

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**APPEAL NO. 538 OF 2019**

**MURIUKI NJAGI MBAE T/A RIVERSIDE WORKSHOP.....APPELLANT**

**-VERSUS-**

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

**JUDGMENT**

**A. INTRODUCTION**

1. The Appellant is a resident individual registered taxpayer and trades as Riverside Workshop.
2. The Respondent is a principal officer appointed under and in accordance with Section 13 of 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.

**B. BACKGROUND**

3. The genesis of this Appeal emanated from investigations establishing that the Appellant operates a timber and furniture workshop in Kerugoya Town. The Respondent avers that the Appellant had been in operation long before 2015 and even involved in construction of residential property next to his workshop but never filed any returns nor paid any taxes from his income. Upon enquiry, the Appellant contended that he was ignorant as far as matters of taxation were concerned and admitted he had no books or records of accounts.
4. The Respondent had a meeting with the Appellant with a view of educating the Appellant on his tax obligations and the importance of keeping records after which, the Respondent requested the Appellant to avail any records in his possession to establish his tax liability.

5. The Appellant availed records as requested and paid presumptive tax of Kshs 375.00 for the year 2019 on 26<sup>th</sup> June 2019 as a final tax. As a consequence, default assessments were raised based on the information available on 30<sup>th</sup> July 2019. The Appellant objected to the assessment and subsequently filed this Appeal.

### **C. APPEAL**

6. The Appellant's Appeal as elaborated in his Memorandum of Appeal dated 14<sup>th</sup> January 2020, is premised on the following grounds;
  - a. That the order of KRA assessing officers is erroneous on the facts and the law.
  - b. That on the facts and in the circumstances of the case, the assessors ought to have accepted the prepared accounts and considered the income and expenditures as stated in the accounts.
  - c. That the assessors are not justified in treating the capital applied in the house construction work as having originated from the business without considering other sources of income for the Appellant and determine whether they are taxable or not.
  - d. That the assessors are not justified in subjecting the estimated value of the houses construction project which is Kshs 5 million to taxation without considering the corresponding allowable expenses associated with generation of that income as stated in the Income Tax Act.
  - e. On the facts and circumstances the assessors ought to have allowed the expenses which are allowable expenses as per Income Tax Act instead of disallowing all of them by disregarding the audited accounts for the three years.
  - f. The assessors were not justified in not requesting for bank statements which would have shown the business income and determine the taxable and non-taxable income.

- g. The assessors were not justified in not affording an opportunity to the Appellant to produce confirmatory documents from the relevant and reliable sources like bank statements which confirm the income business realized, banked and as stated in the audited accounts presented to KRA Offices in Nyeri.
- h. On the fact and in the circumstances of the case, KRA assessors ought not to have concluded the assessment hastily.

#### **D. RESPONSE TO THE APPEAL**

- 7. The Respondent responded to the grounds of Appeal in his Statement of Facts dated 13<sup>th</sup> February 2020 as follows;
  - a. That the Appellant did not support his obligation as required by availing his audited accounts and primary documents for the period of assessment.
  - b. Consequently, the default assessment was based on available information concerning the Appellant and was in conformity with Section 51(8) of the Tax Procedures Act.
  - c. Contrary to what the Appellant would want the Tribunal to believe, the confirmation notice was issued with strict conformity to Section 51 of the Tax Procedure Act.
  - d. That the Appellant in lodging his objection had a duty to provide supporting evidence which was never provided. In addition, the Appellant was contacted through emails and phone contacts as appears on the iTax registration details but there was no response. The contention that the Respondent failed to consider evidence is erroneous as no evidence was provided during the objection process.

- e. That contrary to the Appellant's assertions, the objection decision was rendered in accordance with Section 51(8) of the Tax Procedure Act.
- f. That the Respondent contends that the burden of proving payment of taxes is on the Appellant as provided for under Section 56(1) (4) of the Tax Procedures Act 2015.

#### **E. ISSUE FOR DETERMINATION**

8. The Appeal herein raises the following single issue for determination by this Tribunal, namely:
  - a. *Whether the Appellant provided the Respondent with documents in support of his objection notice*

#### **F. ANALYSIS**

9. Our disposition of this Appeal will be rather short and straightforward on account of the overwhelming lack evidence to make a determination on the substantive tax issues in dispute. The Appellant herein was issued with an assessment order on 30<sup>th</sup> July 2019. The Appellant at some point objected to the assessment as we can conclude from objection application acknowledgement receipt provided by the Appellant. Noteworthy however, the actual objection notice has not been provided in this Appeal. Nonetheless we have perused through the thin record before us and note there is substantially not a single document before us to enable the Tribunal to consider the merits of the Appeal herein.
10. That being said we note in matter tax litigation, the tax payer bears the burden of proof. This is in line with Section 56 (1) of the Tax Procedures Act 2015, the burden shall be on the taxpayer to prove that a tax decision is incorrect. In this Appeal, the tax payer averred for instance that he took a loan from a bank in order to finance the construction of the housing project. However, no evidence

of such facility has been provided to the Commissioner during the audit and objection stage. Neither has such a document been availed to the Tribunal in this Appeal. This and other similar glaring lack of evidence in respect of each of the Appellant's averments leads us to the conclusion that the Appellant herein has failed to dispense with the burden of proof placed upon him by law.

11. The Tribunal finds that the Appellant herein has failed to demonstrate to this Tribunal that the Commissioner's assessment was incorrect. In absence of such demonstration we have no basis for upsetting the Commissioner's assessment. In this regard, we place reliance on Makau J's holding in *Primarosa Flowers Limited vs Commissioner of Domestic Taxes [2019] eKLR* wherein it was held;

*"...the onus is on the taxpayer in proving that the assessment was excessive by adducing positive evidence which demonstrates the taxable income on which tax ought to have been levied..."*

12. Similarly, in *Sheria Sacco Limited vs Commissioner of Domestic Taxes [2019] eKLR* Hon. Kasango J held as follows;

*"...the SACCO however needs to appreciate that what the Tribunal was dealing with was an appeal against the Commissioner's confirming notice that the SACCO had taxes to pay. When one appreciates that then the submissions of the Commissioner, under this head, are correct that the burden of proof lay on the SACCO. This is what is provided under section 39 (b) of the Tax Appeals Tribunal Act. That section provides;*

*In a proceeding 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 not have been made or should have been made differently.*

*The SACCO did not meet that burden of proof..."*

## G. CONCLUSION

13. In light of the foregoing analysis, the Tribunal makes the following Orders: -

- a. The Appeal herein lacks merit and is hereby dismissed.
- b. The Respondent's confirmed assessment dated 16<sup>th</sup> October 2019 be and is hereby upheld in its entirety.
- c. Each party to bear its own costs.

14. It is so ordered.

DATED and DELIVERED at NAIROBI this 16<sup>th</sup> day of July, 2021.

  
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MAHAT SOMANE  
CHAIRPERSON

  
.....  
WILFRED GICHUKI  
MEMBER

  
.....  
ROSE WAMBUI NAMU  
MEMBER

  
.....  
JOHN KINYUA WANGARI  
MEMBER

  
.....  
TIMOTHY CHESIRE  
MEMBER