



**Commissioner of Domestic Taxes v Mutai (Income Tax Appeal E107 of 2023)
[2025] KEHC 12164 (KLR) (Commercial and Tax) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 12164 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E107 OF 2023
WA OKWANY, J
JULY 31, 2025**

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

PAUL KIPYEGON MUTAI RESPONDENT

*(Being an Appeal from the Judgment of the Tax Appeals
Tribunal dated 26th May 2023 in Tax Appeal No. 442 of 2022)*

JUDGMENT

Introduction

1. The Appellant is a Commissioner with delegated powers and functions of the Commissioner-General and acts for and on behalf of the Kenya Revenue Authority (KRA), a body established under the provisions of the [Kenya Revenue Authority Act](#) No. 2 of 1995. The Appellant is charged with the responsibility of collection and administration of revenue taxes on behalf of the Government of Kenya.
2. The Respondent, Paul Kiyegon Mutai, is a Kenyan citizen and a registered tax payer holding KRA PIN Number A00xxxxxx99Z, living and working for gain in Litein Town in Kericho County where he runs a hotel business.

Facts

3. This Appeal herein emanates from the decision of the Tax Appeal Tribunal delivered on 26th May 2023. The Appellant's agents visited the Respondent's business premises on 8th June 2021 and reviewed his VAT Assessment. The Respondent explained that his business was not eligible for VAT registration because his supplies, within a period of 12 months, were below the threshold of Kshs. 5,000,000/=.



The Appellant disregarded the Respondent's said explanation and instead issued him with an order for mandatory registration of VAT. The Appellant also imposed a fine of Kshs. 50,000/= on the Respondent.

4. On 9th December 2021, the Respondent was issued with an additional VAT assessment of Kshs. 1,019,460/= for the period between 1st January 2021 to 8th June 2021. He was also served with a demand notice for the sum of Kshs. 1,050,043.80/= inclusive of penalties.
5. On 29th December 2021, the Respondent objected to the notices after which the Appellant on 3rd February 2023 requested him to provide further documentation. The Respondent supplied the Appellant with his monthly sales records and explained that most of the entries in the system resulted from their finance system installation and testing exercise when dummy entries were created. The Respondent was however issued with an Objection Decision dated 4th April 2022 wherein the Appellant confirmed its earlier assessment thereby precipitating the filing of an appeal at the Tax Appeals Tribunal on 3rd May 2022.
6. The Tribunal rendered its judgment by allowing the Respondent's Appeal and declared that the Appellant had erred when it registered the Respondent for VAT when his business had not attained the Kshs. 5,000,000/= sales threshold as required under Section 34 of the VAT Act. The Tribunal also held that the Respondent had discharged its burden of proof regarding the dummy sales which the Commissioner did not dispute and that the Appellant's Objection Decision was invalid. The Tribunal's decision gave rise to the instant appeal.

The Appeal

7. The Appellant filed the Memorandum of Appeal dated 17th July 2023 wherein it listed the following grounds of appeal: -
 1. That the Honourable Tribunal erred in law in entertaining and considering documents/evidence filed contrary to Section 56 (3) of the [Tax Procedures Act](#) 2015 and Section 13 (6) of the Tax Appeal Tribunal Act, 2013.
 2. That the Honourable Tribunal erred in law and in fact by failing to consider the provisions of Section 109 of the [Tax Procedures Act](#) 2015 and the import of the Appellant's Compounding Order dated 11th June 2021.
 3. That the Honourable Tribunal erred in law and in fact in not appreciating the provisions of Sections 23 and 59 (1) of the [Tax Procedures Act](#) 2015 and Sections 43 of the [Value Added Tax Act](#), 2013 by failing to find that the Respondent failed to provide all the relevant documents/informing requested by the Appellant.
 4. That the Honourable Tribunal erred in fact and law in misconstruing Section 56 (1) of the [Tax Procedures Act](#), 2015 and Section 30 of the Tax Appeal Tribunal Act, 2013 by finding that the Appellant discharged its burden of proof.
8. The Appellant sought the following prayers in the Appeal: -
 - a. The Appeal be allowed
 - b. The judgment of the Tax Appeal Tribunal dated 26th May 2023 be set aside.
 - c. The Appellant's Objection decision dated 4th April 2022 be upheld; and



- d. The costs of the Appeal herein and the Appeal before the Honourable Tribunal be awarded to the Appellant.
9. The parties canvassed the Appeal through written submissions.

The Appellant's Submissions

10. The Appellant submitted on three issues as follows: Whether the Tribunal had jurisdiction to consider the documents annexed to the Respondent's written submissions; Whether the Respondent discharged the burden of proof at the Tribunal; and whether the Tribunal erred in failing to consider the Appellant's case.
11. On the first issue, it was submitted that the Tribunal did not have the jurisdiction to consider the Respondent's documents which were attached to its written submissions because the said documents were never availed to the Appellant at both the Assessment and the Objection review stage and were therefore fresh documents adduced at the Appeal stage after the close of the pleadings, which meant that the Tribunal had no jurisdiction to consider them.
12. It was submitted that the Tribunal not only arrogated itself jurisdiction in considering the Respondent's new documents but also violated the Appellant's right of rebuttal to newly introduced evidence. It was further submitted that a party is bound by its pleadings as was stated by the Court of Appeal in the case of *David Sironga Ole Tukai vs. Francis Arap Muge & 2 Others* (2014) eKLR. It was the Appellant's case that the Tribunal ought not to have relied on the Respondent's written submissions since submissions have no probative value as was determined in the case of *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* (2014) eKLR.
13. On whether the Respondent discharged the burden of proof, it was submitted that the Respondent did not tender any documents to prove his case to the satisfaction of the Appellant as he neither responded to the Appellant's pre-assessment notice, nor disputed to the correctness of the Appellant's findings. The Appellant argued that its decision was premised on all the documents availed to them and that the only action taken by the Respondent was to deny the sales of approximately Kshs. 6M for the month of October 2021 without attributing them to the alleged dummy sales, which was evidently an afterthought.
14. It was submitted that the Respondent only provided two out of the four sets of documentation requested by the Appellant pursuant to Section 59 of the *Tax Procedures Act* 2015. It was the Appellant's case that under Section 23 of the *Tax Procedures Act* 2015 and Section 43 of the VAT Act 2013 the Respondent was obligated to keep the said documents and was therefore required to discharge the burden in accordance with Section 30 of the Tax Appeal Tribunal Act 2013. The Appellant submitted that it was incumbent on the Respondent to provide competent and reliable evidence to rebut their findings and assessments as the burden of proof rested on him. Reference was made to the case of *Kenya Revenue Authority vs. Man Diesel & Turbo Se Kenya* (2021) eKLR and *Commissioner of Domestic Taxes vs. Trical and Hard Limited (Tax Appeal No. E146 of 2020)* (KEHC) 9927 KLR where it was held that the commissioner's determinations on tax deficiencies are presumably correct until the taxpayer adduces relevant and competent evidence in this regard.
15. On whether the Tribunal erred in failing to consider the Appellant's case, it was submitted that the Tribunal was required to give reasons and findings on material questions of fact and evidence and that its decision did not contain a summary of the Appellant's evidence especially on the issue of notice of offence and the compounding order. The Appellant cited the decision in the case of *Edward Kagwathi Katuku vs. Republic* (2022) eKLR where it was held that all evidence ought to be evaluated. The



Appellant noted that the Respondent signed the Notice of Offence on 8th June 2021 which formed the basis of the compounding order on the taxes due as his payment of the Kshs. 50,000/= fine showed that he had agreed to the terms of compounding order.

16. According to the Appellant, the Respondent was thus estopped from renegeing on his admission. Reference was made to the decision in 748 Air Services Limited vs. Theuri Munyi (2017) eKLR and Section 109 (3) (e) of the [Tax Procedures Act](#) 2015 for the argument that a compounding order is final and cannot be the subject of an appeal.

The Respondent's Submissions

17. The Respondent submitted that he did not make actual sales of Kshs. 6,371,625/= in October but that the sales ledger from the system contained dummy sales which the Commissioner relied on in making its erroneous decision. He argued that the issue of dummy sales did not constitute additional grounds and added that the assertion that the evidence was not adduced at the assessment and objection stage was misleading since he had attached the same evidence to his Statement of Facts dated 22nd July 2022 as shown in the Record of Appeal.
18. It was submitted that the Respondent did not provide additional evidence as alleged by the Appellant but merely provided further clarification on the documents that were already before the Commissioner and the Tribunal. It was the Respondent's case that the Commissioner's power to compound offences, as provided under Section 109 of the [Tax Procedures Act](#), was not properly exercised because, firstly; there was no written admission and request for compounding from the taxpayer, and secondly; no competent committee was constituted as required by Section 109 (2) and, lastly; the compounding order was not signed by the offender.
19. The Respondent maintained that the Objection Decision was not only incompetent but also violated the Respondent's right to fair administrative action contrary to the principles stated in the case of Teachers' Service Commission vs. Simon P. Kamau & 19 Others (2010) eKLR where the Court of Appeal endorsed the reasoning in Doody vs. Secretary of State for home Department (1993) 3 All ER.
20. On the issue of documents requested by the Commissioner for examination, it was submitted that out of the four documents, only the audited accounts for the year 2020 were not submitted because the Respondent did not maintain audited accounts since he operated a sole proprietorship with an annual turnover not exceeding Kshs. 1,000,000/=. It was the Respondent's case that the Appellant's request from the same was an abuse of power.
21. It was further submitted that, the fact that the Appellant dismissed the said documents as inconclusive was an indication that they were determined to uphold their previous assessment based on the dummy entries. The Respondent urged the Court to uphold the decision of the Tax Appeals Tribunal and to dismiss the Appeal.

Analysis and Determination

22. Article 165 of [the Constitution](#) empowers the High Court to hear and determine appeals emanating from tribunals. The said Article stipulates as follows: -
 - (3) Subject to clause (5), the High Court shall have—
 - c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;



23. Section 56 of the [Tax Procedures Act](#) Cap 469B gives effect to Article 165 provides for the High Court’s appellate jurisdiction, as a second appellate court, over the decisions of the Tax Appeals Tribunal court as follows: -

56. General provisions relating to objections and appeals

(2) An appeal to the High Court or to the Court of Appeal shall be on a question of law only.

24. The instant Appeal can therefore only lie on a question of law. I have carefully considered the Record of Appeal and the parties’ rival submissions. I find that the following issues arise for this court’s determination: -

- a. Whether the Tax Appeals Tribunal erred in law by considering documents submitted by the Respondent at the submission stage.
- b. Whether the Respondent discharged the burden of proof in accordance with the relevant tax legislation.
- c. Whether the Tribunal properly evaluated the evidence and applied the law regarding VAT registration thresholds and the compounding order.
- d. Whether the Tribunal’s judgment was against the weight of evidence and law.

Whether the Tribunal erred by considering documents submitted at the submission stage

25. The Appellant contended that the Tribunal erred when it considered fresh evidence not availed during the assessment or objection stages. The Appellant contended that such documents were annexed, for the first time, to the Respondent’s written submissions. It was submitted that Section 56(3) of the [Tax Procedures Act](#), 2015 and Section 13(6) of the [Tax Appeals Tribunal Act](#) prohibit parties from introducing new evidence without the leave of the Tribunal.

26. A perusal of the record however reveals that the documents in question, including sales records and an explanation of dummy entries, were attached to the Statement of Facts filed by the Respondent on 22nd July 2022. This rebuts the Appellant’s claim that the documents were introduced for the first time at submission stage. I find that the Tribunal was therefore entitled to consider those documents, as they formed part of the record properly placed before it.

Whether the Respondent discharged the burden of proof

27. Section 56 of the [Tax Procedures Act](#) provides that the burden of proof rests on the taxpayer to prove that a tax decision is incorrect. The Section stipulates as follows: -

56. General provisions relating to objections and appeals

1. In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.

28. Halsbury’s Laws of England, 4th Edition, Volume 17, Paragraphs 13 and 14, stipulates as follows: -

“(13) The legal burden is the burden of proof which, remains constant throughout a trial, it is a burden on establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial, he has failed to establish that to the appropriate standard he will lose.



(14) The legal burden of proof normally rests with the party desiring the court to take action: thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential element of this case.”

29. The issue of burden of proof was also aptly expounded in *Republic vs. Kenya Revenue Authority; Proto Energy Limited (Exparte)* [2022] KEHC 5 (KLR), as follows: -

“The most significant justification for placing the burden of proof on the tax payer is the practical consideration that the Commissioner cannot sustain the burden because he does not possess the needed evidence. Under the system of self-reporting tax liability, the taxpayer possesses the evidence relevant to the determination of tax liability. It is simply fair to place the burden of persuasion on the taxpayer, given that he knows the facts relating to his liability, because the commissioner must rely on circumstantial evidence, most of it coming from the taxpayer and the taxpayer’s records. The taxpayer must present a minimum amount of information necessary to support his position. This safety valve seems to place the burden of production on the taxpayer without relieving the Commissioner of the overall burden of proof. The tax payers’ evidence must meet this minimum threshold. A presumption of correctness arises from the Commissioner’s determination/assessment. The presumption remains until the taxpayer produces competent and relevant evidence to support his/her position. When the taxpayer comes forward with such evidence, the presumption vanishes and the case must be decided upon the evidence presented.”

30. The Appellant averred that the Respondent only provided his Bank Statements for the period 1st January 2021 to 21st September 2021 and monthly statements for the period January to June 2021, but did not provide the audited bank statements for the year 2020 and sales ledgers for the period from January to December.

31. Section 51 of the [Tax Procedures Act](#) provides as follows: -

51. Objection to a Tax Decision

3. A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if—

- a. the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments;
 - b. in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute or has applied for an extension of time to pay the tax not in dispute under section 33(1); and
23. all the relevant documents relating to the objection have been submitted.

32. Under Section 30 of the [Tax Appeals Tribunal Act](#), the burden lies with the taxpayer to prove that a tax decision is incorrect. The Respondent maintained that the sales figures that the Appellant relied upon were system-generated dummy entries arising during testing of his new financial system. He produced documentation in support of this assertion.

33. I find that the Tribunal correctly noted that the Appellant did not challenge the explanation regarding dummy sales, nor did it discredit the documentation provided. It was therefore reasonable for the



Tribunal to find that the Respondent had discharged his burden of proof and that the Appellant's failure to rebut the explanation meant that its objection decision was flawed,

Whether the VAT registration and compounding order were proper**

34. Section 34 of the VAT Act provides that mandatory VAT registration arises only where a business meets or exceeds a threshold turnover of Kshs. 5,000,000 within a 12-month period. The Tribunal evaluated the evidence presented before it regarding the Respondent's actual sales data and made the following finding: -

“The Tribunal has looked at the Appellant's Exhibit 3 which showed how the dummy installation, test and installation was done. A simple arithmetic of the figures provided in this document add up to Kshs. 5,605,170.00. The same figure as that which was relied on by the Respondent to register the Appellant for VAT.

The said Exhibit 3 also has a default date of 1st January 2021 with sales amounting to 5,605,170.00 meaning that if the Respondent's story is to be believed, then it would mean that the Appellant had carried out sales worth Kshs. 5,605,170.00 on the 1st January 2021.....

.....The Tribunal looked at Exhibit 3 and the photo of sales presented to it by the Respondent and it is satisfied that the explanation, by the Appellant that these figures emanated from the default/trial setting when the new system was being set up is plausible. The Appellant has therefore succeeded in proving his case within the remit of Section 56(1) of the TPA.”

35. From the above extract of the Tribunal's judgment, it is clear that the Tribunal properly analysed the evidence placed before it and arrived at the logical conclusion that the Respondent's sales had not reached the threshold set for eligibility for VAT registration. I find that the Appellant's reliance on inflated sales derived from dummy entries was erroneous.

36. Turning to the compounding order, Section 109 of the *Tax Procedures Act* requires that compounding of offences be preceded by a written admission by the taxpayer and be executed by a properly constituted committee. The Section stipulates as follows: -

109. Power of the Commissioner to compound offences

1. The Commissioner may, where he is satisfied that a person has committed an offence under a tax law in respect of which a penalty of a fine is provided, or in respect of which anything is liable to forfeiture, compound the offence and may order that person to pay such sum of money, not exceeding the amount of the fine to which he or she would have been liable if he or she had been prosecuted and convicted for the offence, as the Commissioner may think fit and the Commissioner may order anything liable to forfeiture in connection therewith to be condemned:

Provided that the Commissioner shall not exercise his or her powers under this section unless the person admits in writing that he or she has committed the offence and requests the Commissioner to deal with the offence under this section.

2. For the purposes of subsection (1), the Commissioner shall constitute a committee of not less than three officers to consider applications for the compounding of offences.
3. An order by the Commissioner in accordance with this section shall—
 - a. be in writing under the hand of the Commissioner and the offender, and witnessed by an officer;



- b. specify the name of the offender, the offence committed, the sum of money ordered by the Commissioner to be paid, and the date or dates on which payment is to be made;
- c. have a copy of the written admission referred to under subsection (2) attached;
- d. be served on the offender;
- e. be final and not be subject to appeal; and
- f. on production in any court, be treated as proof of the conviction of the offender for the offence specified, and may be enforced in the same manner as a decree of a court for the payment of the amount stated therein.

If the Commissioner compounds an offence under this section, the offender shall not be liable for prosecution or penalty in respect of same act or omission, the subject of the compounded offence except with the express consent of the Director of Public Prosecutions. (Emphasis added)

37. In the instant case, I find that no material was placed before this court, or before the Tribunal, to show that the Respondent admitted, in writing, that he committed an offence and requested the Commissioner to deal with the offence under the said Section 109. Furthermore, no record was presented before the Tribunal to show that the Commissioner constituted a committee of not less than three (3) officers to consider the application for the compounding of offences as the document produced, dated 11th June 2021, contains signatures of only two officers.
38. My considered view is that the mere fact that the Respondent paid Kshs. 50,000 fine, in the absence of clear admission of fault and the fulfilment of the requisite procedural safeguards, cannot be construed to be an unequivocal admission of guilt. My finding is that the Tribunal was justified in disregarding the compounding order.

Conclusion

39. Having regard to the findings and observations that I have made in this judgment, I find that Tribunal correctly appreciated the applicable law and evidence before it. I also find that the Tribunal did not admit or rely on any new documents, as alleged by the Appellant, and that its conclusions on the burden of proof, VAT registration threshold, and procedural irregularities in the Appellant's actions were sound in law.

Disposition

40. In light of the foregoing findings, this Court finds that the Appeal lacks merit and is hereby dismissed in its entirety. Accordingly, I make the following orders:
 - a. The Judgment of the Tax Appeals Tribunal dated 26th May 2023 in Tax Appeal No. 442 of 2022 is upheld.
 - b. The Appellant's Objection Decision dated 4th April 2022 is set aside.
 - c. I make no orders as to the costs of this Appeal.
41. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS
THIS 31ST DAY OF JULY 2025.**



W. A. OKWANY
JUDGE

