



REPUBLIC OF KENYA



**Haria v Commissioner of Domestic Taxes (Income Tax Appeal E171 of 2024)  
[2025] KEHC 11504 (KLR) (Commercial and Tax) (1 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 11504 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E171 OF 2024**

**PJO OTIENO, J**

**AUGUST 1, 2025**

**BETWEEN**

**RUPEN MULCHAND HARIA ..... APPELLANT**

**AND**

**COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT**

*(Being an appeal from the whole judgment of the Tax Appeals  
Tribunal dated 28th June 2024 in Tax Appeal No. E558 of 2023)*

**JUDGMENT**

1. The dispute originates from a share transfer that formed the culmination of a restructuring process initiated in 2021. The Appellant on 30<sup>th</sup> December 2022 transferred his shares in Harleys Limited to Westlands Heights Limited. The agreement evidencing this transfer was dated 29<sup>th</sup> December, 2022. The Appellant's self-assessment for CGT applied the prevailing rate of 5%. It then presented the Agreement to the lands registry for stamping on 30<sup>th</sup> December, 2022 and which was stamped on 4<sup>th</sup> January 2023.
2. Following the stamping of the agreement on 4<sup>th</sup> January, 2023, the Respondent subsequently issued an additional assessment to the Appellant demanding a substantial sum of Kshs. 416,966,484. The Respondent's basis for this additional demand was that the Appellant should have paid CGT at the new rate of 15% being the agreement for transfer of shares was stamped on 4<sup>th</sup> January, 2023 after the new rate of 15% had come into force. The Respondent further alleged that the Appellant had under-declared the total consideration for the shares by Kshs. 792,208,800 and had claimed an adjusted cost of Kshs. 295,500,000.



3. Dissatisfied with the Respondent's additional assessment, the Appellant lodged an objection. However, the Respondent issued an Objection Decision that confirmed the total capital gains liability of Kshs. 416,966,484. Aggrieved by the Respondent's decision, the Appellant proceeded to file an appeal before the Tax Appeals Tribunal on 5<sup>th</sup> September, 2023. The Tribunal, in its judgment dated 20<sup>th</sup> April 20, 2023 dismissed the Appellant's Appeal and held in favour of the Respondent.
4. The Appellant still dissatisfied by the Tax Appeals Tribunal's decision filed the present appeal. The grounds of Appeal are stipulated in the Appellant's Memorandum of Appeal dated 12<sup>th</sup> July 2024 and are as follows;
  - a. That the Honourable Tribunal erred in law in finding that the tax point for payment of Capital Gains Tax is upon the registration of the transfer instrument in favour of the transferee.
  - b. That the Honourable Tribunal erred in law in relying on section 56 of the *Tax Procedures Act* (hereinafter 'TPA') to the effect that the burden of proof lies on the Appellant which when read with section 95 of the TPA violates Article 50(2)(a) of *the Constitution* on the presumption of innocence.
  - c. That the Honourable Tribunal erred in law and in fact in finding that CGT is due upon registration of the transfer instrument contrary to the provisions of paragraph 11A of the Eighth Schedule of the *Income Tax Act* as to what constitutes the 'tax point' and/or when tax is said to be due.
  - d. That the Honourable Tribunal erred in law in relying on the determination in *Law Society of Kenya vs Kenya Revenue Authority and the AG (2017)* which finding is erroneous, broad and ambiguous yet tax legislation ought to be interpreted strictly.
  - e. That the Honourable Tribunal erred in law by further misconstruing the determination in *Law Society of Kenya vs Kenya Revenue Authority and the AG (2017)* on an obligation to pay Capital Gains Tax (hereinafter 'CGT') whose finding elicits different and contrary ambiguous interpretations and any ambiguity in tax ought to be interpreted in favor of the taxpayer.
  - f. That the Honorable Tribunal failed to appreciate that the subject transfer was not undertaken in the year 2023 but rather in the year 2022 when the rate of Capital Gains Tax (hereinafter "CGT") applicable was 5% and not 15% as alleged in the impugned assessment.
  - g. That the Honourable Tribunal erred in law its interpretation of section 3(2)(f) as read with paragraph 6(1)(a) of the Eight Schedule of the *Income Tax Act* with regards to the tax point for CGT.
  - h. That the Honourable Tribunal erred in its interpretation of the meaning of the word transfer as well as section 37(2) of the *Land Registration Act*.
    - i. That the Honourable Tribunal erred in law in finding that the date when the appellant's transfer deed was franked was the date when CGT was due.
  - j. That the Honourable Tribunal erred in law in failing to appreciate that the Appellant upon self-assessment of the taxes due remitted the necessary taxes to the Respondent as per the payment slip of 30<sup>th</sup> December 2022 and Respondent duly acknowledged the payment.
  - k. That the Honourable Tribunal erred in law in failing to appreciate that once the Respondent certifies a tax as due then it follows that the tax is due at the point of certification.



- l. That the Honourable Tribunal erred in failing to appreciate that the applicable law with reference to the transfer in question being the Finance Act 2015, clearly provides that the due date for tax shall be on or before the date when the application for transfer of the property is made at the relevant office.
  - m. That the tribunal erred in law in its interpretation of what constitutes a tax point.
  - n. That Honorable Tribunal erred in law and in fact in failing to appreciate that where an appellant lodges documents with a government entity for a transfer as was the case herein, then any delay by the government entity in lodging and/or registering the documents cannot be attributed to the appellant.
  - o. That the Honorable Tribunal fell in error by misapprehending the juridical nature of the transaction which resulted in the subject transfer thereby making an incorrect calculation of purportedly wrongly assessed Capital Gains Tax.
  - p. That the impugned determination is arbitrary and erroneous, and the Respondent lacks legal or factual basis as the Appellant has duly paid all taxes as required by law.
  - q. That the Respondent erred in law and in fact in failing to appreciate that the Appellant did not violate any tax laws and strictly complied with all relevant laws in their computation of Capital Gains Tax.
  - r. That the impugned judgment violates the Appellant's Constitutional right to transparency, accountability, legitimate expectation, fair administrative action in tax administration, right to protection of law all contrary to articles 10, 47 and 48 of *the Constitution* of Kenya.
5. Even though the grounds of appeal appear whooping, the gist of the appeal is merely whether the Tribunal properly applied the law when it upheld the respondent's assessment, which rate was applicable to the transaction and if the provisions of section 56 of the TPA and 30 of the TATA were an affront to article 50(2)a of *the constitution*. That appreciation of the dispute is informed by the fact that the proliferation of the grounds is informed by the appellant's approaching the court as if it was a first appellate court obligated to reassess and reexamine the record afresh with a view to coming to own conclusion by way of rehearing. The court appreciates its mandate on a second appeal to have been made a straight-jacket by section 56(1), *Tax Procedures Act*, limited to matters of law only.
  6. Based on the grounds in the Memorandum of Appeal, the Appellant has prayed that the Appeal be allowed and the judgment, order and decree of the Tax Appeals Tribunal be set-aside in its entirety and be awarded the costs of the Appeal.
  7. The Appellant presents that the share transfer agreement was dated 29<sup>th</sup> December 2022, and the shares were effectively transferred on 30<sup>th</sup> December, 2022. That on this date, all necessary taxes, including stamp duty and Capital Gains Tax at the prevailing rate of 5%, were duly paid. The Appellant claims that any delay in the administrative stamping of the agreement by the land registry until 4<sup>th</sup> January, 2023, is not attributable to it.
  8. Regarding the tax point, the Appellant contends that CGT is payable on transfer of property as stipulated by Paragraph 2 of the Eighth Schedule of the *Income Tax Act*. It argues that for shares, Paragraph 6(1)(a) of the Eighth Schedule defines transfer as occurring when the property is sold. From its perspective, the shares were sold and transferred on 30<sup>th</sup> December 2022 when the agreement was dated and the price paid, irrespective of the later stamping date.



9. Concerning the applicable CGT rate, the Appellant maintains that since the transfer was completed on 30<sup>th</sup> December, 2022, the prevailing CGT rate of 5% should apply. It asserts that his self-assessment, which used the 5% rate for the tax period ending 31<sup>st</sup> December, 2022, was correct. Consequently, the Respondent's additional assessment, based on the 15% rate that became effective on 1<sup>st</sup> January 2023 cannot be applied retrospectively to a tax period already concluded under a different legal framework.
10. The Appellant also raises several constitutional challenges. He contends that the additional assessment, which effectively faults him for not paying CGT at 15% on December 30, 2022, amounts to a retrospective application of a law that came into force on 1<sup>st</sup> January, 2023. This is characterized as a retrospective application of a criminal tax legislation, as failure to pay tax is an offense under Sections 95 and 104 of the *Tax Procedures Act*, punishable by imprisonment. This, the Appellant argues, directly violates Article 50(2)(n) of *the Constitution*, which prohibits conviction for an act that was not an offense at the time it was committed.
11. The Appellant further challenges the constitutionality of Section 56 of the *Tax Procedures Act*, which places the burden of proof on the taxpayer, arguing that this provision infringes upon the presumption of innocence guaranteed by Article 50(2)(a) of *the Constitution*. The Appellant concludes that the impugned judgment violates his constitutional rights to transparency, accountability, legitimate expectation, fair administrative action in tax administration, and the right to protection of law, as enshrined in Articles 10, 47, and 48 of *the Constitution*.
12. In response, the Respondent avers that the transfer deed for the shares was executed on 4<sup>th</sup> January, 2023, and that Capital Gains Tax (CGT) became payable upon this transfer. The Respondent further asserts that the Appellant had under-declared the total consideration for the shares in his self-assessment. According to the Respondent, the capital gain was realized upon the registration of the transfer instrument, which occurred in 2023, thereby attracting the higher CGT rate of 15%. The Respondent argues that the Appellant's appeal is null and void, unmerited and liable to be struck out/dismitted.
13. The Respondent's defense of the Tribunal's decision is rooted in several key findings made by the Tribunal:

Regarding the CGT tax point, the Tribunal found that Paragraph 11A of the Eighth Schedule to the *Income Tax Act*, which previously defined the tax point, was unconstitutional. This determination was based on its infringement of property rights, as it required tax payment before the tax was legally due. The Tribunal interpreted the term transfer as encompassing two distinct components: the initial application for transfer by filing an instrument, and the subsequent, crucial act of actual registration of the transferee as the new proprietor. Consequently, the Tribunal held that demanding CGT payment prior to this definitive registration would mean that tax is payable before it has become legally due, which constitutes an illegality.

Based on this interpretation and the declared unconstitutionality of Paragraph 11A, the Tribunal concluded that the Respondent did not err in determining the Appellant's CGT tax point as being upon the registration of the transfer of shares. In assessing whether the Commissioner erred in demanding additional CGT, the Tribunal affirmed that Section 73(2)(b) of the *Income Tax Act* empowers the Respondent to issue an assessment when there is reason to believe that a filed return is incorrect. The Tribunal also noted that the transfer instruments submitted by the Appellant themselves indicated a higher value than what was declared in the Appellant's initial self-assessment, further supporting the Respondent's additional assessment.



14. The Respondent concludes in urging the Court to re-affirm the Tribunal’s judgment dated 28<sup>th</sup> June, 2024 seeks for the Appellant’s appeal to be struck out or dismissed, with costs awarded to it.

### Issues for Determination

15. Having considered the Memorandum of Appeal, the Respondent’s statement of facts, the Tribunal’s Judgement and the submissions filed by both sides, the Court identifies three issues to isolate for determination by the court. The three issues are:
- i. What is the correct tax point for Capital Gains Tax (CGT) upon the transfer of shares under the *Income Tax Act*?
  - ii. What was the applicable CGT rate for the Appellant’s share transfer transaction?
  - iii. Does Section 56 when read with Section 95 of the *Tax Procedures Act* violate Article 50(2)(a) of *the Constitution*?

### Analysis and Determination

#### a. What is the correct tax point for Capital Gains Tax and as such the applicable CGT rate?

16. The determination of the tax point for Capital Gains Tax on share transfers is central to this appeal. The Appellant’s argument is rooted in the *Income Tax Act* itself. Section 3(2)(f) of the ITA stipulates that tax is chargeable on gains accruing in the circumstances prescribed in, and computed in accordance with the Eighth Schedule. Paragraph 2 of the Eighth Schedule then provides that such income is the whole of a gain which accrues on transfer of a property. The definition of transfer for the purposes of this Schedule is provided in Paragraph 6(1)(a), and states that a transfer occurs when property is sold, exchanged, conveyed or otherwise disposed of. It states;
- “Subject to this schedule there is a transfer of property for purposes of this schedule when the property is “SOLD”, “EXCHANGED”, “CONVEYED” or otherwise disposed of.”
17. The court notes that the landscape of CGT rates and tax point provisions has undergone significant evolution. CGT was initially reintroduced on 1<sup>st</sup> January 2015 with an initial rate of 5%. A key amendment directly relevant to the present dispute saw the CGT rate increase to 15% effective 1<sup>st</sup> January 2023. A further significant statutory development occurred with the Finance Act 2023, which became effective on 1<sup>st</sup> July 2023. This amendment defined the CGT due date as the earlier of the receipt of the full purchase price by the vendor or the date the application for transfer is made/ registration of the transfer of title.
18. Stamp duty on the other hand is tax levied on various legal instruments and transactions including the transfer of company shares. Its payment is required for updating the company’s share register and serves to validate the transfer of beneficial ownership. The Court notes that while the KRA has simplified the process by allowing stamp duty payment without mandatory CGT acknowledgment in some instances, a CGT acknowledgment receipt is typically required for the completion of any land or share transfer with the Lands Registry or Capital Markets Authority.
19. In the circumstances, the undisputed Appellant’s transaction date of 30<sup>th</sup> December 2022 falls squarely before the effective date of this Finance Act 2023. Therefore, the court finds that the Appellant’s transaction which attracts CGT occurred before the Finance Act came into operation and is not subject to its implications.



20. Having said so, and given that the impugned shares were sold and paid for on 30<sup>th</sup> December 2022 when the prevailing CGT rate was still 5%, the Appellant's self-assessment for the tax period ending 31<sup>st</sup> December 2022 was the accurate calculation of the tax payable. To say otherwise and delay the date the income was earned would not only apply the Finance Act 2023 retrospectively but also defeat the spirit that tax obligation accrues when the income is earned even before it is received.
21. Pursuant to Section 28(1) of the *Tax Procedures Act* (TPA), a taxpayer's self-assessment is deemed the amount of tax payable for the reporting period to which the return relates with the liberty of the authority to issue additional assessments under Section 31 of the TPA. However, such assessments must relate to the same tax period as the self-assessment. The additional assessment by the authority is thus bad for assigning the income for a year it was never earned and for applying the law under Finance Act 2023 retrospectively.
22. The court thus finds that it was a clear wrong exposition of the law by the Tribunal in inviting the provisions of *Land Registration act* to determine the definition of transfer when there was a clear and unequivocal definition under paragraph 6(1) of the 8th Schedule to the Act. That venture went against the established position of the law that there is no room for inference in a tax law and that the law must be read for its letter says.
23. It is therefore the holding by this court that for the transfer of shares, the tax point for Capital Gains Tax is the date the shares were legally and economically transferred through sale and payment, the 30<sup>th</sup> December 2022. The subsequent administrative act of stamping the document, delayed by a third party awaiting a new regime of the law attracting heavier burden, did not alter the date of the actual transfer for tax purposes and should never have been visited upon the taxpayer to his detriment.

**b. What was the applicable CGT rate for the Appellant's share transfer transaction?**

24. The Court has determined that the Appellant's self-assessment and payment of CGT at 5% were made on 30<sup>th</sup> December 2022, and related to the tax period ending 31<sup>st</sup> December 2022. To the contrary, the Respondent's position is that since the transfer instrument was registered on 4<sup>th</sup> January 2023, the 15% rate, effective from 1<sup>st</sup> January 2023 was correctly applied.
25. Given the determination that the correct tax point for the share transfer was 30<sup>th</sup> December 2022, it becomes axiomatic, undisputed but conceded by the respondent that the increased rate only became effective on the 1<sup>st</sup> January 2023. By the date the new regime tax regime and rate of 15% came into operation the tax period when the income was earned had closed. To apply the new rate to the past year is to apply the law retrospectively. To uphold such an assessment as was done by the Tribunal is to wholly misconstrue and misapply the tax law. for that error the tribunal's decision cannot be left to stand but must be set aside.
26. Furthermore, the principle of legitimate expectation dictates that a taxpayer should not be prejudiced by administrative inaction or delay that leads to a higher tax burden, especially when the taxpayer has already complied in good faith. The Appellant paid the due tax on 30<sup>th</sup> December 2022 under the prevailing law and reasonably expected that his tax obligation for that transaction was settled and extinguished.

**c. Does Section 56 of the *Tax Procedures Act* violate Article 50(2) (a) of *the Constitution* when read with Section 95 of the TPA thus unconstitutional?**

27. The Appellant challenges Section 56 of the *Tax Procedures Act*, which places the burden of proof on the taxpayer, arguing that it violates Article 50(2) (a) of *the Constitution* on presumption of



innocence. To the appellant section 56, as it establishes the incidence of burden of proof, when read with section 95 TPA crating criminal offense negate on the presumption of innocence and thus affronts the constitution.

28. It is tritely established in Kenyan tax litigation that under Section 56 of the TPA as well as Section 30 of the Tax Appeals Tribunal Act, the burden of proof rests on the taxpayer to prove that the tax decision, including assessment is wrong, excessive or should not have been made or should have been made differently. To determine the issue at hand the court has discern how the article 50(2)a interact with civil litigation. The question must be linked to civil litigation because tax litigation and disputes whether before the commissioner, at ADR, at the tribunal, on appeal at the High Court and Court of appeal are civil in nature and not criminal.
29. The presumption of innocence enshrined by article 50(2)a on the other hand applies only in criminal cases. That position of the law requires no elaborate explanation or discussion because as crafted, sub article 2 govern criminal proceedings while sub-article 1 govern civil disputes. Sub article 2 must be confined to criminal proceeding because its sets with the words, every accused person has the right to fair trial...
30. On the basis that the two provisions never converge so as to conflict and the court discerns no basis to allege that the statute violates the principle of the constitution on presumption of innocence.
31. But, would vesting of the incidence of the burden of proof by a statute itself be deemed a violation of the constitution? The court thinks not so. Section 56 of the Tax Procedures Act as mirrored in Section 30 the Tax Appeals Tribunal Act creates not a new law nor standard but merely reiterates the ever-present principle of the Law of Evidence that the onus rests upon he who alleges to prove the allegations<sup>1</sup>.
32. When a taxpayer resists the assessment or indeed any other tax decision by the authority of commissioner, either before the commissioner, the tribunal and the court, he is essentially asserting that the decision is wrong. He is making the allegation and thus inviting the burden to prove that allegation. The court finds that all sections 56 TPA and 30 TAPA do is to reiterate the onus and incidence of the burden in civil proceedings.
33. On the same vein section 95 TPA creates the offence of failure to pay tax on the due date. The court takes the view that, when an offence under section 95 is preferred against any individual, it won't be a favour but an obligation that article 50(2) a be respected and enforced. The court finds and holds that there is nothing unconstitutional about section 56 on its own or when read with section 95 Tax Procedure Act.
34. Out of the foregoing discussions and conclusions, the Court finds and holds that the Appeal herein is merited and is allowed. Allowed on terms that the judgment of the tribunal dismissing the appeal is set aside and, in its place, substituted with a judgment that: -
  - i. The tax point for the Capital Gains Tax for the appellant transaction was 30.12.2022
  - ii. The tax rate for capital gains tax for the appellants transaction was 5%
  - iii. The Respondent's additional assessment and Demand Notice dated 27.7.2023 for Kshs. 416,966,484 to the Appellant are hereby quashed and set aside.
  - iv. Costs of appeal before the tribunal and this Appeal is awarded to the appellant to be borne by the Respondent

<sup>1</sup> Sections 107 to 109, Evidence Act.



35. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 1<sup>ST</sup> DAY OF AUGUST, 2025.**

**PATRICK J O OTIENO**

**JUDGE**

