

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO.191 OF 2021

JOSE WAGWE KARURI..... APPELLANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a registered taxpayer and a director and shareholder at Masters Enterprises Limited. Her principal business is in real estate.
2. The Respondent is a principal officer of Kenya Revenue Authority appointed under and in accordance with Section 13 of the Kenya Revenue Authority Act, and is charged with the responsibility of among others, assessment, collection, accounting and the general administration of tax revenue on behalf of the Government of Kenya.
3. The Respondent commenced review of the Appellant's tax returns and vide its notice dated 18th May, 2020 informed the Appellant that during the period January 2014 to December 2019, she owned rental buildings in Jericho and Parklands but filed nil income tax returns in 2017 and 2018 and did not file returns from 2014 to 2016. The Appellant was asked to provide bank statements and rented schedules for the period January 2014 to December 2019 by 29th May, 2020.
4. Vide a letter dated 20th July, 2020 the Respondent reminded the Appellant that she had not provided the records and information on the rental business as required. The said letter gave the breakdown of the undeclared rental

income from the year 2014 to 2019 totaling Kshs. 22,577,272/= and asked for payment not later than seven (7) days from the date of the letter. The assessment was subsequently confirmed vide the Respondent's letter dated 18th August, 2020.

5. The Respondent then proceeded to issue three Assessment Orders KRA202018930540, KRA202018930443 and KRA202018931131, on 16th October 2020 totaling to Kshs 8,590,782.85/=.
6. The Appellant issued a notice of objection vide her letter dated 26th October, 2020 denying owning the said properties.
7. An exchange of emails took place between 5th December, 2020 and 5th February, 2021 and vide a letter dated 10th March, 2021 the Respondent wrote to the Appellant informing her that her objection application had been rejected and that the principle tax amount of Kshs 6,763,639/= together with the resultant penalty and interest remained due and payable.
8. Being aggrieved by the Respondent's letter, the Appellant issued a notice of intention to appeal dated 9th April, 2021 and proceeded to file her Memorandum of Appeal and Statement of Facts dated 19th April, 2021 with the Tribunal on 23rd April, 2021.

THE APPEAL

9. The Appeal is premised on the following grounds;
 - a) **That** the Respondent erred in law and fact by assessing taxes and demanding the production of documents in contravention to Section 23(I) of the Tax Procedures Act No.29 of 2015 (TPA) hereinafter called the "Act".

- b) **That** the Respondent erred in fact by estimating ridiculous rents to the houses without due regards to the locations and general rents paid in such areas.
- c) **That** the Respondent erred in fact by considering the electricity meters application as ownership of the house thus even including rural homes for purposes of imposing tax.
- d) **That** the Respondent confirmed the notice of assessment without due regard to all records, explanations and information provided by the Appellant thereby failing to appreciate all issues presented by the Appellant before confirming the assessment.
- e) **That** the Respondent erred in law and fact by failing to put into consideration the explanation that the personal pins were used for electricity connections to houses owned by Master Enterprises Limited, a company where Mrs Karuri is a co-director and that collections of rent has since been taxed on Master hence subjecting the taxpayer to a double taxation.
- f) **That** the amounts confirmed by the Respondent of Kshs. 22,577,262/= in respect to income tax for the period January 2014 to 2019 is therefore wrong in law and fact and should be annulled.

10. The Appellant prays that this appeal is allowed and the decision by the Respondent is annulled or varied in such manner as is just and reasonable.

THE RESPONSE

11. In response to the Appellant's grounds of Appeal, the Respondent states:-

- a) **That** the appellant failed to file the 2014 return and therefore a default assessment was raised and the taxes demanded. The rest of the periods are within time and not in contravention of Section 23(1) (c) of the TPA.
- b) **That** the Appellant's properties that were assessed were in Buruburu and Ruaka in Nairobi Kenya. The number of units in Buruburu are 40 and assessed at monthly rent of Kshs 15,000/= per unit, while the Ruaka property has only one unit at Kshs 50,000/= monthly. The Respondent submits that these are the rates of rental properties in this area as a general survey was conducted.
- c) **That** data provided by Kenya Power & Lighting Company (KPLC) indicated that the Appellant was the one who had applied for the meters for these properties and from her profile in the Respondent's system, her income is from rental properties, so it goes that these were the properties she was earning income from.
- d) **That** the Appellant never provided any information or records as in the objection letter she denied any knowledge of the said properties even after requesting for the documents severally.
- e) Further, that the Appellant denied any knowledge of the properties and failed to disclose that the houses were registered under Masters Enterprises, a company that she is a director and therefore the income was assessed on the Appellant and not the company Masters Enterprises.
- f) **That** the assessments were confirmed as the Appellant at the time of objecting failed to demonstrate that the income had been declared by Masters Enterprises. Therefore, the tax computed of Kshs 13,565,203/= together with the resultant interest and penalties totaling to Kshs 22,577,263 =15 was due and payable.

12. The Respondent therefore prays that: -

- a) The Appeal be dismissed for lack of merit
- b) The Respondent's Assessment and Objection Decision (Invalidation Notice dated 21st March, 2021) be upheld.
- c) The costs of the Appeal be awarded to the Respondent.

SUBMISSIONS OF THE PARTIES

13. The Appellant submitted that the decision of the Respondent is unfounded in law and ought to be annulled. She therefore raises two issues for determination.

- a) **Whether the Respondent erred in law and fact in raising additional income tax assessment on the Appellant for the years of income 2014 to 2019.**

14. The Appellant submits that she did not own any property in Ruaka and Buruburu and as such the assessment is fraudulent and with malice, further that the Respondent did not adduce any evidence to support its claim.

15. The Appellant cited *TAT No.58 and 126 of 2019, Shreeji Enterprises limited vs Commissioner of Investigation and Enforcement* where the Tribunal observed;

“Although the current law provides that the Appellant to prove that the tax was paid or that the Respondent's assessment was wrong.....in demanding the production of documents which are not prescribed by legislation the tax authority should be guided by reasonableness, the nature and circumstances of the trader otherwise it would, as it occasionally does, demand information which the trader cannot produce because he does not have”

16. The Appellant averred further that since she owns no building in Ruaka and Buruburu, she had no document to give hence the onus must revert back to the Respondent.

17. The Appellant submitted that she had been denied her fundamental rights as donated under Article 47(1)(2) of the Constitution and cited the case in ***Republic vs National Land Commission & 2 other Ex-parte Archdiocese of Nairobi Kenya Registered Trustee (St Joseph Mukasa Catholic Church Kahawa West (2018) eKLR*** where Justice G.V Odunga observed that:-

“In my opinion, the Respondents action did not meet the tenets of a fair administrative action. This is not to say the Applicants action was lawful or valid. That is not a matter for determination by this court. However, the process of arriving at the Respondent’s decision was flawed right from inception....”

b) Whether the documentation provided by the Appellant were sufficient and in conformity with requirements of Section 51(3) of the Tax Procedures Act, 2015.

18. The Appellant submits that the Respondent erred in finding that she provided documentation. She further stated that there were no documents to be provided as proving ownership of what she did not have was beyond her jurisdiction and impossible.

19. The Respondent framed three issues for determination:

a) Whether there is a proper appeal before the Tribunal

20. The Respondent submits that it did not issue an objection decision hence the Appellant’s Appeal is premature and the Tribunal lacks jurisdiction to hear and determine it. Further that the Appellant objected to the Respondent’s

assessment vide her letter dated 26th October, 2020 but did not attach supporting documents, as such the objection as lodged was invalid pursuant to Section 51(3) of the Tax Procedures Act.

21. The Respondent submits further that it granted the Appellant fair administrative action via several email correspondence asking her to avail supporting documents in vain, a fact the Appellant has not disputed.
22. The Respondent avers that the Appellant had a recourse to appeal to the Respondent once her objection was invalidated for failure to attach supporting documents which she did not do hence the appeal before the Tribunal is prematurely lodged and the same should be dismissed with costs to the Respondent.

b) Whether the Respondent is proper in law in issuing the Appellant with the income tax assessment.

23. The Respondent submits that it issued notices to the Appellant on 18th May, 2020 and 20th July, 2020 informing the Appellant about its findings and asking her to correctly declare her returns and pay the taxes due. The Appellant was also asked to provide records or information on rental business which notice she failed to honour leaving the Respondent with no option other than issue an income tax assessment vide its letter dated 16th October, 2020.
24. The Respondent submits that while the Appellant denied owning properties in Buruburu and Ruaka, its investigations and data provided by Kenya Power and Lighting Company indicated that the Appellant was the one who had applied for the meters to these properties, and from her profile in the Respondents system, her income is from rental of the said properties.

25. The Respondent avers that having established that the meters were applied for by the Appellant, it was proper therefore to draw inference that the properties are owned by the Appellant. It was upon the Appellant at this point to avail documents indicating her interests in those properties.
26. The Respondent submits further that until such evidence is availed to rebut the decision, any reasonable person will come to the conclusion that the properties are owned by the Appellant. Therefore, the Respondent acted appropriately in issuing the Appellant with the assessed income tax.
- c) *To whom should the costs be awarded.*
27. The Respondent submits that costs follow the event and that it is the Appellant who has initiated the event. Having proved that the appeal lacks merit the Respondent should be granted the costs.

ISSUES FOR DETERMINATION

28. Having considered the pleadings and documents produced before it, the Tribunal is of the view that the following are the issues for its determination.
- a) *Whether the Appeal is properly before the Tribunal.*
- b) *Whether the Respondents income tax assessment for the year of income 2017 to 2019 is proper in law.*
- c) *Which orders should be made in the circumstances?*

ANALYSIS AND FINDINGS

29. It is to these issues that the Tribunal will turn to analyze.
- a) *Whether the Appeal is properly before the Tribunal.*
30. The Respondent has submitted that the Appellant brought this Appeal prematurely to the Tribunal as it had not issued any objection decision. The

Tribunal notes that the Respondent raised an assessment on i-Tax on 16th October, 2020 which the Appellant objected to on 26th October, 2020. This assessment was for the years of income 2017, 2018 and 2019. There followed some email communication from the Respondent on 5th December, 2020 and 5th February 2021 that culminated in the Respondent's letter dated 10th March, 2021 demanding payment of principal tax of Kshs 6,763,639.00 together with the resultant penalty and interest.

31. The Tribunal notes further that at Paragraph 8 of its submission, the Respondent has stated that it did not issue any objection decision which is appealable, hence terming this Appeal as premature. However, at paragraph 22(b) of its Statements of Facts the Respondent prays that the Tribunal ***“upholds the Respondent’s Assessment and Objection Decision (Invalidation Notice dated 21st March, 2021).”*** The Tribunal notes that no such letter dated 21st March, 2021 has been adduced by the Respondent and the Tribunal will only make reference to the letter dated 10th March, 2021. It is evident that the Respondent is contradicting itself by acknowledging that on one hand, the letter dated 10th March, 2021 is an Objection Decision while on the other stating that it never issued one.
32. Indeed, looking at the communication from the Respondent there doesn't appear to be any one document that can be pointed out to meet all the tenets of an objection decision.
33. The Respondent has urged the Tribunal to dismiss the Appellant's Appeal on grounds that the same is not proper for want of an objection decision. The Respondent did not plead this issue in its Statement of Facts and introduced the same in its submissions. If the Tribunal was to stand aside and watch this happen, it will doubtless allow the Respondent steal a march on the Appellant. The Respondent ought to have raised this very significant issue in

good time and put the Appellant on notice for a response. The law frowns at surprises.

34. For this reason and the other matters to be considered hereafter, it is not appropriate to decide this issue in the Respondent's favour.

c) Whether the Respondent's income tax Assessment for the year 2017 to 2019 is proper in law.

35. The Appellant argued that the Respondent erred in raising the tax for the reason that she did not own the properties in Buruburu and Ruaka. The Respondent on the other hand argued that the name used in registering the electricity meters with KPLC was the Appellant's and that the burden of proof lay with the Appellant to provide the relevant documents to prove her case.
36. The Appellant contended at Paragraph 5 of its Memorandum of Appeal that the Appellant's PIN registration was used for electricity connections to houses owned by Master Enterprises Limited, a company where the Appellant is a co-director and further that rent collection has since been tasked on Master Enterprises hence subjecting her to double taxation.
37. Both the Appellant and the Respondent have failed in assisting the Tribunal arrive at a just determination in this tax dispute.
38. When the Appellant denied that she owned properties in Ruaka and Buruburu, it was necessary for the Respondent to justify the Notice of Assessment by providing copies of the documents and material relied upon in arriving at the tax demand. It would have been useful if the Respondent provided copies of land ownership documents alongside the data provided by KPLC. The KPLC documents would assist a great deal if copies of old and

current electricity bills, bank statements or statements from Mpesa, Airtel Money or any other digital based payment platforms were provided.

39. Again, the Respondent at Paragraph 4 of the Statement of Facts averred that the Appellant owned rental buildings in Jericho and Parklands. The Tribunal observes that no document was submitted by any of the parties to support the demand. It would have again helped if the Respondent had availed communication relating to the demand on rental income from these properties in Jericho and Parklands to enable the Tribunal consider the same.
40. The Appellant similarly failed in providing documentation relating to rental income she alleged was declared by Masters Enterprises where she is a co-director.
41. In view of the apparent confusion with regard to the ownership of the properties upon which the tax assessment was being made coupled with lack of sufficient documentation filed by the parties to enable the Tribunal fairly determine this matter, it would not be just for the Respondent's tax Assessment for 2017 to 2019 to be allowed.

C) Which orders should be made in the circumstances?

42. In view of the findings above, it is necessary that the Tribunal makes orders that meet the ends of justice for both parties. It will be unfair to let the Appellant pay taxes whose basis is unclear. On the other hand, it will be unjust to stop the Respondent in carrying out its legal mandate of levying taxes where such taxes are due and payable.
43. For these reasons, the Tribunal finds that it is appropriate that the Respondent's tax assessment against the Appellant be set aside and that the

Respondent proceeds to conduct a fresh tax assessment backed up with the proper materials with reference to the subject properties.

FINAL DECISION

44. The Tribunal therefore makes the following final orders: -

- a) The Appeal be and is hereby allowed in part.
- b) The Respondent's Confirmation of Assessment dated 10th March, 2021 be and is hereby set aside.
- c) The Respondent be and is hereby allowed to conduct a fresh assessment of any rental income due from the Appellant for the years of income 2017 to 2019.
- d) Each party to bear its costs.

45. It is so ordered.

DATED and DELIVERED at NAIROBI this 11th day of March, 2022.

**PATRICK LUTTA
CHAIRPERSON**

**DELILAH K. NGALA
MEMBER**

**MWAI MBUTHIA
MEMBER**

**ELISHAH NJERU
MEMBER**

**TIMOTHY K. CHESIRE
MEMBER**

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO.192 OF 2021

STEPHENSON KIRURI MBARI..... APPELLANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a Kenyan entrepreneur and a registered tax payer dealing in real estate with residential and commercial houses that earn him rental income. He is also a director and shareholder of Master Enterprises Ltd.
2. The Respondent is a principal officer appointed under and in accordance with Section 13 of the Kenya Revenue Authority Act, and the Authority is charged with the responsibility of among others, assessment, collection, accounting and the general administration of tax revenue on behalf of the Government of Kenya.
3. The Respondent issued a demand notice to the Appellant dated 18th May, 2020 claiming that the Appellant owned rental buildings in Umoja 1, Huruma and Ngei estates in Nairobi, but filed nil income tax returns in 2016, 2017 and 2018, and did not file returns for 2014 and 2015 years of income. The Appellant was given up to 29th May, 2020 to provide bank statements and rent schedules for the period January 2014 to December 2019.
4. Vide a letter dated 20th July, 2020 the Respondent referred to the earlier notice of 18th May, 2020 and issued another demand for the unpaid tax of

Kshs 31,415,550/= for the years of income 2014 to 2019. This was followed up with a notice of assessment of income dated 18th August, 2020 demanding the unpaid income tax which was made up of the following:

Tax Head	principal	Penalty	interest	Total
Income tax	18,878,803	943,940	11,592,807	31,415,550

5. The Appellant issued its notice of objection vide his letter dated 26th October, 2020. In the said letter, the Appellant through his agent denied owning properties in Jericho, Parklands, Buruburu and Ruaka. He made reference to the Respondent's letters dated 18th May, 2020 and 20th July, 2020 which had specified different properties in Umoja1, Ngei, Huruma and Athi River.
6. The Respondent issued its objection decision dated 17th December, 2020 confirming tax demand of Kshs 31,415,550.00.
7. Being aggrieved by the Respondent's decision, the Appellant filed its Notice of Appeal dated 9th April, 2021, and subsequently proceeded to file its Memorandum of Appeal and Statement of Facts dated 19th April, 2021.

THE APPEAL

8. The Appellant set the grounds of appeal in its Memorandum of Appeal dated 19th April, 2021 and stated as follows:
 - a) **That** the Respondent erred in law and fact by assessing taxes and demanding the production of documents in contravention to Section 23(l) (c) of the Tax Procedures Act (TPA) No.29 of 2015 herein after called the "Act".

- b) **That** the Respondent erred in fact by estimating ridiculous rents to the houses without due regard to the locations and general rents paid in such areas.
 - c) **That** the Respondent erred in fact by considering the electricity meters application as ownership of the house thus including rural homes for purposes of imposing tax.
 - d) **That** the Respondent confirmed the notice of assessment without due regard to all records, explanations and information provided by the Appellant thereby failing to appreciate all issues presented by the Appellant before confirming the assessment.
 - e) **That** the Respondent erred in law and fact by failing to put into consideration the explanation that the personal pins were used for electricity connections to houses owned by Master Enterprises Limited a company where Mr. Mbari is a co-director and that collections of rent has since been taxed on Master hence subjecting the taxpayer to a double taxation.
 - f) That the amounts confirmed by the Respondent of Kshs 31,415,550 in respect to income tax for the period January 2014 to 2019 is therefore wrong in law and fact and should be annulled.
9. The Appellant prays that the appeal is allowed and that the decision by the Respondent is annulled or varied in such manner as is just and reasonable.

THE RESPONSE

10. In response to the grounds of appeal, the Respondent stated as follows:
- a) That the Appellant was issued with a notice of assessment dated 18th August, 2020 for income tax for the period 2014 to 2019 for Kshs

31,415,550/=. However he never objected to the notice until 27th October, 2020 pointing out the following:-

- i) That taxes for the properties in question had been accounted for under a company named Masters Enterprise Ltd without adducing any evidence to that effect.
 - ii) That one of the properties is a family residence.
- b) The Respondent avers that in its Objection Decision dated 17th December 2020, it notified the Appellant that :
- i) The assessment was based on several rental properties where taxes on rental income had accrued but not accounted for.
 - ii) Respondent listed the location of the rental houses as Umoja 1, Huruma, Ngei and Athi River. However, the Appellant never adduced any evidence to show that either taxes had been accounted for or the property was for family residence.
 - iii) The Appellant was requested to validate its Objection by providing evidence but he never responded to the same.
- c) The Respondent avers that its Objection Decision was issued on 17th December, 2020 and therefore the Notice of Appeal was required to be filed within thirty days from the date of the Objection Decision in accordance with Section 13(I) (b) of TPA. The Appellant's Notice of Appeal was dated 9th April, 2021, more than three months from the date of Objection.

- d) The Respondent avers that in the absence of any tenancy agreements it was incumbent upon the Respondent to assess taxes to the best of its judgement in accordance with Section 31 of the TPA.
- e) The Respondent avers that the Appellant is required to keep proper records as required under Section 23(l)(b) of TPA, which provides:

23

(l) "A person shall –

(b) Maintain any document required under a tax law so as to enable the person's tax liability to be readily ascertained".

- f) The Respondent further avers that under Section 56(l) of TPA, the burden shall be on the Appellant to prove that a tax decision is incorrect, which the Appellant had failed to discharge.

11. The Respondent therefore prays that :-

- i) The Objection Decision dated 17th December, 2020 be upheld
- ii) This Appeal lacks merit and the same be dismissed with costs.

SUBMISSIONS OF THE PARTIES

12. In his submissions filed on 25th November, 2021, the Appellant came up with two issues for determination.

a) Whether the Respondent erred in law and fact in raising additional income tax assessment on the Appellant for the years of income 2014 to 2019.

13. The Appellant denied owning the properties in Umoja 1, Huruma, Ngei and Athi River and termed the assessment as fraudulent and malicious as the Respondent was not able to adduce any evidence to confirm ownership. The

Appellant relied on Section 3(1) and 3(2)(i) of income tax Act which provides as follows:

3(1)

“Subject to, and in accordance with this Act, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non –resident, which accrued or was derived from Kenya”

3(2) (i)

***“Subject to this Act, income upon which tax is chargeable under this Act is income in respect of gains or profit from –
(i) any business for whatever period of time carried on... ”***

14. The Appellant submitted further that since he owned no building as claimed by the Respondent, he had no document to adduce hence the onus must revert to the Respondent. To buttress his assertion, the Appellant cited the case of ***Shreeji Enterprises Limited vs Commissioner of Investigations and Enforcement, TAT No.58 and 126 of 2019*** in which the Tribunal observed as follows:

“Although the current law provides that the onus of proof lies with the Appellant to prove that tax was paid or that the Respondent’s assessment was wrong--- in demanding the production of documentation which are not prescribed by legislation, the tax authority should be guided by reasonableness, the nature and circumstances of the trader otherwise it would, as it occasionally does, demand information which the trader cannot produce because he does not have...”

15. The Appellant further submitted that his fundamental rights as enshrined in the Constitution and the TPA were fundamentally denied. He cited Article 47(1)(2) of the Constitution which provides as follows:

“(1) every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administration action, the person has the right to be given written reasons for the action”

16. The Appellant submitted that the Respondent’s assessment was contra statue and ought to be quashed. He cited the following three cases to buttress his argument:-

i) In the ***Republic vs National Lands Commission 2 others Ex-parte Archdiocese of Nairobi Kenya Registered Trustees (St Joseph Mukaga Catholic Church Kahawa West(2018) eKLR*** where Justice G.V Odunga observed that

“.....In my opinion, the Respondent’s action did not meet tenets of a fair administrative action. This is not to say that the Applicant’s action was lawful or valid. This is not a matter for determination by this court. However the process of arriving at the Respondent’s decision was flawed right from inception...”

ii) ***Republic vs Kenya Revenue Authority Ex-parte Yaya Towers Limited (2008) eKLR***, it was observed that :-

“Every public body owes its power to the Act donating the same and it is also subject to the Constitution. If a public body

acts outside or exceeds the powers donated to it, it will be acting without jurisdiction”

- iii) *Mungangia Tea Factory Company Ltd & others vs Commissioner of Domestic Taxes (2020) eKLR*, the judges observed as follows; -

“However the collection of these taxes must appear to be punitive, arbitrary, abrupt, discriminatory, or unfair because if the taxpayer closes shop because of the perceived irregularity, arbitrariness or frustrations there will be no tax to collect.”

17. The Appellant further submitted that the law requires the Appellant to keep records for five years as provided for under Section 23(1) of TPA and that it is against the law to demand production of supporting documents for the periods out of the jurisdiction as provided under the tax law.

b) Whether the documents provided by the Appellant were sufficient and in conformity with requirements of Section 51(3) of TPA.

18. The Appellant avers that by the Respondent’s requiring him to prove ownership of what he did not own is beyond his jurisdiction and impossible hence there were no documents to be provided. The Appellant relied on the case of *Alfred Kioko Muteti vs Timothy Miheso & another (2015) eKLR* where it was held that a party can only discharge its burden upon adducing evidence. Merely making pleadings is not enough. In reaching its findings, the court stated that:-

“Thus, the burden of proof lies on the party who would fail if no evidence at all were given by either party.....

Pleadings are not evidence and it is not enough to plead particulars of negligence and make no attempt in one's testimony in court to demonstrate by way of evidence how the accident occurred and how the 1st defendant was to blame for the said accident. It is trite law that he who alleges must prove and that the burden does not shift to the adverse party even if the case proceeds by way of formal proof and or undefended".

19. The Respondent on its part established two issues for determination.
a) Whether the Notice of Appeal was filed contrary to Section 13(1)(b) of the Tax Appeals Tribunal Act, 2013.

20. The Respondent reiterated that it had issued its Objection Decision on 17th December, 2020, whereas the Appellant filed his Notice of Appeal on 9th April, 2021.

21. The Respondent relied on Sections 52(I) of TPA and 13(I) (b) of the Tax Appeals Tribunal Act to buttress its argument. These Sections provide;
Section 52 of TPA

"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, 2013(No.40 of 2013)"

Section 13 of TAT - Procedure for Appeal

(i) A notice of appeal to the Tribunal shall.....

(b) Be submitted to the Tribunal within thirty days upon receipt of the decision of the Commissioner."

22. The Respondent therefore submits that the aforementioned Section is couched in mandatory terms and that failure by the Appellant to file his Notice of Appeal within the stipulated timelines is fatal and therefore renders the appeal void.

b) Whether the Appellant produced evidence in support of its Objection as stipulated in Section 51(3) of the Tax Procedures Act, 2015.

23. The Respondent avers that it relied on Section 31(c) of TPA to issue the assessment. The Section provides as follows:-

“Subject to this section, the Commissioner may amend an assessment (referred to in this section as the “original assessment”) by making alterations or additions, from the available information and to the best of the Commissioners’ judgement, to the original assessment of a taxpayer for a reporting period to ensure that –

(c) In any other case, the taxpayer is liable for the correct amount of tax payable in respect to which the original assessment relates”.

24. The Respondent also justified the assessment by citing Section 50(i)(a) of TPA which provides as thus:-

“Except in proceedings under this Part-

a) The production of a notice of an assessment or a document under the hand of the Commissioner shall be conclusive evidence of the making of the assessment and that the amount and particulars of the assessment are correct”.

25. The Respondent submitted further and averred that the Appellant had failed to provide evidence to support its objection. He had averred that the:-
- i) Tax had been accounted for in the accounts of another company;
 - ii) Some of the properties are used as residential premises for his family;
 - iii) Rents for the premises were incorrect;
 - iv) He had provided list of rental premises that are excluded for purposes of imposing tax.

26. In seeking to provide similarities to the Appellant's conduct the Respondent made references to *TAT No.394 of 2018 Nextgen Office Suites Ltd vs Commissioner of Domestic Taxes*, where the Tribunal held that:-

“The Appellant’s Objection notice has violated this last requirement in order to fully meet the validity threshold of the notice of objection. However, the Commissioner was accommodating enough to remind the Appellant to provide the several documents in order to make a conclusive determination on the notice of objection. The Appellant’s failure in submitting these documents in a timely manner speaks to callous disregard for the requirements of the Tax Procedures Act both in terms of the validity requirements of Objection notices and the timelines set therein”.

27. The Respondent further cited the holding in *TAT No. 618 of 2020: Ahmed Salah Mohammed vs Commissioner of Domestic Taxes*. In particular paragraphs 21,26 and 30 where it was held:-

“21. The Tribunal has carefully read the Appellant’s Notice of Objection and observes that nowhere in the said objection had the Appellant alluded to providing evidence to support his case.”

26. The Tribunal is of the view that the Appellant has not adduced any evidence to support his contention. A mere averment is not sufficient to prove any claim”.

27. It is the Tribunal’s view that the Appellant had failed to demonstrate the desire to prosecute his case by availing adequate documentary evidence to support his case.....”.

28. The Respondent further relied on Section 30 of the Tax Appeals Tribunal Act to shift the burden of proof to the Appellant. The section provides that:-

“In a proceedings 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 have been made differently.”

ISSUES FOR DETERMINATION

29. Considering that the Respondent has raised a preliminary objection on the validity of the Appeal, the Tribunal has framed a single issue around it whose determination is capable of disposing of the entire appeal as follows: -

a) Whether the Notice of Appeal was filed within the statutory timelines.

ANALYSIS AND FINDINGS

Whether the Notice of Appeal was filed within the statutory timelines.

30. The Respondent submitted that this Appeal should be rendered void for the reasons that the Appellant filed its Notice of Appeal out of time. From the documentation filed, the Tribunal takes note that the Respondent's Objection Decision was issued on 17th December, 2020 while the Appellant's Notice of Appeal was filed on 9th April 2021.

31. The Tax Appeals Tribunal Act, 2013 at Section 13(1)(a)(b) prescribes as follows:

"13(1) A notice of appeal to the Tribunal shall-

a) be in writing

b) be submitted to the Tribunal within thirty days upon receipt of the decision of the Commissioner".

32. This Section is couched in mandatory terms and does not offer room for deviation. The Tribunal notes that the period between the Respondent's Objection Decision on 17th December, 2020 and the Appellant's Notice of Appeal on 9th April, 2021 is more than three months therefore filed out of time.

33. In the case of *Commissioner of Domestic Taxes vs Local Productions (Kenya) Ltd [2020] eKLR*, the High Court held that:-

"...The time, manner and process of filing an appeal is governed by statute, as it is trite law that a right of appeal is a creation of statute and its exercise is governed by statutory strictures governing the exercise of that right..."

34. In view of the foregoing, this Tribunal makes a finding that the Notice of Appeal was filed out of time thereby rendering the Appeal invalid *ab initio*.

The Appellant ought to have applied for extension of time for filing of the Notice of Appeal which would have had the effect of validating the same.

35. The Tribunal is left with no alternative but strike out the Appeal on account of the Notice of Appeal being improperly filed. The Appellant is at liberty to apply for extension of time and if granted, proceed to file a proper Appeal for determination on merit.

FINAL DECISION

36. The Tribunal makes the following final Orders: -

- a) The Appeal be and is hereby struck out.
- b) Each party to bear its costs

37. It is so ordered

DATED and **DELIVERED** at **NAIROBI** this 11th day of **March**, 2022.



.....
PATRICK LUTTA
CHAIRPERSON



.....
DELILAH K. NGALA
MEMBER



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