



**Gachui v Commissioner for Domestic Taxes (Income Tax Appeal E045 of 2025)
[2025] KEHC 9327 (KLR) (Commercial and Tax) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9327 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E045 OF 2025**

F GIKONYO, J

JUNE 30, 2025

BETWEEN

SUSAN NUNGARI GACHUI APPELLANT

AND

COMMISSIONER FOR DOMESTIC TAXES RESPONDENT

JUDGMENT

Restraint of property

1. This is an appeal against the judgment dated 31st January 2025 by the Tax Appeals Tribunal (“Tribunal”) in TAT No. E814 of 2023; Susan Nungari Gachui v Commissioner for Domestic Taxes.
2. In the judgment, the Tribunal dismissed the appellant’s appeal on the basis that it lacked the jurisdiction to try the appeal. The basis for the decision was that, a notice of restraint of property, an enforcement measure, issued by the Commissioner, is not an appealable decision within the meaning of section 52(1) of the [Tax Procedures Act](#) (TPA) and section 3 of the [Tax Appeals Tribunal Act](#) (TAT Act).
3. The memorandum of appeal dated 13th March 2025, raises the following grounds, namely, that the Tribunal: -
 1. Erred in law and in fact by misinterpreting, misapplying, and/or incorrectly construing the provisions governing appeals of an appealable decision under Section 52(1) of the [Tax Procedures Act](#), 2015, as read together with Section 3 of the [Tax Appeals Tribunal Act](#), 2013;
 2. Erred in law and in fact by misapprehending, misapplying and/or incorrectly applying the interpretation of an appealable decision as set out under Section 3 (1) of the [Tax Procedures](#)



Act 2015, thereby arriving at an erroneous finding that the Appellant’s appeal was not based on an appealable decision;

3. Erred in law in disregarding and failing to apply the Stare Decisis principle, by manifestly misapprehending and misapplying the principles set out in the established and binding precedent in Commissioner of Domestic Taxes v Pevans East Africa Limited & 6 others (Tax Appeal E003 of 2019) [2022] KEHC 10392 (KLR) as well as under judicial review in Krystalline Salt Limited v Kenya Revenue Authority NRB HC JR No. 359 of 2018 [2019] eKLR; and
4. Erred in law and in fact by admitting and determining issues that were neither pleaded nor properly before it, thereby exceeding its jurisdiction and occasioning a miscarriage of justice.

Background

4. The appellant is a registered taxpayer engaged in the business of leasing residential houses, from which she earns rental income.
5. The respondent issued the appellant income tax assessments in November 2013 and May 2015, amounting to Kshs. 73,108,365. The appellant lodged its objection 6 years later on the 29th June 2021. The appellant failed, refused and or neglected to give a justification for lodging its objection late. The respondent thus rejected the appellant’s objection application on 21st July 2021.
6. The Commissioner issued agency notices dated 8th September 2023, to the appellant’s bankers to remit into its account the Kshs. 73,108,365. It subsequently issued the notification of restraint of property L. R. No. 209/8553/165 dated 25th October 2023.
7. Upon inquiry, the appellant was informed of legacy assessments for 2007 to 2012 giving rise to Kshs. 39,312,695. The appellant also discovered amended assessments in her iTax account for 2016 and 2017 amounting to Kshs. 21,310,015.00. Dissatisfied, the appellant lodged an appeal before the Tribunal through her notice of appeal dated 17th November 2023.

Appellant’s submissions

8. The appellant filed written submissions dated 13th May 2025. She argued that a notice of restraint of property, like an agency notice, is an enforcement action under the Tax Procedures Act. She asserted that the court has held that the Commissioner’s act of demanding tax and issuing agency notice was an appealable decision under section 3 (1) of the TPA.
9. The appellant relied on:-
 1. Commissioner of Domestic Taxes v Pevans East Africa Limited & 6 others (Tax Appeal E003 of 2019) [2022] KEHC 10392 (KLR) (Commercial and Tax) (13 May 2022) (the “Pevans Case”)
 2. Krystalline Salt Limited v Kenya Revenue Authority NRB HC JR No. 359 of 2018 [2019] eKLR (“the Krystalline Salt Case”)
10. The appellant thus urged the Court to allow her appeal with costs, and to set aside the Judgment of the Tribunal dated 31st January 2025; to declare that the appeal before the Tribunal was properly instituted, and that the Tribunal had jurisdiction to hear and determine the matter on its merits.



Response

11. In opposition to the appeal, the Commissioner filed a statement of facts dated 29th April 2025 and written submissions dated 16th June 2025. It argued that the notification is its administrative or enforcement right of execution as envisaged under section 40 (5) of the TPA, not an appealable decision or a decision on the Taxpayer's tax liability. It relied on sections 3(1) and 52 (1) of the TPA. It also argued that the appellant has misconstrued the principles in the Pevans and Krystalline Salt cases.
12. The Commissioner's position is that it issued the respondent with assessments, but the appellant failed to issue her objection in time. It contended that the appellant ought to have appealed the invalidation decision, not the notification or challenged the notification through judicial review.
13. The Commissioner urged the court to uphold its decision dated 21st July 2021 and to dismiss the appeal with costs.
14. The Commissioner relied on Commissioner of Domestic Taxes v Altech Stream (EA) Limited [2021] KEHC 5755 (KLR).

Analysis and Determination

Duty of court

15. This court's duty in such an appeal is circumscribed to questions of law under 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."
16. The inference is that the court will only engage with matters of fact for the background and context and to ascertain the Tribunal's findings are based on evidence and the law. *Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others NYR CA Civil Appeal No 48 of 2013 [2013] eKLR*
17. In *Meenakshi Mills, Madurai v The Commissioner of Income Tax, Madras (1957) AIR 49, (1956) SCR 691*, the Supreme Court of India observed that a question of law would arise in three instances:-
 - a. the construction of a statute or document of title;
 - b. the legal effect of the facts found where the point for determination is a mixed question of law and fact;
 - c. a finding of fact unsupported by evidence."

The issue

18. The issue is whether the notice of restraint of property, and enforcement measure, is an appealable decision. The issue involves the construction of a tax statute. There are two key principles to consider when interpreting tax statutes.
19. Justice Nyamu in *Stanbic Bank Limited v Kenya Revenue Authority (CA Civil Appeal No. 77 of 2008 [2009] eKLR*, captured them as follows:-

"In my interpretation of the law, it is quite evident that I have not sought any assistance from outside a dictionary in ordinary use. Moreover, I have not strained the meaning of words in order to achieve any particular result. I have simply adopted the ordinary meaning of the words used in the relevant tax statute. This is because as regards tax law the issue of intention



or intendment does not rise, if there is any ambiguity, and I did not detect in my analysis, the same must be construed in favour of the tax payer. In tax law, the converse is also true that if the meaning is clear, that tax is chargeable, the issue of what was intended is not the function of the court and where tax liability is expressed and located by law courts must uphold the taxman's position.”

20. The appellant relied on the decisions in the Pevans and Krystalline Salt Case to argue that the Notice of Restraint of Property, an enforcement decision similar to an agency notice, is an appealable decision.
21. The Commissioner conceded that a notice of restraint of property is an enforcement decision. However, it contended that the notice is not appealable but ought to be challenged through judicial review. It also contended that the appellant misinterpreted the principles in the cited decisions.
22. The notice of restraint of property was made under Section 40 (5) of the TPA, which provides:-

“Security on property for unpaid tax

40.

- (1) Where a taxpayer, being the owner of property in Kenya, fails to pay a tax by the due date, the Commissioner may notify the Registrar in writing that the property, to the extent of the taxpayer's interest in the property, shall be the subject of a security for the unpaid tax specified in the notification:

Provided that the Commissioner shall, within seven days from the date of the notification to the Registrar, by notice in writing inform the taxpayer and any other person who may have an interest in the property about the notification.

- (2) Where the Registrar has been notified by the Commissioner under subsection (1), the Registrar shall, without levying or charging a fee, register the Commissioner's notification as if it were an instrument of restraint on the disposal, mortgage on, or charge, as the case may be, the property specified in the notification.
- (3) A registration under subsection (2) shall, subject to any prior restraint on disposal, mortgage or charge, operate as a legal restraint on the disposal, mortgage, or charge on, the property to secure the amount of the unpaid tax, and any prior restraint shall supersede the Commissioner's notification.
- (4) The Commissioner shall, upon the payment of the whole of the amount of unpaid tax secured under this section, direct the Registrar in writing to cancel the notification made under subsection (2), and the Registrar shall, without levying or charging a fee, record the cancellation of the notification and the notification shall cease to apply.
- (5) Where the taxpayer fails to pay the tax liability described in the notification under subsection (1) within two months after receipt of the notification, the Commissioner or authorised



officer may, at the cost of the taxpayer, dispose of the property that is the subject of the restraint on disposal, mortgage or charge, by public auction or private treaty, or as provided for under the relevant Act for the recovery of the tax:

Provided that where a plan has been agreed between the taxpayer and the Commissioner, the liability shall be settled within the agreed payment plan before the notification by the Commissioner is lifted.”

23. From my reading of the impugned judgment, it was based on the Tribunal’s interpretation of section 52(1) of the TPA and sections 3(1) and 12 of the TATA, reproduced below:-

24. Section 52(1) of the TPA provides that:-

“ 52.

(1) A person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the *Tax Appeals Tribunal Act* (Cap. 469A).”

25. Section 3(1) of the TATA provides that:-

“There is established a Tribunal to be known as the Tax Appeals Tribunal to hear appeals filed against any tax decision made by the Commissioner.”

26. Section 12 of the TATA provides that:-

“ 12. A person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal,...”

27. The Tribunal concluded that:-

“79. The Notice of Appeal filed by the Appellant indicates clearly that the Appeal before the Tribunal is an Appeal against the Notification of Restraint over the Appellant’s Property for unpaid taxes. Such a notification does not amount to a tax decision but rather a communication from the Respondent on enforcement measures as provided for in Section 40 of TPA states (Supra).

80. The Tribunal therefore finds that the Notice of Restraint over property for unpaid taxes issued to the Appellant is not an appealable decision and hence does not fall within the Tribunal’s Jurisdiction.

81. The Tribunal is guided by its decision in TAT Misc 185 of 2022 EMV Investments Limited vs Commissioner of Domestic Taxes where it held that:

“With no appealable decision disclosed the Tribunal lacks the jurisdiction to grant any leave for the Applicant to pursue a non-existent right to appeal.



82. The Tribunal therefore concludes that there is no appealable decision in this case, the result is that it is seized of the jurisdiction to entertain the Appeal and shall down its tools.”

28. From the above, the Tribunal arrived at the finding that a notice of restraint of property does not amount to a tax decision but rather a communication from the Commissioner on enforcement measures as provided for in section 40 of the TPA.

29. As earlier noted, in this appeal, the Commissioner accepts that the notice of restraint of property is an enforcement decision, similar to an agency notice. According to the Commissioner, the appellant ought to challenge the notice through judicial review, not an appeal.

30. In the Krystalline Salt Case, cited by the appellant, the applicant had challenged an agency notice through judicial review. The court considered whether the agency notice was appealable and the implication which provides that:-

“ 12. Appeals to the Tribunal

A person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal.”

31. The court went on to find that:-

“ 38. ...whether the decision is an appealable decision within the above provision. As stated above, the act defines an “appealable decision” as an objection decision and any other decision made under a tax law other than—

(a) a tax decision; or

(b) a decision made in the course of making a tax decision and any other decision made in the course of making a tax decision. The words any other decision under the tax laws” is significant. The impugned decision fell under the above definition. To hold otherwise would amount to intellectual dishonesty given the clarity of the provision.”

32. It is worth noting that in the same decision, the court found that the impugned action was an administrative action and an aggrieved party could bring an application for judicial review under section 7 of the *Fair Administrative Action Act*. However, the court also found that since the impugned action was an administrative action, section 9 (1), (2), (3) and (4) of the *Fair Administrative Action Act* on the requirement for exhaustion of available remedies applied.

33. In the Pevans case, the court found that the respondents were entitled to appeal against the commissioner’s decision leading to the issuing of agency notices in accordance with section 52(1) of the TPA. The court was in agreement with the findings in the Krystalline Salt Case that a decision made under any other tax law including the exercise of power under section 42 of the TPA is an appealable decision. The court thus found that the Commissioner’s decision of demanding and issuing agency notices to the respondents’ bankers was an appealable decision to the Tribunal within the meaning and definition of an ‘appealable decision under section 3(1) of the TPA.



34. Opinion appears to be divided on this subject. However, it is profitable to note that, “Appeal” means an appeal to the Tribunal against a decision of the Commissioner under any of the tax laws; and tax laws means; ... e) any other tax legislation administered by the Commissioner. S.2 of the TAT Act
35. The Tax Procedures Act is tax legislation administered by the Commissioner, thus, a tax law for purposes of the TAT Act.
36. The language of the Tribunal treats the notice of restraint of property as mere communication by the Commissioner to the Registrar.
37. Such approach is completely oblivious of the essential and substantive imperatives, characteristics and effects of the notification including;
 - a. The Registrar shall register the Commissioner’s notification
 - b. A registration under subsection (2) shall, subject to any prior restraint on disposal, mortgage or charge, operate as a legal restraint on the disposal, mortgage, or charge on, the property to secure the amount of the unpaid tax,
 - c. The Commissioner shall, upon the payment of the whole of the amount of unpaid tax secured under this section, direct the Registrar in writing to cancel the notification made under subsection (2), and the Registrar shall, without levying or charging a fee, record the cancellation of the notification and the notification shall cease to apply.
 - d. If the taxpayer fails to pay the tax liability described in the notification within two months after receipt of the notification, the Commissioner or authorised officer may, at the cost of the taxpayer, dispose of the property that is the subject of the restraint, by public auction or private treaty, or as provided for under the relevant Act for the recovery of the tax:
 - e. The communication is also made to the taxpayer.
38. These essentials are profound, making such, a decision of the Commissioner under the tax law. It is not merely a communication to the registrar.
39. From the foregoing, I find that a notice of restraint of property falls under “any other decision under the tax laws” under section 12 of the TATA. Therefore, a notice of restraint of property is an appealable decision. Accordingly, I find that the Tribunal erred by finding that it did not have jurisdiction because the appellant’s appeal was not based on an appealable decision.

Conclusion

40. In conclusion, the appeal is allowed. The Tribunal’s Judgment dated 31st January 2025 is hereby set aside. The matter is remitted back to the tribunal for determination by a competent panel other than the trial panel.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT ONLINE APPLICATION THIS 30TH DAY OF JUNE, 2025

F. GIKONYO M

JUDGE

In the presence of: -

1. Mbaabu for Appellant



2. Lemaiyan for KRA

3. CA Kinyua

4

