Commissioner of Domestic Taxes v Prexx Ventures (Income Tax Appeal E152 of 2024) [2025] KEHC 3691 (KLR) (Commercial and Tax) (25 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3691 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E152 OF 2024

RC RUTTO, J

MARCH 25, 2025

BETWEEN

COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT

AND

PREXX VENTURES ..... RESPONDENT

(Being an Appeal against the Judgment delivered on 26th April 2024 at the Tax appeals Tribunal in Tax Appeals Tribunal Case No. E193 of 2023)

JUDGMENT

1. This appeal arises from a judgment delivered by the Tax Appeals Tribunal Appeal No. E193 of 2023. In the said claim, the Respondent was dissatisfied with the decision of the Appellant in upholding the tax assessment of Kshs.6,621,971/= for the tax period between January 2016 to December 2017.

2. The Tax Appeal Tribunal (TAT), upon hearing the appeal filed by the Respondent, quashed the income tax assessments for 2016 and upheld the income tax and VAT assessments for 2017.

3. The Appellant being aggrieved with the Tribunal's judgment, lodged this appeal setting out the following grounds of appeal; that the Tribunal erred in: adjudicating on an issue, relating to the income tax assessment for the year 2016 contrary to Section 29 of the Tax Procedure Act 2015; adjudicating on issues neither raised nor pleaded by the parties, which were not in the Respondent's Notice of Objection, the Appellant's objection decision and the appeal documents without giving parties an opportunity to submit on the same contrary to Section 56 (3) of the *Tax Appeals Tribunal Act* 2013; failing to afford the Appellant a reasonable opportunity as required under Section 26 of the *Tax Appeals Tribunal Act* 2013 to present its case and respond to the issue of the validity of the Income Tax Assessment for the year 2016; assuming the jurisdiction it did not have to consider issues or grounds not forming part of the Objection Decision and the appeal contrary to Sections 3 and 12 of the *Tax*

Appeals Tribunal Act 2013; raising issues suo moto that were neither pleaded nor forming part of the Appeal and making a finding on the said issues without affording the parties an opportunity to be heard on the issues; shifting the burden of proof to the Appellant to demonstrate by evidence fraud contrary to the well established cannons of taxation that the burden of proof rests on the taxpayer to explain the variance and failure to which the burden never shifts and failing to appreciate that in a self-assessment regime such as Kenya, the assessments by the Appellant enjoys the presumption of correctness including the prima facie existence of the alleged fraud requiring the taxpayer to rebut by providing the evidence to bridge the gap and disprove the Appellant's assessments.

4. The Appellant prayed that this Honourable court: -

   a. Allows and sets aside the decision of the Tax Appeals Tribunal dated 26th April 2024.

   b. Upholds the Appellant's Objection Decision dated 30th March 2023 confirming the additional principal assessments amounting to Kshs.7, 836, 813/=.

   c. In the alternative, the matter be referred back to the Tribunal for parties to be heard on the issues on merit; and

   d. Grants the costs of this appeal and the proceedings before the Tax Appeals Tribunal to the Appellant in this appeal.

5. During the hearing of the appeal and with leave of the court, both parties filed written submissions which I will consider along the oral highlights. The Appellant's submissions are dated 30th October 2024 while the Respondent's submissions are dated 3rd October 2024. Parties highlighted their submissions on 4th November 2024.

Appellant's submissions

6. Mr. Wainaina, counsel for the Appellant, made oral highlights of the written submissions and elaborated the grounds of appeal, which were summed up into one issue: - whether the Tribunal erred in vacating the Income Tax Assessments for the year 2016.

7. The Appellant's counsel began by clarifying that the appeal specifically challenges part of the Tribunal's judgment that vacated the Income Tax Assessment for 2016. The Appellant submitted that there was no dispute as to whether the Income Tax Assessments for 2016 were issued within the statutory timelines. It further argued that it is a well-established legal principle that a party is bound by its pleadings and that a judicial authority should not determine issues that have not been pleaded. In support of this argument, the Appellant relied on the case of David Sironga Ole Tukai v Francis Arap Muge & 2 Others [2014] eKLR, where the court emphasized that it will not adjudicate matters that have not been pleaded by the parties.

8. The Appellant's counsel further submitted that the Tribunal assumed jurisdiction it did not have by raising, considering, and determining an undisputed issue that was not properly before it. He contended that the Tribunal's jurisdiction was derived from the Appellant's Objection Decision dated 30th March 2023. Since the issue of whether the assessment was time-barred did not form part of the Objection Decision and the subject of the appeal before the Tribunal, the Tribunal lacked jurisdiction to consider an issue that the Respondent had not raised in the Notice of Objection. Relying on Sections 3 and 13(6) of the *Tax Appeals Tribunal Act*, the Appellant asserted that the Tribunal did not have the jurisdiction or power to amend the Notice of Objection or the Objection Decision to introduce or determine an issue that was not in dispute. Additionally, the Appellant cited Section 56(3) of the *Tax Procedures Act* to submit that only the Respondent and the Appellant have the statutory mandate to define the scope of issues for determination by the Tribunal.

9. The Appellant's counsel submitted that the issue of whether the Income Tax Assessments for the year 2016 were issued out of time is not a pure point of law. He further contended that it issued the Respondent with assessments under Section 31 of the *Tax Procedures Act* and, therefore, Section 29 of the *Tax Procedures Act* does not apply in this case. He argued that, under Section 31(4) of the *Tax Procedures Act*, the statutory limitation period of five years is computed from the date the taxpayer submits a self-assessment return. Consequently, for the Tribunal to determine whether the taxes assessed by the Appellant fell within the five-year statutory limitation, it first needed to ascertain the exact date on which the Respondent submitted the self-assessment return.

10. The Appellant's counsel submitted that, after framing the undisputed issue, the Tribunal failed to afford the Appellant a reasonable opportunity to be heard and to respond to the issue, contrary to Articles 47(1) and 50(1) of *the Constitution* of Kenya. Relying on the case of Commissioner of Domestic Taxes v Ibangua Investments Company Limited [2023] KEHC 26013 (KLR), the Appellant submitted that the findings and holding at paragraphs 86–92 of the impugned judgment are erroneous and were made in total disregard of the relevant legal provisions. The Appellant further asserted that he should be given an opportunity to respond to the issue as framed by the Tribunal to justify the basis for amending the Respondent's income and VAT returns.

11. In conclusion, the Appellant prayed that the orders sought in the Memorandum of Appeal dated 20th June 2024 be granted.

Respondent's Submissions

12. This appeal was strenuously opposed by Mr. Bosire, Advocate for the Respondent. The Respondent's counsel submitted that the assessment for the year 2016 was quashed on the ground that it did not comply with Sections 29(5) and (6) of the *Tax Procedures Act*, as these provisions do not permit an assessment beyond five years from the last reporting date of the company's financial year. Counsel argued that the issue determined by the Tribunal was a point of law and that the Tribunal was justified in referring to Section 29(5) of the *Tax Procedures Act*, as its members are presumed to have knowledge of the law. In support of this position, he relied on the cases of Kenya Agricultural and Livestock Research Organisation v. Okoko & Another (Civil Appeal 36A of 2021) [2022] KEHC 3302 (KLR) (Judgment delivered on 29th June 2022) and Pancras T. Swai v Kenya Breweries Limited [2014] eKLR.

13. On the issue of whether the Tribunal's determination of a legal matter that was not explicitly pleaded amounted to denying the Appellant the right to be heard, the Respondent submitted that the Appellant was afforded a reasonable opportunity to present its case, inspect the documents related to the proceedings, and make submissions. Therefore, the Respondent contended that the Appellant was not denied the right to be heard and urged the court to uphold the Tribunal's decision of 26th April 2024.

Analysis and Determination

14. Although the Appellant raised seven grounds in its Memorandum of Appeal, its submissions have only been limited to one issue which is whether the Tribunal erred in vacating the Income Tax Assessments for the year 2016. Therefore, it is the duty of the court to establish whether the Tribunal erred in arriving at its decision and whether the decision is supported by the evidence on record. In doing so, the court acknowledges that its jurisdiction is limited by Section 56(2) of the *Tax Procedures Act* (TPA), which provides that "An appeal to the High Court or to the Court of Appeal shall be on a question of law only."

15. Therefore, this court is not permitted to substitute the conclusions of the Tribunal based on its own analysis of the facts. However, the court must ensure that the conclusions reached by the Tribunal are supported by the evidence on record and are not perverse as was held in the case of John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others [2018] eKLR.

16. Thus, this court will limit itself to what constitutes points of law. This was well explained by the Court of Appeal in the case of Peter Gichuki King'ara v IEBC & 2 Others, Nyeri Civil Appeal No. 31 Of 2013, (Court of Appeal) (Visram, Koome & Odek, JJA) of 13.02.2014 as follows:

> " [I]t is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanor – is an issue of law."

17. Based on the above authority, and having considered the record of appeal, both written and oral submissions and authorities cited, the only issue of law for determination is whether the tribunal erred in law in determining an issue not raised in the appeal. The issue in question relates to the issuance of assessment for the year 2016.

18. The Appellant's appeal challenges the Tribunal's decision, arguing that the Tribunal erroneously determined an issue that was not part of the appeal before it. That the Tribunal by doing so consequently, denied the Appellant an opportunity to respond to the issue as framed by the Tribunal. Specifically, the Appellant appeals against the Tribunal's determination in Paragraphs 86 to 92 of its judgment, which addressed the following issue:

> " a)Whether the Respondent erred in law and in fact by issuing an assessment for year 2016
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> 86. The Tribunal notes that the instant appeal relates to the tax dispute for the years 2016 and 2017 as outlined by the Respondent's Statement of Facts.
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> 87. The tribunal notes that Section 29 (5) of the TPA states that:-
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> 'Subject to subsection (6), an assessment under subsection (1) shall not be made after five years immediately following the last date of the reporting period to which the assessment relates.'
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> 88. The only time that the Respondent is allowed to assess beyond the five years period is a situation where there is "gross or willful neglect or fraud by a taxpayer." The respondent did not allege willful neglect or fraud in this matter.
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> 89. The Tribunal notes that the assessment was made on 7th November 2022. Since the law allowed the Respondent to assess the taxpayer for a period if not more than 5 years, the earliest the Respondent should have gone back to was October 2017 for VAT and the year 2017 for income tax as it did not allege or prove "willful neglect, evasion or fraud" by the taxpayer.
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> 90. The tribunal reiterates its holding in a similar matter. TAT Appeal No. 411 of 2021, City Gas East Africa v Commissioner of Investigations & Enforcement where Tribunal held that the Respondent erred in assessing the Appellant for

a period longer than five years when there was no evidence of willful neglect or fraud.

91. The Tribunal is also guided by the High Court holding in Tax Appeal No. E033 of 2020 Commissioner of Domestic Taxes versus Unga Limited where Justice DS Majanja held at Paragraph 41-

'Under Section 29 of the TPA, the Commissioner is empowered to make a default assessment when a taxpayer fails to file a tax return. This power is however limited in time to five years under Section 29 (5) thereof. There is thus an expectation that the Commissioner would move with haste in doing so before the statutory timeline expires.'

92. Based on the statute and case laws cited above, the Tribunal finds that the Respondent erred in law and in fact by issuing assessment for the year 2016 for income tax which period was outside the statutory timelines of five years provided by the law."

19. Based on the parties' submissions, it is undisputed that the above issue was not among those raised by the Respondent in her appeal to the Tribunal. However, what remains in dispute is whether the issue constitutes a point of law that the court can determine on its own motion. I have reviewed the authorities cited by the Respondent regarding whether a court of law can determine an issue of law on its own motion, even when it has not been pleaded by the parties. In Kenya Agricultural and Livestock Research Organisation versus Okoko & Another (Civil Appeal 36A of 2021) [2022] KEHC 3302 (KLR) (29th June 2022) (Judgment), the issue of law that the court suo moto determined is on the locus standi of the parties to institute proceedings before the court. In Pancras T Swai versus Kenya Breweries Limited [2014] eKLR, the issue of law that the Court of Appeal commented on at Paragraph *22* and *23* was based on a review that was allowed which was not proper because of the court's wrong application of the law or due to the failure to apply the law at all.

20. While this Court acknowledges the relevance of the cited authorities, they do not override a party's constitutional right to a fair hearing. Fundamental principles of justice demand that any issue raised must be subjected to a fair and public hearing before a court or tribunal. Even when a party raises a preliminary objection on a point of law, the court does not summarily determine the matter based solely on the documents filed. Instead, it ensures that all parties are accorded a reasonable opportunity to present their arguments for or against the objection. Any deviation from this established principle undermines the very foundation of due process and cannot be countenanced.

21. I am therefore persuaded with the decision by Honourable D.S Majanja J as was delivered by Honourable Mabeya J. in the case of Commissioner of Domestic Taxes v Ibangua Investments Co. Ltd [2023] KEHC 26013 (KLR) where the court held that;

" 17. In an appeal, the pleadings are the Memorandum of Appeal and Statement of Facts which define the issue the Tribunal is to consider. In its Memorandum of Appeal filed at the Tribunal dated 25.02.2022, the Respondent complaint was that the Objection Decision was based on lack of supporting documents and that the Commissioner refused to give the Respondent adequate time to trace the documents. It stated that the Respondent was tracing the documents and was willing to present them. It prayed that, "the Tax Appeals Tribunal to direct that the Respondent to issue amended assessments in accordance with supporting documents and explanations provided by our client." It is

therefore clear that the issue of the delay in issuing the Objection Decision was not pleaded as a basis for the appeal before the Tribunal.

18. The issue of non-compliance with section 51(11) of the TPA was raised by the Respondent in its submissions before the Tribunal. While nothing prevented the Commissioner from seeking leave of the Tribunal and filing supplementary submissions to counter this submission by the Commissioner, section 56(3) of the TPA provides that, "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 on the grounds stated in the objection to which the decision relates unless the Tribunal or Court allows the person to add new grounds." The Tribunal therefore had an obligation to inform the Commissioner that it intended to consider a ground that had not been raised in the Memorandum of Appeal or Statements of Facts. Even if the issue concerned jurisdiction, the party adversely affected had the right to be heard and to put its position forward as provided by section 26 of the Tax Appeal Tribunal Act which requires the Tribunal to ensure that the parties have the opportunity to put their case forward".

22. Given that the issue of whether the Respondent erred in law and fact by issuing an assessment for the year 2016 was neither pleaded nor addressed in the parties' submissions, this Court finds that the Commissioner was deprived of a fair opportunity to present his position. Such a failure to afford the affected party a chance to be heard constitutes a fundamental violation of the right to a fair hearing and undermines the integrity of the adjudicative process. While it could have remained an issue of law that could be raised at any time, it is not one that could be decided summarily as the point remained contested with the appellant in exercise of its statutory mandate was entitled to an opportunity to explain its understanding.

23. In conclusion and for the reasons set out above, and appreciating that this is appeal, I am not inclined to make a conclusive determination on the Objection Decision dated 30th March 2023 as urged by the appellant, the TAT not having had the opportunity to address itself to the merits in view of its suo moto finding. I am satisfied that the matter should be remitted back to the Tribunal as proposed in the alternative prayer of the application. Consequently, this appeal is allowed as follows: -

a. The Tribunal's finding on the *suo moto* basis relating to the income tax assessment for year 2016 is hereby set aside.

b. Prayer c of the Memorandum of Appeal is granted. The matter be remitted back to the Tribunal for determination of issue on merit.

c. Each party to bear its own costs.

DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF MARCH, 2025.

RHODA RUTTO

JUDGE

Delivered on the virtual platform, Teams this 25th day of March, 2025.

In the presence of;

Wanyoike Court Assistant

.....Applicant

.....Respondent