



REPUBLIC OF KENYA



**KENYA LAW**

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**Commissioner Investigation and Enforcement v Suma Health  
Products (K) Limited (Income Tax Appeal E082 of 2024)  
[2025] KEHC 5244 (KLR) (Commercial and Tax) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5244 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E082 OF 2024**

**RC RUTTO, J**

**APRIL 25, 2025**

**BETWEEN**

**COMMISSIONER INVESTIGATION AND ENFORCEMENT ..... APPELLANT**

**AND**

**SUMA HEALTH PRODUCTS (K) LIMITED ..... RESPONDENT**

*(Being an Appeal against the Judgment delivered on 9th February 2024 at  
the Tax Appeals Tribunal in Tax Appeal Tribunal Case No. 1425 of 2022)*

**JUDGMENT**

1. This appeal arises from a judgment delivered by the Tax Appeals Tribunal No. 1425 of 2022. The genesis of the dispute is that the appellant served the respondent with a notice of tax assessment with a total liability amounting to Kshs.85,169,432/=. The Respondent responded through a notice of tax objection letter upon which the appellant issued an objection decision dated 18<sup>th</sup> October 2022. The respondent aggrieved by the objection decision filed an appeal at the Tax Appeals Tribunal.
2. Upon hearing the appeal, the Tax Appeals Tribunal partially allowed it and varied the objection decision. The Tribunal directed that the VAT assessment for any period prior to 29<sup>th</sup> June 2017 be set aside, and similarly, the Corporation Tax assessment for any period prior to January 2017 be annulled. The Appellant was further ordered to re-compute VAT and Corporation Tax in accordance with the Tribunal's variations within 90 days from the date of the judgment.
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 law and misdirected itself by erroneously applying Section 29 of the Tax Procedure *Act No. 29 of 2015*; by holding that the institution of a criminal prosecution was a pre-requisite in demonstrating fraud, gross or wilful under-declaration



to warrant the assessment period outside the five-year limitation; reaching an erroneous and absurd conclusion by failing to appreciate that criminal and civil proceedings are two distinct legal processes that can run concurrently without each of the processes diminishing the proceedings of the other; by failing to appreciate that the Appellant is vested with the discretion to either prosecute the taxpayer or levy a penalty under Section 80 of the *Tax Procedures Act*; by failing to appreciate that the consequence of the civil process at the Tax Appeals Tribunal is solely for the determination of the quantum of taxes payable by the Respondent herein and not whether a criminal offence has been committed or not; by shifting the burden of proof to the Appellant to demonstrate by evidence fraud contrary to the well-established canons of taxation that the burden of proof rests on the taxpayer to explain the variance and failure to which the burden never shifts;’ and by 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 evidence to bridge the gap and disprove the Appellant’s’ assessments.

4. The Appellant prayed that this Honourable Court allows the appeal and sets aside the decision of the Tax Appeals Tribunal dated 9<sup>th</sup> February 2024 by upholding the Appellant’s objection decision dated 18<sup>th</sup> October 2022 confirming additional assessments amounting to Kshs.84, 076, 645/= and granting the appellant costs of this appeal and the proceedings before the Tax Appeals Tribunal.
5. The appeal was canvassed by written submissions. The Appellant’s submissions are dated 16<sup>th</sup> October 2024. As at the time of writing this judgment, the Respondent had not filed its submissions.

### **Appellant’s Submissions**

6. Counsel for the Appellant in his submissions set out two issues for determination, that is whether the Tribunal’s judgment was issued under the wrong provisions of the Tax Procedure Act (TPA) and whether prosecution is a pre-requisite for sustaining enlargement of time beyond the five-year limitation.
7. On the first issue, counsel submitted that the Respondent’s suit was fatally defective on the grounds that Section 29 of the *Tax Procedures Act* applies only where a taxpayer has not filed a return. He argued that, in this case, the filing of a return was not in dispute, as a NIL return also constitutes a valid return. Consequently, if the Respondent wished to challenge an assessment, the matter would fall under the ambit of Section 31 of the *Tax Procedures Act* rather than Section 29 of the Act.
8. The Appellant’s counsel relied on the case of *Karata Ernest & Others v. Attorney General* (Civil Revision No. 10 of 2020) [2010] TCZA 30 (29 December 2010), which was cited in *Biosystems Consultants v. Nyalo Links Arcade* (Civil Appeal No. E185 of 2023) [2023] KEHC 21068 (KLR) (31st July 2023) (Ruling), as well as *Mzuri Sweets Limited v. Commissioner of Investigations and Enforcement (TAT Appeal No. 574 of 2020)*. He submitted that the Tribunal had departed from its own precedent and misdirected itself in law by applying the wrong statutory provisions, leading to an erroneous decision.
9. On the second issue, the Appellant’s counsel submitted that the Commissioner took issue with Paragraph 83 of the Tribunal’s judgment, where the Tribunal held that the Appellant ought to have commenced prosecution against the Respondent to substantiate allegations of fraud. While referencing the case of *Kenya Revenue Authority v. Maluki Kitili Mwendwa* [2021] eKLR, the Appellant argued that the Tribunal’s position failed to appreciate that the unique nature of Kenya as a self-assessment regime and placed the Respondent at an undue advantage. Instead of requiring the Respondent to first disprove the Appellant’s assessments which enjoy the presumption of correctness,



the Tribunal shifted the burden prematurely. The Appellant asserted that only if the Respondent successfully discharges this burden does the burden shift back to the Appellant.

10. Further, the Appellant's counsel emphasized that its investigation has a both a criminal and civil outcome and since criminal proceedings are independent of civil proceedings, the absence of prosecution should not relieve the Respondent of the burden of proof, particularly where the presumption of correctness of the tax assessment has not been rebutted. The Appellant referred to Section 80 of the [Tax Procedures Act](#) and argued that the Commissioner has the discretion to either prosecute the Respondent for the offence or impose a penalty. Therefore, that the Tribunal's holding that prosecution was a prerequisite to sustaining an allegation of fraud, improperly interfered with this discretion. In support of this argument, the Appellant relied on the case of *Rana Auto Selection Limited & 2 Others v. Kenya Revenue Authority & Another* [2021] eKLR, where the court held that the non-institution of criminal proceedings has no bearing on matters before the Tax Appeals Tribunal.
11. On whether the Tribunal erred in shifting the burden of proof to the Appellant to demonstrate fraud, the Appellant submitted that the Tribunal's holding that the Commissioner failed to lead evidence to prove fraud against the Respondent to justify extending the scope of assessment beyond the five-year limitation was erroneous.
12. The Appellant argued that the allegations of fraud in this case stemmed from the Respondent's failure to truthfully declare all sales made which according to section 97 of the Tax Procedure Act constituted fraud on the face of it. The Appellant had duly notified the Respondent of these discrepancies. Consequently, the burden of proof shifted to the Respondent to explain the variance in its declarations.
13. The Appellant further submitted that, upon conducting a banking analysis test using the Respondent's ledgers and sales records, it noted significant under declaration of sales. As a result, the Appellant determined that the Respondent's books of account could not be relied upon and opted instead to use third-party data to reassess the tax liability.
14. The Appellant asserted that a taxpayer must either defend its self-assessment or prove that the Appellant's assessment was incorrect. In support of this position, the Appellant relied on the case of *South African Revenue Service v. Spur Group Limited* [2021] ZASCA 145 (15 October 2021). Additionally, the Appellant argued that while it had fulfilled its duty to establish the existence of fraud, the Respondent failed to disprove the discrepancies identified in the tax analysis.
15. The Appellant further relied on Section 56(1) of the [Tax Procedures Act](#) and Section 30 of the [Tax Appeals Tribunal Act](#), emphasizing that the burden of proving that a tax decision is incorrect always rests on the taxpayer. The Appellant concluded his submissions by stating that the Tribunal erred in determining that the Appellant can only audit or investigate beyond the five-year period only if, criminal charges for fraud are preferred against the Respondent. The Appellant sought that the court allows the appeal and uphold the Appellant's Objection decision.

### **Analysis and Determination**

16. The issue for determination is whether the decision of the tribunal was issued under the wrong provision of the Tax Procedure Act. This court takes note of the appellant's submission that the Respondent's suit was fatally defective on the grounds that Section 29 of the [Tax Procedures Act](#) applies only where a taxpayer has not filed a return. In this instant, the applicant urged that the respondent filed a NIL return and if the Respondent was to challenge the assessments, the same fell under the ambit of Section 31 of the [Tax Procedures Act](#) and not Section 29 of the same Act.



17. From the record before this court, the respondent herein appealed to the Tribunal against the objection decision by the appellant on nine grounds; of importance is ground number one which states that the “respondent (appellant herein) erred in fact and law by conducting a default assessment which exceeded the timeframe provided under section 29 of the *Tax Procedures Act*. In its assessment, the respondent (appellant herein) included the year 2015 despite the 5 year time frame contemplated by section 29 of the *Tax Procedures Act* having passed”
18. The Tribunal, in determining the issue set out two issues for determination namely, whether the respondent (appellant herein) erred in law and in fact by issuing assessments for the period outside the statutory timelines provided by law and whether the Respondent’s assessment were justifie.
19. It thus held at that it was the duty and responsibility of the appellant to enforce the law. That the appellant should have prosecuted the respondent herein if it had evidence. The fact this was not done creates doubt as to whether there was any fraud, evasion or wilful neglect. It is this finding of the tribunal that spurred this appeal.
20. I have perused the Tribunal’s proceedings and documents filed by the parties herein and I note that the issue that the Respondent’s appeal was fatally defective on the grounds that the same fell under the ambit of Section 31 of the *Tax Procedures Act* and not Section 29 of the same Act was not raised by the Appellant during the proceedings before the Tribunal or at all. In fact, I do note that the Appellant participated fully well aware of the provisions which the appeal was premised on.
21. This court also notes the appellants earlier submission as aptly captured by the Tribunal in its decision was that the respondent had failed to file self-assessment returns for the tax years 2015 and 2016 despite having taxable income and hence met the threshold for section 29(6) of the Act. I do not agree with the appellant’s argument.
22. The Appellant submitted that the Tribunal departed from its precedent in *Mzuri Sweets Limited v. Commissioner of Investigations and Enforcement (TAT Appeal No. 574 of 2020)*. However, I find no departure from that precedent. The law is trite that an assessment under section 29 must be made not more than 5 years after the last date of reporting. That the facts of the foregoing case differ from those of the present matter. I find this is the law that the Tribunal applied in excluding the VAT assessment for any period prior to 29<sup>th</sup> June 2017. In this case, the Appellant admitted to issuing a default assessment outside the five-year timeframe stipulated under Section 29(6) of the *Tax Procedures Act*. Hence, it cannot shift goal posts before this Court. I find that the matter was well determined under section 29 of the Act.
23. The Appellant has further submitted on alleged errors by the Tribunal made pursuant to its determination on the application of Section 29 (6) of the *Tax Procedures Act*. Specifically, where the Tribunal in its judgment stated that; -

“The Tribunal finds that it was the duty and responsibility of the Respondent to enforce the law. The Respondent should therefore have prosecuted the Appellant if it had the evidence. The fact this was not done creates doubt as to whether there was any fraud, evasion or willful neglect.”
24. The Appellant challenges the Tribunal’s decision, arguing that the judgment fails to appreciate the unique nature of Kenya’s self-assessment tax regime. The Appellant asserts that the institution of criminal prosecution is not a prerequisite for demonstrating fraud, gross misrepresentation, or willful under-declaration to justify an assessment beyond the five-year limitation period.



25. Furthermore, the Appellant contends that the Tribunal’s decision improperly shifts the burden of proof to the Commissioner, despite the fact that the burden of proof rests on the Respondent. The Appellant maintains that the Respondent failed to account for the variance identified in the tax assessment analysis.

26. It is undisputed that the Appellant issued a default assessment outside the five-year time frame and this has been justified to be pursuant to Section 29 (6) of the [Tax Procedures Act](#). Section 29 (6) of the [Tax Procedures Act](#) provides that:-

“29. Default assessment

1. ....
2. ....
3. ....
4. ....
5. 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.
6. Subsection (5) shall not apply in the case of gross or wilful neglect, evasion or fraud by a taxpayer.”

27. This court notes that on the basis of the provision of section 29(6) of the Act, the appellant can issue additional assessment outside the five -year time frame on account of neglect, evasion or fraud by a taxpayer. This is also in tandem with Section 31 (4) of the [Tax Procedures Act](#) which provides that;

“The Commissioner may amend an assessment—

- a. in the case of gross or willful neglect, evasion, or fraud by, or on behalf of, the taxpayer, at any time.”

28. Thus, in addressing whether the Tribunal erred, the key question to determine is who bears the burden of proof under Section 29(6) of the [Tax Procedures Act](#). Section 56 (1) of the [Tax Procedures Act](#) 2015 provides that;

“In any proceeding under this part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.”

29. Further, Section 30 of the [Tax Appeals Tribunal Act](#) provides:

“In a proceeding before the Tribunal, the appellant has the burden of proving—

- a. where an appeal relates to an assessment, that the assessment is excessive; or
- b. in any other case, that the tax decision should not have been made or should have been made differently.”

30. The burden of proof always rests on the taxpayer to demonstrate that a tax decision is incorrect, as provided under Section 56(1) of the [Tax Procedures Act](#). However, there are instances where this burden shifts to the Commissioner. One such instance arises under Section 29(6) or Section 31(4)(a) of



the *Tax Procedures Act*, where the Commissioner seeks to recover taxes beyond the five-year limitation period. In such cases, the Commissioner must substantiate and show that indeed there existed fraud, tax evasion, or willful neglect to justify the extended assessment period. This means that for the proviso to apply, there must be a clear determination and finding that such gross or willful neglect, evasion or fraud actually occurred.

31. The Appellant alleged that the Respondent had under declared exports for the period prior to 29<sup>th</sup> June 2017. That upon conducting a bank analysis, the Appellant discovered that the exports made by the Respondent had not been accounted for in the corporate tax returns. In response, the Respondent denied the allegation, asserting that its business does not involve the exportation of goods. This, in the court's view shifted the burden of proof back to the appellant to discharge.
32. The Appellant did not provide evidence of willful neglect or fraud but instead submitted that, "The Appellant discharged its mandate after raising assessments and particularizing the fraud owing to the inconsistencies of data to which the Respondent failed in discharging the burden of proving otherwise to the contrary."
33. This court notes that particularizing elements of fraud is different from proving fraud and the appellant's omission in proving is contrary to the principle set out in Section 107 of the *Evidence Act*, which stipulates that he who alleges must prove. Thus, once the respondent raised the issue of limitation under section 29(6) of the Act, the appellant bears the burden of proving that the tax payer engaged in gross or willful neglect, evasion or fraud. It is expected that once the particulars are set out, the tax payer will respond to the same. As this will remain a contestation between the appellant and the taxpayer, it will then be up to the evaluating authority, in this case the Tax Appeals Tribunal to assess the evidence and make a determination as to whether the proviso applies, which then would allow the exclusion of the time limitation as contemplated under the statute.
34. Since the Appellant was conducting investigations, there was nothing preventing it from providing evidence before the Tribunal, which was a quasi-judicial proceeding, to substantiate the claim that the alleged exports actually took place. For example, the Appellant could have written to the Kenya Ports Authority to request export documentation in order to verify the allegation. This court concludes that the Appellant failed to demonstrate gross or willful neglect, tax evasion, or fraud to the Tribunal's satisfaction. Therefore, the Tribunal's conclusion was proper.
35. Having addressed the issue of the burden of proof, I disagree with the Tribunal's decision that prosecution is necessary before proving fraud. This is just but one of the ways of proving gross, willful neglect, tax evasion or fraud. As the appellant is not in control of the prosecution process including conviction of a tax payer, it is farfetched to subject the appellant to the criminal process as a prerequisite. All the Appellant needs to demonstrate before the Tribunal, which acts as a quasi-judicial body, is the presence of willful neglect or fraud that justifies the assessments made under Section 29(6) of the *Tax Procedures Act* within the requisite threshold for a civil dispute.
36. Nothing prevents the criminal and civil processes from running concurrently albeit with different standards of proof, the criminal process attracting a higher standard of beyond reasonable doubt. Indeed Section 80 of the *Tax Procedures Act* grants the appellant the discretion to either prosecute the Respondent for the offence or impose a penalty. However, this is only when there is a determination on the malfeasance on the part of the taxpayer. In this instance, the taxpayer was entitled to pursue its complaint as it did on the assessment in which circumstance the application of section 80 does not arise.
37. I find therefore that this appeal is not merited. Consequently, the appeal is dismissed. Since the Respondent did not participate in the appeal, no costs are awarded.



Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 25<sup>TH</sup> DAY OF APRIL, 2025.**

**RHODA RUTTO**

**JUDGE**

In the presence of;

.....for Appellant

.....for Respondent:

Sam Court Assistant:

