Commissioner of Domestic Taxes v Wilken Aviation Limited (Income Tax Appeal E223 of 2024) [2025] KEHC 7698 (KLR) (Commercial and Tax) (30 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7698 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E223 OF 2024

RC RUTTO, J

MAY 30, 2025

BETWEEN

COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT

AND

WILKEN AVIATION LIMITED ..... RESPONDENT

(Being an Appeal from part of the judgment of the Tax Appeals Tribunal Dated 12thJuly 2024 in the Tax Appeals Tribunal Number E. 441 of 2023)

JUDGMENT

1. The appellant is the Commissioner of Domestic Taxes appointed under the *Kenya Revenue Authority Act* as an agency of the government of Kenya to collect and receive revenues. The respondent is a private limited liability company incorporated in the Republic of Kenya and engaged in the business of operating charters and hiring aircraft.

2. The dispute between the two parties arose from the appellant's assessment of withholding taxes, income tax and PAYE on the respondent's transactions. On 8th November 2022 the appellant issued a tax assessment for Ksh.63,287,036 for income tax, withholding tax and PAYE. In response on 30th March 2023 the respondent, filed an objection requesting for extension of time to lodge a late objection. The appellant, through a letter dated 24th April 2023 allowed the respondent to file a late objection. Subsequently, the respondent lodged an objection on 2nd May 2023. By way of a letter dated 30 June 2023, the appellant issued its Objection Decision wherein it adjusted the tax assessment to Kshs.26,903,764.

3. The respondent aggrieved with this assessment, filed a Notice of Appeal to the Tax Appeals Tribunal (TAT) dated 26th July 2023. The TAT on 12th July 2024, delivered its decision partially allowing

the appeal. It set aside confirmed assessment in relation to withholding tax for any period prior to September 2017 and the period between 9th July 2016 and 7th November 2019. It upheld the withholding tax for the period subsequent to 7th November 2019. It set aside in its entirety the confirmed assessment in relation to income tax. It set aside the PAYE assessment pertaining to any period prior to September 2017 and ordered each party to bear its own costs.

4. This decision has precipitated the appeal before me. The appellant filed a Memorandum of Appeal dated 25th August 2024. It sets out six grounds of appeal as follows:

    a. That the honourable Tribunal erred in fact and in law in filing to appreciate that the dispute before it was based on section 59 of the *Tax Procedures Act* 2025 which expressly gives power to the appellant to request the production of records and additional information which can fully satisfy the appellant where he is of the view that the information given is insufficient.

    b. That the honourable Tribunal failed to appreciate and/or give due regard to the provisions of Section 17 of the VAT Act 2013, Section 54A, 59(1) and 94 of the *Income Tax Act* Cap 470 Laws of Kenya applicable to the dispute which requires the taxpayer to keep transactional records for a period of five years.

    c. That the honourable Tribunal erred in both law and fact in failing to take into account and/or disregarding evidence as demonstrated by the appellant of falsified returns by the respondent contrary to section 73 of Income Tax which empowers the appellant determine tax due to the best of his judgment where there is reasonable cause to believe that the return is not true and correct and determine accordingly the amount of the income of that person and assess him accordingly.

    d. That the Tribunal erred in law shifting the burden of proof to the appellant contrary to the express provisions of section 30 of the *Tax Appeals Tribunal Act*.

    e. That the Tribunal erred when it framed the wrong issues for determination thus asked itself the wrong questions and in so doing arrived at a wrong conclusion.

    f. That the Tribunal erred both in law and fact in ignoring all material evidence placed before it and based its judgment on a biased approach without due regard to the balance of the scales of justice.

5. The appellant seeks orders that this appeal be allowed, that the judgment of the Tax Appeals Tribunal (TAT) dated 12th July 2024 be set aside in its entirety and for costs.

6. The appeal was canvassed by way of written submissions.

7. The appellant filed its submissions dated 8th October 2024. It submits that the assessments were correctly issued and they conform to the *Income Tax Act*.

8. The appellant urges that section 56(1) of the Tax Procedure Act (TPA) places the onus of proof in tax objections on the taxpayer who in this case failed to avail evidence that would support a contrary assessment or that would have guided the appellant at arriving to a different objection decision. It cites the decision in Commissioner of Domestic Taxes v Metoxide Limited [2021] to buttress this assertion.

9. It is the appellants case that the TPA under section 29(1) empowers it to make alterations or additions to original assessments from available information for a reporting period based on the best judgment.

10. It is submitted that the respondent under declared income earned and was uncooperative in the provision of relevant records and failed to respond to request of documents. Therefore, the assessments were based on the available information based on the best judgment by the appellant.

11. It is the appellant's case that it established that the respondent failed to declare rental income and all other incomes for the years 2014-2019 contrary to the *Income Tax Act* which brought this issue to its purview under section 73(1) of the *Income Tax Act*. It reinforces this contention with the decisions in TAT E072 of 2023 Joyce Mwende Titus v Commissioner of Domestic Taxes and Commissioner of Investigations and Enforcement v Kidero (Income Tax Appeals E028 of 2020 eKLR.

12. The appellant submits that the respondent failed to provide signed financial statements and books of account to support their allegations and it made an assessment on the information available.

13. It is submitted that the respondent knowingly and recklessly committed an offence according to sections 94 and 95 of the TPA.

14. It is contended that the respondent failed to discharge its burden of proof and this court should be guided by the decisions in Monaco Engineering Limited v Commissioner of Domestic Taxes TAT Appeal No. 67/2017, Osho Drappers Ltd v Commissioner of Domestic Taxes, TAT No. 159 of 2018, Miao Yi*v Commissioner of Investigations & Enforcement TAT No. 441 of 2019*, Ritz Enterprises Limited v Commissioner of Investigations & Enforcement TAT No. 227 of 2018, KRA v Man Diesel &Turbo Se, Kenya [2021] eKLR, Janet Kaphiphe Ouma and another v Marie Stoppes International (Kenya) HCC No. 68 of 2007, Dyer & Dyer Limited v *Commissioner of Domestic Taxes TAT 139 of 2020*, Commissioner of Domestic Taxes v Metoxide Limited [2021], Ken Iron and Steel Limited v Commissioner Investigations and Enforcement (2021) and Commissioner of Domestic Services v Galaxy Tools Limited (2021) eKLR.

15. The appellant concludes by urging this court to uphold its objection decision and order the respondent to pay the confirmed tax assessments it issued, it prays that the appeal to be allowed and it be awarded costs of this appeal.

16. The respondent filed lengthy rival submissions dated 20th September 2024. The respondent urges that the decision rendered by the Tribunal should be upheld on four grounds. Firstly, that the assessment of withholding tax for the period August 2016 to September 2019 was without statutory basis.

17. It is submitted that there is need for strict adherence to the letter of the law when it comes to tax statutes. It is argued that if a case doesn't strictly fall within the legal provisions, no tax can be imposed by inference or analogy. It relies on the decisions in Equity Group Holdings Limited v Commissioner of Domestic Taxes [2021] eKLR, [2021] KEHC 25 KLR and Civil Appeal No. 180 of 2019; Export Trading Company vs Kenya Revenue Authority [2018] eKLR to bolster this assertion.

18. It is submitted that the appellant ought to have taken into consideration the repeal of section 35(6) of the Income Tax by the Finance Act, 2016. That based on this law, the respondent did not withhold any tax during that period.

19. It is the respondent's case that tax assessment is an administrative process. Therefore, the appellant is under an obligation to act in accord with Article 47 of the *Constitution* as read with the *Fair Administrative Action Act* which mandate all persons exercising administrative powers to do so under the authority of written law or else their acts are ultra vires.

20. It is submitted that considering the appellant demanded withholding taxes for a period of assessment for which the impugned law was not in operation, the appellant acted ultra vires and therefore, the assessment decision is laced with illegality and does not stand the test of the law.

21. Secondly, it is the respondent's case that the assessment of PAYE went beyond the statutory limitations. It is submitted that appellant erred in law and in fact by making an assessment for PAYE for the years 2014/2015, 2015/2016, 2016/2017. It is submitted that this is an assessment made more than five years after the end of the reporting period, contrary to the provisions of section 29(5) and 79 of the *Tax Procedures Act*. It is urged that the appellant's attempt to assess PAYE beyond this period was both illegal and procedurally unfair. Reference was made to the decisions in Equity Group Holdings Limited v Commissioner of Domestic Taxes [2021] eKLR, [2021], on Cape Brandy Syndicate v Inland Revenue Commissioners [1920] 1 KB 64, Commissioner of Domestic Taxes v Airtel Networks Kenya Limited (Income Tax Appeal E062 of 2022) [2023] KEHC, Jafferali Alibhai v Commissioner of Income Tax [1961] EA 610, and Kanjee Naranjee v Income Tax Commissioner [1964] EA 257) 25059 (KLR) are cited to buttress this assertion.

22. Thirdly, the respondent submits that the appellant improperly analyzed the respondent's bank statements in its Objection Decision. It is urged that the appellant misapplied the banking analysis test in an attempt to determine the respondent's income during the period under review, which ultimately led to an inaccurate and inflated taxable income figure.

23. It is submitted that the appellants erroneously classified the respondent's interbank transfers as income amenable to Income Tax which they shouldn't have because the *Income Tax Act* states that income tax is only chargeable on "gains and profits" and these transactions did not amount to "gains and profits". The respondent submits that it delivered as requested by the appellant, the supporting documentation for the inter-company transfers but this was ignored for being time-barred. It is submitted therefore that it follows that the appellant did not consider the evidence provided by the respondent to prove that the interbank transfers were not income but just normal transfers between related entities.

24. It is contended that the respondent discharged its burden of proof in proving that the impugned bank transfers were not income. The respondent submits that the evidence was presented only that it was disregarded by the appellant for being time barred. It is argued that the appellant's failure to consider relevant and competent evidence proves that the burden of proof shifted to the appellant.

25. Fourthly, it is the respondent's case that the appellant erred in law and fact by incorrectly and wrongly classifying four pilots, who are independent contractors, as employees subjecting them to PAYE assessments contrary to Section 37 of the *Income Tax Act* as applicable then and section 2 of the *Employment Act*.

26. It is submitted that the assessment for PAYE was done outside the period allowed under the TPA, which is five years. It urged that section 54A(1) of the Income Tax does not give the time frame for the keeping of records but section 23 of the TPA states this period as five years and is the latter Act of Parliament having come into force on 19 January 2016 as *Act No. 29 of 2015*.

27. It is the respondent's case that section 94 of the *Income Tax Act* cited by the appellant does not exist as it was repealed by section 110 of the *Tax Procedures Act*, *Act No. 29 of 2015*. It is urged that section 59(1) of the *Income Tax Act* does not exist. It is submitted that section 17 of the VAT Act of 2013 does not mandate the keeping of records for a period of more than five years and nor does it provide or mandate the keeping of such records. It is therefore urged that the appellant cannot rely on these provisions of the law to mandate the respondent to keep records for more than five years. It is the respondent's case that the assessment for PAYE for the years prior to 2017 are inadmissible as they are not contemplated in the TPA. Therefore, the objection decision and its reference to PAYE for the years 2014/2015, 2015/2016, 2016/2017 is void.

28. It is submitted that the question of burden of proof in tax cases has been determined and the principle applied is that of a swing of the burden of proof. The respondent relies on the decision in *Republic v Kenya Revenue Authority, ex parte Proto Energy Limited (Judicial Review Application E023 of 2021*) [2022] KEHC 5 (KLR) (24 January 2022) (Judgment) to support its contention.

29. It is submitted that the respondent lacked control over the impugned four pilots involved in the dispute because they maintain the freedom of engaging in work for competing companies. It is contended that the pilots were not employees, in the context of section 37(1) of the *Income Tax Act* as there was no employer-employee relationship. It is urged that the appellant made claims that were unsupported and such claims cannot swing the pendulum of burden of proof. The decision in Kenya Power & Lighting Co Ltd v Rassul Nzembe Mwadzaya [2020] eKLR is relied on for this contention.

30. The respondent concludes by urging this court to dismiss this appeal for being incompetent and fatally defective. Further, that the court affirms the judgment of the honourable Tribunal and set aside, in its entirety, the Objection Decision contained in the letter dated 30 June 2023 demanding payment of Kshs.26,903,764. This court is also urged to entirely set aside the appellant's tax assessment older than five years from the date of assessment, and that it be awarded costs of and incidental to this appeal.

31. I have considered the submissions as well as the entire record before me. Before I set out the issues for determination in this case, I must state that the appellate jurisdiction of this Court is stipulated 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".

32. Black's Law Dictionary defines matters of fact and matters of law as:

> " Matter of fact: A matter involving a judicial inquiry into the truth of alleged facts and Matter of law: A matter involving a judicial inquiry into the applicable law."

33. The court in Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others [2014] eKLR while evaluating the difference between the two terms relied on M'riungu And others Vs. R [1982-88] 1 Kar 360 when it stated, (per Chesoni AJA) at p366 that: -

> " We would agree with the views expressed in the English case of Martin v Glyneed Distributors Ltd (t/a MBS Fastenings) [1983] 1 CR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decision of the trial of first appellate court unless it is apparent that; on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad law."

34. The Supreme Court has binding precedent on what constitutes appeals on matters of law only. In Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, Petition 2B of 2014 [2014] eKLR, the Court in paragraph 80 delivered itself as follows:

> From the foregoing review of the comparative judicial experience, we would characterize the three elements of the phrase "matters of law" as follows:
>
> (a) the technical element: involving the interpretation of a constitutional or statutory provision;
>
> (b) the practical element: involving the application of the *Constitution* and the law to a set of facts or evidence on record;

(c) the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record.

The court went on to explain at paragraph 81 (c):

> the conclusions arrived at by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on "no evidence", or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were "so perverse", or so illegal, that no reasonable tribunal would arrive at the same; it is not enough for the appellant to contend that the trial Judge would probably have arrived at a different conclusion on the basis of the evidence.(emphasis mine)
>
> The court went on at paragraph 81A :
>
> 81A. It is for the appellate Court to determine whether the petition and memorandum of appeal lodged before it by the appellant conform to the foregoing principles, before admitting the same for hearing and determination.
>
> 82. Flowing from these guiding principles, it follows that a petition which requires the appellate Court to re-examine the probative value of the evidence tendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate Court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge's commitment to the highest standards of knowledge, technical competence, and probity in electoral-dispute adjudication, on the other hand.(emphasis mine)

35. Guided by the foregoing, this court carefully considered the Memorandum of Appeal as framed and finds that grounds a,c,e,f of the Memorandum of Appeal relate primarily to the question of fact and evidence and not questions of law. Through these grounds, the appellant is asking this court to review the evidence presented and this constitutes a question of fact. In other words, the appellant requires the court to re-examine the probative value of the evidence tendered at the trial Court, and is inviting this court to calibrate this evidence. As the aforestated grounds relate primarily to questions of fact, they do not qualify as grounds that can be determined on appeal. I am compelled to add that the appellant has not satisfactorily demonstrated how the conclusion reached by the Tribunal was not supported by established facts or evidence on record. As such, I shall dismiss these grounds in limine.

36. Grounds b and d however raises a matter of law and form the basis of the issues for determination in this case which I have isolated as whether the tribunal erred in not taking into account provisions of Section 17 of the VAT Act 2013, Section 54A, 59(1) and 94 of the *Income Tax Act* Cap 470 and whether the tribunal correctly interpreted the burden of proof. I shall examine these in turn.

37. Asto whether the tribunal erred in not taking into account provisions of Section 17 of the VAT Act 2013, Section 54A, 59(1) and 94 of the *Income Tax Act* Cap 470 the appellant's case is that the Tribunal failed to appreciate and/or give due regard to the provisions of Section 17 of the VAT Act 2013, Section 54A, 59(1) and 94 of the *Income Tax Act* Cap 470 Laws of Kenya applicable to the dispute which requires the taxpayer to keep transactional records for a period of five years.

38. Section 17 of the VAT Act 2013 provides for 'credit for input tax against output tax' and the requisite documentation for the same. A thorough reading of this somewhat lengthy provision reveals that this provision does not mandate the keeping of transactional records for a period of five years or at all. In addition, section 54A(1) of the *Income Tax Act* does not give the time frame for the keeping of transactional records, and section 59 (1) of the *Income Tax Act* does not exist. Further, section 94 of the *Income Tax Act* was deleted by The *Tax Procedures Act* No. 29 of 2015, in the second schedule. The Tribunal can therefore not be faulted for not considering the same. This ground therefore fails.

39. As to whether the tribunal correctly interpreted the burden of proof the appellant contends that the Tribunal erred in shifting the burden of proof to it contrary to the express provisions of section 30 of the *Tax Appeals Tribunal Act*. On the other end the respondent urges that it discharged this burden and the burden shifted to the appellant.

40. Section 30 of the Tax Appeal Tribunal Act provides:

> 30. Burden of proof
>
> 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.

41. The Tribunal noted that while it is settled law that the burden of proof in tax cases lies with the taxpayer in accordance with section 30 of the TAT, this onus may however shift to the appellant if the taxpayer has made a prima facie case. The Tribunal held that if the appellant failed to rebut the prima facie case, then the taxpayer succeeds. The Tribunal found that the respondent had provided evidence that the appellant's assessment was wrong and that the respondent must push back to show its assessment was not erroneous or excessive. The Tribunal noted that by tabling information that it did, the respondent succeeded in making a prima facie case that non-items were taxed by the appellant. The onus then shifted to the appellant to disprove these documents by making a prima facie case that its income assessment was justified.

42. In Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte) [2022] KEHC 5 (KLR), Mativo J rendered himself thus at paragraph *46*:

> " Perhaps I should mention that the uniqueness of tax laws is underscored by the fact that even where the constitutionality of such provisions has been challenged, courts have consistently held that placing the burden upon the tax payer is not unconstitutional nor is it contrary to Parliament's intent.[39]There is a distinction between the legal burden of proof and the evidential burden of prove. These are two different concepts. The *Evidence Act*[40] places the burden of proving the existence any fact in issue on the party who assets. The evidential burden exists in the form of a tactical onus to contradict, weaken or explain away the evidence that has been led. It is the latter form of burden which may shift from one party to the other. By requesting the information from the applicant, the Respondent acted perfectly within the law because the information is held by the applicant. By failing to provide the information sought, the applicant allowed a golden opportunity of shifting the evidential burden of prove to the Respondent to disapprove the correctness or otherwise of its returns."(emphasis mine)

43. The Supreme Court in Raila Od*inga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms: "...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."

44. In the instant case, it is evident that the tribunal was referring to the evidential burden. In this regard and guided by foregoing precedent, I do not consider that the Tribunal erred on its determination with regards to burden of proof as argued by the appellant and this ground therefore fails.

45. The upshot is that the appeal herein is found to lack merit and is dismissed, the decision of the Tribunal dated 12th July 2024 is upheld, and each party to bear its own costs.

46. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 30TH DAY OF MAY, 2025.

RHODA RUTTO

JUDGE

In the presence of;

..... for Appellant

..... for Respondent

Sam Court Assistant