Otieno Ragot & Co Advocates, SC Pet No. E011 of 2023, the Supreme Court held that:

> " We are cognisant that the purpose of interpretation of statutes or documents...is to discern the intention of the framers thereof. In doing so, such intention can be derived from the words used therein..."

29. And in Law Society of Kenya v. Attorney General & another, SC Petition No. 4 of 2019, [2019] KESC 16 (KLR), the same Court considered how the intention of the Legislature is ascertained. It concluded thus:

> " ...intention is construed by scrutinising the language used in the provision which inevitably discloses its purpose and effect. It is the task of a court to give a literal meaning to the words used and the language of the provision must be taken as conclusive unless there is an expressed legislative intention to the contrary." (Emphasis added).

30. The decision of this Court in County Government of Nyeri & Another v. Cecilia Wangechi Ndungu [2015] eKLR, is to the same effect. The Court held that: -

> "Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors. (Emphasis added).

31. In addition to the words used in the statute, the context is equally important and cannot be ignored. Indeed, as we shall show below, the definition of "land" in *the Constitution* applies, depending on the context. The importance of context in statutory interpretation was underlined by the Supreme Court of India in Reserve Bank of India v. Peerless General Finance and Investment Co Ltd [1987] 1 SCC 424, a decision which the Supreme Court of Kenya cited with approval in Kenya Airports Authority v. Otieno Ragot & Co Advocates (supra). The Indian Court held that: -

> "Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."

32. The other relevant principle to bear in mind is that tax legislation, like all penal legislation, is construed strictly without straining the words used for the purpose of bring a taxpayer within the application of

the tax statute. If tax legislation is ambiguous, it is construed strictly against the taxman and in favour of the tax payer. Rowland J. aptly captured these sentiments in Cape Brandy Syndicate v. Inland Revenue Commissioners [1920] 1 KB 64 when he stated as follows: -

> "...in a taxing Act, one has to look merely at what is clearly said. There is no room for intendment as to a tax. There is no equity about tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied One can only look fairly at the language used... If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."

33. And in Russell v. Scott [1948] 2 ALL ER 5, Lord Simonds stated as follows: -

> "My Lords, there is a maxim of income tax law which, though it may sometimes be overstressed yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him."

34. These principles on strict interpretation of tax legislation have been applied by our courts in a number of decisions, among them Stanbic Bank Kenya Ltd v. Kenya Revenue Authority [2009] eKLR; Republic v. Commissioner of Domestic (Taxes Large Taxpayers Office) ex parte Barclays Bank of Kenya Ltd. (Mis. Civil Application No. 46 of 2013); Commissioner of Domestic Taxes (Large Tax Payer Office) v. Barclays Bank of Kenya Ltd [2020] eKLR; Republic v. Commissioner of Income Tax ex parte SDV Transami (*CA No. 212 of 2004*); Kenya Revenue Authority v. Universal Corporation (*CA No 150 of 2018*); and The Commissioner of Income Tax v. Investment Power Kenya Ltd. [2016] eKLR.

35. Turning back to this appeal, the VAT Act, 2013 provides for imposition of value added tax for supply of goods and services made in or imported into Kenya. Specifically, section 5 of the Act provides for the charging of value added tax, while the First Schedule to the Act provides for the supply of good and services that is exempt from value added tax. For the purposes of this appeal, the disputed provision is paragraph 8 of Part II of the First Schedule, which provides for supply of services that are exempt from VAT. The provision reads as follows:

> " First Schedule Part II - Services
>
> 8. Supply by way of sale, renting, leasing, hiring, letting of land or residential premises;
>
> "residential premises" means land or a building occupied or capable of being occupied as a residence, but not including hotel or holiday accommodation;
>
> Provided that this paragraph shall not apply where such services are supplied in respect of—
>
> a. car park services; or
>
> b. conference or exhibition services, except where such services are provided for educational institutions as part of learning."

36. It is crystal clear that as far as paragraph 8 of Part II of the First Schedule is concerned, the legislative draftsperson provided for exemption from VAT of the supply of "land" by way of the five listed means, separately and distinctly from the supply of "residential premises" by the same means. In treating "land" and "residential premises" to mean one and the same thing, the learned judge reasoned as follows:

23. It is clear from paragraph 8 that what is exempt is the sale, renting, leasing, hiring, letting of land; and the sale, renting, leasing, hiring letting of residential premises. One will note that there is the use of word "or" between land and residential premises. The word "or" is defined in Oxford Advance Learner's Dictionary 7th edition as:

"used to introduce another possibility."

It follows that the exempt supply relates to land or residential premises. That means exempt supply is in respect to land and residential premises.

24. The parties in this matter are in agreement that the definition of land is the one in Article 260 of *the Constitution* which defines land:

'Land includes-

a. The surface of the earth and the subsurface rock;

b. Any body of water on or under the surface;

c. Marine waters in the territorial sea and exclusive economic zone;

d. Natural resource completely contained on or under the surface; and

e. the airspace above the surface.'

25. I wholly agree with the plaintiff's submissions that that definition applies to what is on the surface of the earth and in the air space above the surface of the earth." (Emphasis added).

37. From the definition of "land" in *the Constitution*, the High Court therefore, concluded that the definition covered "residential premises" because such premises were on the surface of the earth. The court specifically held that:

> " The statute, in this case paragraph 8, does give exemption to "supply by way of sale, renting, leasing, hiring, letting of land." The plaintiff purchased land which means what was on the surface of the earth and the subsurface rock and the air space above the surface. His transaction was VAT exempt as per VAT Act 2013 Part II paragraph 8." (Emphasis added).

38. It is in support of the interpretation adopted by the High Court that the respondent stretches imagination to credulity by submitting that to hold that "residential premises" and "land" mean different things, is to invite an absurdity, because there is no residential premises that are not erected on land. On our part, we are not persuaded of the correctness of the interpretation adopted by the High Court, for the following reasons.

39. First and foremost, the definition of land in *the Constitution* is not intended for all and sundry situations and contexts. Very advisedly, Article 260 of *the Constitution* opens with these crucial and significant words:

> " In this Constitution, unless the context requires otherwise—...land includes..." (Emphasis added)

40. The definition of land in Article 260 of *the Constitution* applies if, and only if, the context permits. If the context does not permit, that definition will not apply. What that means is that *the Constitution* permits a definition of land that is different from that given in Article 260, depending on the context. Thus, for example, if a landowner literally applied the definition of land in Article to 260 of *the Constitution*, he or she would conclude that because land is defined to include the subsoil, any minerals found in the

subsoil under their land is part and parcel of the land. Yet, notwithstanding the definition of land in *the Constitution*, under the *Mining Act*, minerals under the land do not form part of the landowner's land. In the *Mining Act*, land is understood to exclude it's the subsoil if it has minerals. One cannot validly contend that the *Mining Act* is ambiguous because its appreciation of land is different from that of *the Constitution*. In the same vein, there is absolutely nothing unusual for the VAT Act to define land so as to exclude premises erected thereon, notwithstanding the definition of land in *the Constitution*, which defines land to include the airspace above.

41. The respondent forcefully argues that it is an absurdity to levy VAT on the supply of land and residential premises separately, because one cannot have residential premises that are not erected on land. Logical as that argument may appear at first sight, it ignores the fact that it is not all land that has premises erected thereon. If that fact is accepted, it becomes easy to appreciate that the legislature can exempt supply of land (vacant) from VAT and separately exempt supply of residential premises, even though they stand on land. It is in this respect that the definitions in the *Land Act* become relevant as examples. The *Land Act*, 2012 defines land in section 2 to mean land as defined in Article 260 of *the Constitution*. However, notwithstanding the fact that buildings stand on land, the Act treats land as distinct and different from buildings erected thereon. Accordingly, it defines "building" to mean: -

> " any structure or erection of any kind whatsoever whether permanent or temporary, whether movable or immovable and whether completed or uncompleted."

42. In the case before the Court, the context is a tax statute which has deliberately provided distinctly for exemption from VAT of some transactions involving land, on the one hand, or residential premises on the other. Article 260 of *the Constitution* allows the Legislature, depending on the context in which it is legislating, to define "land" in a manner that is different from the definition of land in Article 260 of *the Constitution*. Where the Legislature has, in a statute like the VAT Act, defined land differently from the definition in Article 260 of *the Constitution*, there is nothing amiss or unconstitutional with that, and neither the parties nor the courts are allowed to hammer, squeeze, twist, wring or contort the definition provided in the statute so as to force it to fit the definition of land provided in *the Constitution*.

43. Secondly, sight must not be lost to the fact that deliberately, in Article 260, *the Constitution* does not make the definition of land therein precise or immutable. The words in the definition of land in that provision to the effect that "land includes", leaves no room for doubt that in some contexts "land" may be defined to include more or less things than provided in Article 260 of *the Constitution*. In that respect, Article 260 allows, depending on the circumstances and context, land to be defined, for example, to exclude the subsurface rock, marine waters, natural resources under the surface, and even the airspace above the surface.

44. The position adopted by the High Court and strongly defended by the respondent in this appeal is nothing more than a direct or literal application of the two Latin maxims on ownership of land, namely "quicquid plantatur solo solo cedit" and "cius est solum eius est asque ad coelum et ad inferas." The import of the first maxim is that whatever is permanent attached to land forms part of that land. The second maxim postulates that whoever owns the lands, owns it up to heaven and to the core of the earth. As we have demonstrated above with the example of the *Mining Act*, these maxims cannot be applied literally in all cases. There are many instances where the Legislature has enacted legislation that expressly disavows literal application of the two maxims. Other examples few examples will suffice. These include, the *Water Act*, Cap 372 under which water on land is owned by the State, rather than by the owner of the land. In that context, the owner of the land cannot claim that the land includes the water, because the water is on the land. The same situation applies under the *Petroleum Act*, Cap 308, which, by section 14 vests all petroleum existing in the strata lying within Kenya and its continental

shelf in the National Government. Such petroleum is understood to be different from the land, even if it is in the subsoil.

45. Way back in 1895, Jeremiah Smith warned that in truth, maxims operate only within a narrow range and it would be a palpable error to raise them to the position of general principles. They are not law and are not to be given effect as legal rules particularly in cases where it is unreasonable to apply them. They are only maxims, convenient currency merely guide posts pointing the right road, but not the road itself. See Jeremiah Smith, "The Use of Maxims in Jurisprudence" (1895) 9 Harv L. Rev. 13).

46. In this appeal, not only has the legislature exempted supply of land and residential premises from VAT, but it has gone further and defined "residential premises" to mean: -

> " land or a building occupied or capable of being occupied as a residence, but not including hotel or holiday accommodation."

47. As earlier pointed out, the VAT Act is an exemption statute, meaning that what is not exempted by the Act from levy of VAT is vatable. A proper reading of paragraph 8 of Part II of the First Schedule and taking into account the definition of "residential premises" compels the conclusion that the supply of any building that is not occupied as a residence is not exempt from VAT. To hold otherwise is to render irrelevant or superfluous the express reference to "residential premises" in the Act and the manifest intention of the Legislature in going further to define what "residential premises" means. It is trite that the courts always eschew any canon of interpretation whose effect is to render otiose or utterly irrelevant an express and unambiguous provision of the statute.

48. A statute has to be interpreted so as to avoid rendering superfluous clear language used by the Legislature. Courts are therefore obliged, as much as possible, to give effect to every clause and word used in a statute so as to avoid an interpretation that suggests that the Legislature was ignorant of the meaning of the language it had used. In Standard Ltd & 2 Others v. Christopher Ndarathi Murungaru [2016] eKLR, this Court held as follows:

> " An interpretation of *the Constitution* (statute) that destroys one or some of its provisions or renders them otiose, or results in anomalous or illogical conclusions cannot be countenanced." See also CKC & Another (suing through their mother and next friend JWN) v. ANC [2019] eKLR).

49. Bearing in mind the caution we have alluded to regrading maxims, the Latin maxim, "expressio unius est exclusio alterius" is relevant in the interpretation of the impugned provision because is not unreasonable to apply in the circumstances of this appeal. It posits that the express mention in a statute of contract of one or more things in a class implies that other things in the same class that are not mentioned are excluded. Thus, for expanse, in M/s Swastic Gases P. Ltd v India Oil Corporation Ltd [2013] SC 265, the Supreme Court of India explained the significance and application of the maxim as follows: -

> This legal maxim (expressio unius est exclusio alterius) means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts."

50. In this appeal, the palpable exclusion in paragraph 8 of Part II of the First Schedule to the Act of supply of the class of premises known as "residential" from levy of VAT, without any mention of supply of the class of premises known as "commercial", must mean that unlike residential premises, supply of commercial premises are not exempt from levy of VAT.

51. In Attorney General of Belize v. Belize Telecom Ltd. [2009] 2 All ER 1127 Hoffman LJ emphasised that in interpreting a statute or document, a court cannot add terms or ignore those that are clear. He expressed the principle as follows:

> " [t]he court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed ... It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument." (Emphasis added).

52. Both parties relied heavily on the legislative history of the disputed provisions to support their respective cases. In our view, if the legislative history of the provisions shows anything right from 2006, is that at various times Parliament has excluded from VAT the designated transitions, if they involved "land", "residential buildings' and "non-residential buildings". Previously supply of land, residential buildings and non-residential buildings were all exempt from VAT. By 2013, supply of non-residential builds was no longer exempt from VAT. What that simply indicates is that over that history, Parliament did not treat "residential buildings" and "non-residential buildings" as synonymous with "land", when they were exempt from VAT. The history also clearly indicates that as of now, only the supply of "land" and the supply of "residential premises" are exempt from VAT.

53. As regards the use of the words "and/or" in the impugned provision, that of and by itself is not decisive. Whereas in ordinary parlance "and" is conductive while "or" is disjunctive, courts do not inexorably apply strict grammatical construction, where doing so would frustrate clear legislative intendment. Accordingly, depending on the context, the court may read those words interchangeably. This approach is not novel. Thus, for example, as regards the words "may" and "shall", ordinarily "may" denotes discretion while "shall" denotes a mandatory requirement. Yet, depending on the context in which they are used, "may" can connote something that is mandatory, while "shall" may import a discretion. (See Rangaswami, The Textile Commissioner & others v. Sugar Textile Mills (P) Ltd. & Another [1977] AIR 1516, 1977 SCR (2) 825).

54. Accordingly, as regards issue number one, we are satisfied that the High Court erred in holding that for the purposes and in the context of the VAT Act, land includes buildings erected thereon.

55. The second issue is whether there is really any ambiguity in paragraph 8 of Part II of the First Schedule to the Act. In holding that the provision was ambiguous, the High Court reasoned as follows:

> " [The] responsibility placed upon the legislature demands that any legislation passed by them must be clear and unambiguous. That cannot be said of paragraph 8 of the VAT Act. This is because *the Constitution* itself defines what land is. That definition includes all land both with commercial and residential premises. Since my finding is that the supply which is

exempt under paragraph 8 is both to land and residential premises, and because what the plaintiff purchased was land he then was not liable to pay VAT on the purchase price." Emphasis added

56. It is clearly apparent that the High Court found the contested provision to be ambiguous because in its appreciation, the Act defines land differently from *the Constitution*, under which land includes everything on it. By attempting to define residential premises differently from the definition of land in *the Constitution*, the Act is unclear and that unclarity brings about ambiguity. As far as the High Court is concerned, anything on land, whether residential premises or commercial premises, is exempt from VAT by virtual of being on land as defined by *the Constitution*.

57. We have demonstrated when dealing with issue number one, that the definition of land in *the Constitution* must be applied depending on the context and that there is nothing that prevents the Legislature in a particular legislation like the VAT Act, from defining land differently from the definition in *the Constitution*. In our view, there is no ambiguity as far as paragraph 8 of Part II of the First Schedule to the Act.

58. In a spirited attempt to persuade the Court that the provision in issue is ambiguous, the respondent argued that it was not clear how VAT is charged on supply of mixed-user premises, and in a bid to understand the issue better, the Court posed the question whether supply of a commercial ranch would constitute exempted land or non-exempted commercial premises. The appellant's response was that the difficulty was not real because there was an established industry practice on apportionment as regards supply of mixed-use premises.

59. We must emphasise that the central issue raised in this appeal is squarely whether the supply of commercial premises is exempt from VAT. That is the only question that we can legitimately answer. It would be remiss to conclude that paragraph 8 of Part II of the First Schedule to the Act is ambiguous on the basis of perceived unclarity regarding for example, mixed-use premises. In this appeal, we cannot determine issues of mixed-user premises because, first, the issue is not before us, and second and more importantly, we have not heard full argument on the matter. That issue must await resolution in a case where it is properly raised. A pronouncement on such an issue will be mere obiter dicta.

60. In Stanbic Bank Ltd v. Kenya Revenue Authority [2009] eKLR, this Court (Nyamu, JA.) aptly observed that in interpreting a tax statute, the court should not strain any of the words used in order to find an ambiguity. It is only required to adopt the ordinary meaning of the words used in the tax statute, so that if there is ambiguity, the statute is construed in favour of the tax payer and conversely, if there is no ambiguity, the court must uphold the tax.

61. As regards the second issue, we are satisfied that there is no ambiguity in paragraph 8 of Part II of the First Schedule to the Act and that the High Court erred in finding and holding otherwise.

62. The last issue is whether the refund that the High Court ordered the appellant to make to the respondent was due and payable. Having found that the supply of commercial premises is not exempt from VAT under paragraph 8 of Part II of the First Schedule to the Act and that the said provision is not vitiated by any ambiguity, it follows that the appellant lawfully levied VAT on the appellant's transaction involving the supply of commercial premises and therefore, the High Court erred by directing the appellant to refund to the respondent the sums it had levied as VAT.

63. For the foregoing reasons, we allow this appeal, set aside the judgment of the High Court dated November 29, 2018 and substitute therefore an order dismissing the respondent's suit in the High Court. As costs follow the event and there being no compelling reasons why the Court should depart from that general rule, the appellant is awarded costs of the suit and this appeal. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH, 2025.

K. M'INOTI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.