



**Mwaura v Commissioner of Domestic Taxes (Appeal E675 of 2023)  
[2024] KETAT 1054 (KLR) (12 July 2024) (Judgment)**

Neutral citation: [2024] KETAT 1054 (KLR)

**REPUBLIC OF KENYA  
IN THE TAX APPEAL TRIBUNAL  
APPEAL E675 OF 2023  
CA MUGA, CHAIR, BK TERER, D.K NGALA & SS OLOLCHIKE, MEMBERS  
JULY 12, 2024**

**BETWEEN**

**GEORGE KINYANJUI MWAURA ..... APPELLANT**

**AND**

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

**JUDGMENT**

1. The Appellant is a male Kenyan citizen who has been making annual returns and a geologist by profession offering geological services to a number of clientele mostly in the private sector.
2. The Respondent is a principal officer appointed under Section 13 of the [Kenya Revenue Authority Act](#), CAP 469 of Kenya's Laws Under Section 5 (1) of the Act, the Kenya Revenue Authority is an agency of the Government for the collection and receipt of all tax revenue. Further, under Section 5(2) of the Act with respect to the performance of its functions under subsection (1), the Authority is mandated to administer and enforce all provisions of the written laws as set out in Part 1 and 2 of the First Schedule to the Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.
3. The Appellant was issued with total principal additional income tax assessments of Ksh 2,443,492.00 on 3<sup>rd</sup> May 2018 based on assessment of works or supplies done for the County Government of Nakuru for the 2015 and 2016 years of income. This was after data obtained from the Integrated Financial Management Information System (hereinafter "IFMIS") indicated that the Appellant had undeclared income.
4. The Appellant objected to the assessment on 3<sup>rd</sup> December 2019 and the Respondent rejected the Appellant's objection and rendered its objection decision on 31<sup>st</sup> January 2020 confirming the assessments as issued.



5. Aggrieved by the Respondent's objection decision dated 31<sup>st</sup> January 2020, the Appellant filed his notice of appeal dated 2<sup>nd</sup> October 2023 at the Tribunal on even date but was granted Leave to file the Appeal out of time on 2<sup>nd</sup> November, 2023 when through the Tribunal orders the Appeal was deemed as having been filed on 12<sup>th</sup> October, 2023.

### **The Appeal**

6. The Appeal was premised on the following grounds as laid-out in the Memorandum of Appeal filed on 12<sup>th</sup> October 2023;
7. That the learned assessing officer erred in law and in fact in the confirmation of additional assessment against the objections of Appellant while the following facts were clear;
  - a. That the additional assessments were of Ksh 2,444,292.00 issued to the Appellant on 3<sup>rd</sup> May 2018 were indeed an error.
  - b. That the Respondent based the assessments on works done from 2015 to 2017 for the County Government of Nakuru.
  - c. That the assessment was erroneous and that the Appellant submits that he was unaware his KRA PIN was being used.
  - d. That the Appellant had no dealings with Nakuru County and that he was still a student at the time.
8. That the learned assessing officer erred in law and in fact by not considering information and explanation provided by the Appellant.
9. That the learned assessing officer erred by failing to put into further consideration documents and explanations provided confirming actual documentation for the said period provided by the Appellant.

### **Appellant's Case**

10. The Appellant stated as follows in his undated Statement of Facts filed on 12<sup>th</sup> October 2023;
11. That as a geologist by profession, he had been making annual returns as required by law. Further, that he completed his Master's Degree program at the University of Nairobi in the year 2018 having begun the program in the year 2015.
12. That he was issued with an assessment for works or supplies done for and paid for by the County Government of Nakuru yet he had no dealings whatsoever with any County Governments' in the Republic of Kenya let alone Nakuru County Government as evidenced by his attached bank statements proving that there were no transactions on his account with the said County Government.
13. The Appellant contested the Respondent's averments stating that he has never engaged in any other work apart from geological services and only became formally employed in the year 2019.

### **Appellant's Prayer**

14. The Appellant's made the following prayers to the Tribunal:
  - a. That the Appeal be allowed; and
  - b. The confirmation of the Respondent be set aside.



## The Respondent's Case

15. The Respondent replied to the Appeal through its Statement of Facts dated 14<sup>th</sup> February 2024 and filed on 25<sup>th</sup> March 2024;
16. The Respondent stated that the instant case arose from a dataset on IFMIS that indicated the Appellant had undeclared income and reiterated its position as held in the objection decision. In doing so, the Respondent cited Section 5 of the [Kenya Revenue Authority Act](#), CAP 469 of Kenya's Laws which state as follows:
- “(1) The Authority shall, under the general supervision of the Minister, be an agency of the Government for the collection and receipts of all revenue.
  - (2) In the performance of its functions under subsection (1), the Authority shall-
    - (a) administer and enforce-
      - (i) all provisions of the written laws set out in Part I of the First Schedule and for that purpose, to assess, collect and account for all revenues in accordance with those laws
      - (ii) the provisions of the written laws set out in Part II of the First Schedule relating to revenue and for that purpose to assess, collect and account for all revenues in accordance with those...”
17. The Respondent asserted that it was exercising powers conferred to it under the Act in assessing the tax payable and issuing the tax assessments more so Section 24(2) of the [Tax Procedures Act](#), CAP 469B of Kenya's Laws (hereinafter “TPA”) which empowers the Respondent to assess a taxpayer's liability using any information available.
18. The Respondent averred that it requested the Appellant to provide documents in support of his objection but the Appellant failed to adduce them which led to rejection of the objection and consequent confirmation of the assessments. The Respondent reiterated Section 23 of the TPA that the responsibility to maintain and provide all material documents in order to ascertain taxes due and payable was upon the Appellant who ought to have been paying taxes for the years under review. Further, the Respondent relied on Section 51 of the TPA which provides as follows:
- “A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if-
    - (c) all the relevant documents relating to the objection have been submitted.”
19. In buttressing this position, the Respondent cited Section 54 (1) of the [Income Tax Act](#), CAP 470 of Kenya's Laws (hereinafter “ITA”) which provides as follows:
- “(1) A person carrying on a business shall keep records of all receipts and expenses, goods purchased and sold and accounts, books, deeds, contracts and vouchers which in the opinion of the Commissioner, are adequate for the purpose of computing tax.”



## Respondent's Prayer

20. The Respondent made the following prayers to the Tribunal:
- (i) That the Tribunal upholds and affirms the Respondent's decision dated 31<sup>st</sup> January 2020; and
  - (ii) That the Tribunal dismiss the Appeal with costs.

## Parties' Written Submissions

21. The Appellant's written submissions dated 24<sup>th</sup> October 2023 were filed on 27<sup>th</sup> October 2023 wherein in stated as hereinunder:
22. The Appellant stated that the dispute arose out of the Respondent's decision to issue additional assessments against the Appellant based on the premise that the Appellant did some business with the County Government of Nakuru but failed to file returns as required by law.
23. The Appellant submitted that the basis of the assessment was a variance between the withholding VAT and sales declared in VAT return for 2015 and 2016 yet the Appellant never engaged in any business activities with the County Government of Nakuru as alleged by the Respondent because the Appellant was still a University student. Moreover, the Appellant obtained KRA PIN in the year 2009 when he was applying for university funding and only learnt about the outstanding arrears in the year 2018 via a phone call from the Respondent.
24. The Appellant submitted that even after lodging a late objection on 3<sup>rd</sup> December 2019 and seeking extension of time to defend his position against the income tax assessments raised on 3<sup>rd</sup> May 2018; the Respondent despite having been provided information went ahead to reject the same and confirm the additional assessments as raised contrary to Section 51(6) of the TPA which provides as follows:
- “The Commissioner may allow an application for extension of time to file a notice objection if-
- a. The taxpayer was prevented from lodging the notice of objection within the specified period because of an absence from Kenya, sickness or other reasonable cause; and
  - b. The taxpayer did not unreasonably delay in lodging the notice of objection.”
25. That out of panic, the Appellant entered into a payment plan with the Respondent which the Appellant felt was unfair and illegal for the Respondent to have approved additional assessments without prior communication with the Appellant who only became aware of the tax liabilities via a phone call. Additionally, the Respondent failed in its demand for taxes or in issuing the assessment as it did not engage the Appellant from the onset for provision of documents, records or other information as may be required from a taxpayer for purposes of verifying self-assessment.
26. That had the Respondent contacted the Appellant at the pre-assessment stage, all facts about his lack of involvement with the County Government of Nakuru would have been handled at that stage; but the Respondent blatantly disregarded the due process and plight of the Appellant as a taxpayer in clear violation of Article 47 of *the Constitution* of Kenya, 2010 (hereinafter “*the Constitution*”) which stipulates that all citizens have a right to fair administrative action which encompass that administrative action taken by a public body ought to be expeditious, efficient, lawful, reasonable and procedurally fair.



27. To further buttress this position, the Appellant relied on the case of Export Trading Company vs Kenya Revenue Authority (2018) eKLR that;

“This court notes that the importance of taxation and the collection of taxes for any government cannot be gainsaid. It must however be noted that the processes and procedures leading to the collection of the said taxes, must meet the relevant legal and constitutional thresholds in order to ensure the citizen’s rights have not been violated and/ or are threatened with violation.”

28. The Respondent’s written submissions were dated 23<sup>rd</sup> April 2024 and filed on 24<sup>th</sup> April 2024 wherein the Respondent submitted on two issues for determination as follows;

**(i) Whether the Respondent’s charge to tax on the Appellant was proper in law.**

29. The Respondent submitted that its decision was guided by Section 31 of the TPA which empowers the Respondent to make assessments based on information available to him and to the best of his judgment. Moreover, that the decision was communicated to the Appellant and included a statement of findings explaining why the assessments were confirmed and was thus guided in substance and effect and complied with the requirements as couched under Section 51 (8-11) of the TPA which provides that;

“(8) Where a notice of objection has been validly lodged within time, the Commissioner shall consider the obligation and decide either to allow the objection in whole or in part, or disallow it, and Commissioner’s decision shall be referred to as an “objection decision”.

(9) the Commissioner shall notify in writing the taxpayer of the objection decision and shall take all necessary steps to give effect to the decision, including, in the case of an objection to an assessment, making an amended assessment.

(10) an objection decision shall include a statement of findings on the material facts and the reasons for the decision.

(11) where the Commissioner has not made an objection decision within sixty days from the date that the taxpayer lodged a notice of the objection, the objection shall be allowed.”

30. To further firm this position, the Respondent cited the case of Commissioner for Her Majesty’s Revenue and Customs TC/2017/02292 Saima Khalid Appellant vs The Commissioners for Her Majesty’s Respondents Revenue and Customs at paragraph 29.

31. The Respondent stated that the Appellant failed to provide documents that showed the assessment was either erroneous or invalid which left the Respondent no option but to exercise best judgment and reject the Appellant’s objection. Additionally, the Respondent submitted that the assessment was hinged on the letter of the law and that it was the Appellant who did not adduce evidence to support its assertions against the assessment at the objection stage. In arriving at its decision, the Respondent reiterated the Tribunal’s holding in Digital Box Limited vs Commissioner of Domestic Taxes [TAT No. 115 of 2017] which was as follows:

“...the use of the word ‘judgment’ makes it clear that the Commissioners are required to exercise their powers in such a way that they make a value judgment on the material



which is before them. Secondly, clearly there must be some material which is before the commissioners on which they can base their judgment. If there is no material at all it would be impossible to form a judgment as to what tax is due...what the words ‘best of their judgment’ envisage, in my view, is that the commissioners will fairly consider all material placed before them and on that material, come to a decision which is one which is reasonable and amount of tax which is due. As long as there is some material on which the commissioner’s act they are not required to carry out investigations which may or may not result in further material being placed before them.”

**(ii) Whether the Appellant discharged its burden of proving that the Respondent’s decision was erroneous.**

32. The Respondent submitted that contrary to Appellant’s assertions, it requested severally to be furnished with relevant documents and followed due process and reviewed documents availed by the Appellant who failed to prove why the Respondent’s decision was in any way inconsistent based on extraneous factors, excessive or incorrect through provision of documents. The Respondent relied on Section 24(2) of the TPA which provides that the Respondent is not bound by the returns filed by the Appellant or information provided by or on behalf of the taxpayer in assessing a taxpayer’s tax liability and is allowed to use any information available as was in the case herein.
33. The Respondent further submitted that Section 23, Section 51(3)(c) and Section 59 of the TPA when read together mandate the Appellant to maintain and produce documents required under any law which is deemed necessary in determination of a taxpayer’s tax liability.
34. Moreover, the Respondent stated that Section 56(1) of the TPA placed the onus of proof in tax objections on the Appellant who in the instant case failed to avail documentary evidence that would have guided the Respondent in arriving at a different objection decision. The Respondent buttressed this position by citing the Tribunal’s decision in the case of Ushindi Exporters Limited vs Commissioner of Investigation and Enforcement [TAT No. 7 of 2015] which was as follows:

“The burden of proving that the tax assessment is excessive or should have been made differently never shifts to the Respondent and is placed squarely on the Appellant as Section 30 (a) and (b) of the *Tax Appeals Tribunal Act* states.

- a. Where an appeal related 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

By purporting to shift the burden of proving that the tax assessment against it was incorrect or should have been different the Appellant failed in discharging the burden, placed upon it by law.”

35. In bolstering this position further, the Respondent relied on the case of Tumaini Distributors Company(k) Limited vs Commissioner of Domestic Taxes [2020] eKLR where the High Court in determining the issue as to whether the Commissioner followed the correct procedure or correctly assessed a company’s tax liability found out that the Appellant had failed to provide the relevant documents despite several requests by the Commissioner. The High Court upheld the decision of the Tribunal, holding that since the Appellant had not provided all the documents, the Commissioner was right in reaching the assessment based on the material available.



## Issues for Determination

36. The Tribunal having carefully considered the parties' pleadings, documentation and submissions brought before it notes that two issues call for its determination as follows:
- a. Whether the Appellant discharged his burden of proof.
  - b. Whether Respondent's objection decision dated 31<sup>st</sup> January, 2020 was justified.

## Analysis and Determination

37. The Tribunal having established two issues for its determination proceeds to analyze them as hereinunder:

### (a) Whether the Appellant discharged his burden of proof.

38. The Tribunal notes that the genesis of the instant dispute arose when the Respondent issued the Appellant with additional income tax assessments of Ksh 2,443,492.00 on 3<sup>rd</sup> May 2018 allegedly arising from works or supplies carried out for the County Government of Nakuru for the 2015 and 2016 years of income. The Appellant offered his rebuttals late on 3<sup>rd</sup> December 2019. The Tribunal notes that Section 51(2) of the TPA provides as follows:

“A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.”

39. The Tribunal notes the Appellant's contention that he was ambushed with assessments that he only became aware of vide a phone call from the Respondent sometime in December of 2019. Further, that out of panic he rushed into a payment plan with the Respondent which he felt was unfair and illegal.
40. The Tribunal notes that the Appellant denied having ever had any business dealings with any County Government in the Republic of Kenya let alone the County Government of Nakuru and provided his Personal Identification Number (PIN) Certificate and bank statements as proof that he never engaged in any other business save for his geological services. The Tribunal however observes that the Appellant did not clearly state why he failed to file his returns despite being a registered taxpayer and notwithstanding the fact that he was a student. The Tribunal notes the following provisions of Section 52(a) of the ITA:

“(a) every individual chargeable [emphasis ours] to tax under this Act shall for any year of income commencing with the year of income 1992, furnish to the Commissioner a return of income, including a self-assessment of his tax from all sources of income, not later than the last day of the sixth month following the end of his year of income...”

41. The Tribunal further notes that the Appellant did not show any proof that he had safe guarded his PIN from unwarranted access in view of the fact that a password is required to connect to or access the I-TAX portal in respect of any PIN for any activity on the said portal. Moreover, the Appellant did not show any steps he had undertaken to report the irregular and illegal use of his personal PIN for the transactions with the County Government of Nakuru.
42. The Tribunal is of the view that if the Appellant suspected, after receiving the phone call, that there could have been suspicious activity on his i-Tax portal, he ought to have adduced evidence that he had reported the matter to the relevant authorities. The Tribunal is of the further view that if for example,



the Appellant had reported the matter to the National Police Service, it would have been expected that he could have produced an Occurrence Book (OB) number as evidence of making such a report.

43. The Tribunal also notes that in the alternative and in view of the fact that a PIN is protected data. In an instance where the Appellant suspected that some unknown person or persons were granted access to the his i-Tax portal and PIN without his knowledge, he ought to have produced the report he had made for to the Office of the Data Protection Commissioner (ODPC) as evidence that he had reported such a breach. The Appellant did not adduce as evidence, any of these reports.
44. The Tribunal associates with the Court decision in the case of Alfred Kioko Muteti vs. Timothy Miheso & Another [2015] eKLR that a party can only discharge its burden of proof upon adducing evidence. Merely making pleadings is not enough.
45. The Tribunal finds and holds that the Respondent was executing its duties when it assessed the Appellant on whom the law under Section 56(1) of the TPA and Section 30 of *Tax Appeals Tribunal Act*, CAP 469A (hereinafter “TATA”) bequeaths the odious burden of proving the incorrectness, excessiveness or unfairness of tax assessments.
46. It is the Tribunal’s view that the duty of the Respondent is sacrosanct as it is mandated to administer and enforce all provisions of the written laws as set out in Part 1 and 2 of the First Schedule to the *Kenya Revenue Authority Act*, CAP 469 of Kenya’s Laws (hereinafter “KRA Act”) for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws pursuant to the following provisions of Section 5 (1) and (2) of the KRA Act:

“5. Functions of the Authority

- (1) The Authority shall, under the general supervision of the Minister, be an agency of the Government for the collection and receipt of all revenue.
- (2) In the performance of its functions under subsection (1), the Authority shall—
  - (a) administer and enforce—
    - (i) all provisions of the written laws set out in Part I of the First Schedule and for that purpose, to assess, collect and account for all revenues in accordance with those laws;
    - (ii) the provisions of the written laws set out in Part II of the First Schedule relating to revenue and for that purpose to assess, collect and account for all revenues in accordance with those laws;
  - (b) to advise the Government on all matters relating to the administration of, and the collection of revenue under the written laws or the specified provisions of the written laws set out in the First Schedule; and



(c) to perform such other functions in relation to revenue as the Minister may direct.....”

47. The Tribunal’s finding is that that the Appellant failed in his duty to discharge his burden of proof.

**(b) Whether Respondent’s objection decision dated 31<sup>st</sup> January, 2020 was justified.**

48. The Tribunal having found that the Appellant failed in his duty of discharging the burden of proof finds that in the circumstances, the Respondent’s objection decision dated 31<sup>st</sup> January, 2020 was justified.

**Final Decision**

49. The upshot of the foregoing is that the Appeal herein lacks merit and the Tribunal accordingly proceeds to make the following Orders:

- a. The Appeal be and is hereby dismissed.
- b. The Respondent’s objection decision dated 31<sup>st</sup> January 2020 be and is hereby upheld.
- c. Each party to bear its own costs.

50. It is so ordered.

**DATED AND DELIVERED AT NAIROBI ON THIS 12<sup>TH</sup> DAY OF JULY, 2024.**

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**CHRISTINE A. MUGA - CHAIRPERSON**

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**BONIFACE K. TERER - MEMBER**

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**DELILAH K. NGALA - MEMBER**

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**OLOLCHIKE S. SPENCER - MEMBER**

