

REPUBLIC OF KENYA  
IN THE TAX APPEALS TRIBUNAL  
APPEAL NO 60 OF 2015

JOHN KINUTHIA MAKUMI .....APPELLANT

VERSUS

THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGEMENT

**BACKGROUND**

1. The Appellant is a registered Tax payer engaged in the business of letting rental property in Nairobi and Kiambu.
2. The Respondent is established by the Kenya Revenue Authority Act, Cap 469 (KRA Act), as an agency of the government, for the purpose of collection and receipt of revenue. It is required to administer and enforce all provisions of the laws set out in the KRA Act for the purposes of assessing, collecting and accounting for all revenue in accordance with those laws.
3. The Respondent issued an assessment notice to the Appellant dated 5<sup>th</sup> May 2014 demanding outstanding taxes of Kshs.170,434,143/= having conducted a compliance check on the Appellant's rental income for the years 2010 to 2014.
4. The Appellant being aggrieved by the action taken by the Respondent filed his Objection thereto dated 12<sup>th</sup> June 2014 and served on the Respondent on 13<sup>th</sup> June 2014. The Assessment was thereafter confirmed by the Respondent on 30<sup>th</sup> July 2014 having received additional information from the Appellant and adjusting the initial

demand on VAT assessment of Kshs.37,594,294/= on account of the documents availed and issuing a confirmed assessment for corporation tax of Kshs.132,839,849/= arising from the rental income.

## THE APPEAL

5. The Appeal was on the following Grounds;

### Corporation tax

- a. The assessments are excessive and not in accordance with accounts and returns filed.
- b. The Assessments have also been raised right on the heels of previous assessment raised for the period 2008-2012 through an assessment dated 30<sup>th</sup> November 2012.
- c. The necessary taxes have been paid.

### VAT

- a. The assessment is estimated and excessive
- b. No withholding VAT paid has been taken into account.

6. The Respondent's filed their response and opposed the Appeal on the following grounds;

- a. The Appellant failed to attend an interview to facilitate the compliance check as requested via invitation despite numerous follow ups and reminders.
- b. The Appellant failed to avail himself for an interview and to file income tax returns as required, and the estimated assessment was raised based on the Respondent's best Judgment in relation to the property owned by the Appellant and the Rent Charged per unit.

c. The Appellant lodged a late objection stating that the assessment was estimated and not in accordance with returns alleged to have been filed. At the time of lodging the objection the Appellant indicated that they had attached the returns for the period under review which was not the case. However the copies of the returns and accounts were availed at the time of lodging the Appeal;

7. At the hearing on the 12<sup>th</sup> August 2016 a partial consent was recorded and adopted as follows:-

- I. Withholding Tax inclusive of interest and penalties relating to accountancy fees and management fees amounting to Kshs.217,150/=.
- II. On VAT inclusive of interest amounting to Kshs.5,287,445/=.
- III. That the Appellant undertook to pay the total principle tax of Kshs.2,971,156/= within 30 days of the filling the consent before the Tribunal and further that he would apply for waiver on interest and penalties.

The parties having entered consent, the issues for determination after considering the pleadings and arguments of the parties are as follows;

#### **ISSUES FOR DETERMINATION**

8. Upon considering the evidence and submissions of the parties, the Tribunal is now left with the following issues for determination in this case:

- d. Whether withholding tax should be charged on contractual fees.

- e. Whether under section 56(3) of the Income Tax Act of the laws of Kenya there was an alleged fraud, or gross wilful neglect
- f. Whether the under-declared rental income on Wangige and Industrial area properties should be brought to charge
- g. Whether expenses not fully supported by documentary evidence should be disallowed for tax purposes.
- h. Whether the Appellant rental properties qualify for industrial deductions.

### APPELLANT'S CASE

- 9. The Appellant having not been satisfied with the response from the Respondent, filed an Appeal with Tax Appeal Tribunal and argued as follows:
  - i. The Appellant argued that he was an elderly tax payer and had been unwell and that the Respondent charged withholding tax on contractual fees for the year of Income 2005 to 2008 of Kshs.1,209,592/= being principal tax. The Appellant submitted that part of the tax being demanded is time barred as provided for under Section 79 of the Income tax Act as no assessment may be raised after the expiry of Seven (7) years .
  - ii. The Appellant submitted that whereas the Respondent relied on Section 56(3) of the Income Tax Act alleging fraud, gross or wilful neglect to enable him demand tax, there is no evidence adduced, by the Respondent, to prove the alleged fraud, gross or wilful neglect. The Appellant further states that fraud is a

criminal act and no such action has been committed by the tax payer.

- iii. The Appellant submitted that a compliance review had been undertaken for the period 2008 to 2009 and the matter was not raised. The Appellant provided all information voluntarily, which information was relied on to raise the assessment. The Appellant also maintains that had the Respondent requested for the information before the same would have been provided as it was available at the time.
- iv. The Appellant holds the view that if the contractor in question filed and paid the taxes due during those years, then the demand for payment would amount to double taxation as the Government would not have lost any revenue.
- v. The Appellant further challenged the delay in raising the assessments by the Respondent. They also held the position that the parties had generally consented that the period for tax review was to cover the years 2010 to 2012 under the Income Tax head.
- vi. The Respondent disallowed the following expenses, repairs and maintenance, mileage, rates, security, salary and wages, general expenses, Electricity water and sewage, accountancy fees and telephone and postage. The Appellant submitted that he had to undertake renovations of the premises especially those in Lavington area, during this period, due to their age and keep them habitable. However, due the Appellant's ill health, mainly being sole proprietor and that most of the transactions were in

cash he was not able to maintain complete records of all transactions.

- vii. The Appellant submits that he has had to rely on third parties to provide him with information in the circumstances and is unable to trace others as they are in the informal sector( juakali).
- viii. The Appellant submits that he usually uses 2 vehicles as he is generally assisted by his wife and one of his other children as he has been inducting his family into the family business due to his advanced age and further holds the view that mileage claims are not subject to PAYE rules since the tax payer is not in employment.
- ix. The Appellant consented to the disallowed amounts of Kshs.88,000/= per year. The Appellant submits that the Commissioner should allow amounts of Kshs. 48,110/= and Kshs.49,550/= for the years 2010,2011 and 2012 as supported by rates bills.
- x. The Appellant further submits that he will provide the evidence for General expenses as they have since been able to obtain some of the documents. With regard to the disallowance on electricity, water and sewerage, the Appellant submits the same relates to the expenses incurred for common areas as this was his responsibility as the landlord.
- xi. On the issue of salary and wages, the Appellant submits that these were mainly office assistances, messengers, cleaners and supervisor.

- xii. That the Respondent introduced a tax amnesty in 2015 and they would like to take advantage of the amnesty, however the Appellant submitted that he shall continue to provide information and to engage with the Respondent on the outstanding issues.

## RESPONDENTS CASE

10. The Respondent presented their case as hereunder;
- i) The Appellant was selected for compliance check and invited for an interview scheduled to take place on the 4<sup>th</sup> September 2013, the Appellant didn't honour the invitation.
  - ii) The failure of the Appellant to attend interview led the Respondent to write to known tenants of the appellant under powers conferred under section 59 by Income Tax Act Cap 476
  - iii) That the onus of filing returns belongs to the Appellant, the Appellant filed his returns the same day he filled an Appeal on the 10<sup>th</sup> September 2014.
  - iv) That the documents and receipts availed did not tally with the total expenses claimed in the audited accounts.
  - v) That the property in Lavington was built between 2005 to 2008 at a total cost of Kshs. 46,770,881/= whereas the total repair costs for the period 2010 to 2012 relating to the same property amounted to Kshs.70,017,264/=.
  - vi) That daily mileage claim on two vehicles by the Appellant was disallowed and restricted tax allowance for one car at the rate of 70% as per PAYE rules and guidelines, given that the Appellant

could not adduce evidence as to why they needed two vehicles to visit their tenants on daily basis.

- vii) That contrary to the Appellant's submissions he only provide payroll for year 2011 to the Respondent.
- viii) The Appellant failed to provide supporting documents for general expenses hence all these expenses disallowed for income tax purposes.
- ix) The Appellant didn't provide supporting documents for the following expenses, electricity, water, sewerage, telephone and postage hence all these expenses were disallowed.

### **TRIBUNAL ANALYSIS AND FINDINGS**

11. The Tribunal perused all the pleadings and submissions filed and find that the Respondent commenced their compliance check on the Appellant in August 2013 and an interview scheduled for 4<sup>th</sup> September 2013 which the Appellant failed to attend.
12. The Tribunal notes the Appellant only supplied the Respondent with documentation after he lodged the objection and the Respondent could only raise the issue of Withholding tax after interrogating all the documents availed including the late filed tax returns filed by the Appellant and the architects certificates when they became aware of the amounts paid on contractual fees.
13. The Tribunal finds that section 56(3) Income Tax Act allows the Respondent to audit a taxpayer up to seven back, this brings the year of income of 2006 within seven years period and therefore the withholding tax claim is within time. It is trite law that the

responsibility rests with the Taxpayer to deduct or remit withholding tax and the penalty for failure to deduct or remit Withholding tax rests with the Taxpayer as provided for under Section 35 of and the Withholding Tax Rules 2001 of the Income Tax Act. The Appellant on his own admission confirmed that he did not comply with this provision of the law.

14. The Tribunal further finds that the Appellant was unable to provide receipts and records that tallied with the total expense claimed in the audited accounts on yearly basis and therefore there was no evidence that the amount per the audited accounts was wholly and exclusively incurred in the generation of rental income. The Tribunal finds therefore that all the expenses disallowed by the Respondent were neither supported fully nor wholly and exclusively incurred in generation of income. The sample receipts availed were of capital nature and hence disallowed as provided for under Section 16 of the Income Tax Act

*“ Save as otherwise expressly provided, for purposes of ascertaining the total income of a person for a year of income, no deduction shall be allowed in respect of-*

*(a) expenditure or loss which is not wholly and exclusively incurred by him in the production of the income*

*(b) capital expenditure ,or any loss, diminution or exhaustion of capital”*

15. The Tribunal finds that the Appellant failed to declare certain income relating to rental income on the Wangige and Industrial area property. The Industrial building deduction on commercial building came into

effect on the 1<sup>st</sup> January 2010 Via the Finance act 2009 and applies only to buildings that were first occupied on or after January 2010. The property in question was first occupied in March 2009 and therefore didn't qualify for commercial building deduction.

16. The Tribunal finds that whereas the Appellant has attempted to rely on the tax amnesty , the Appellant cannot enjoy the benefit of the amnesty given that he was already under assessment under tax compliance check. He has also not made full disclosure of all his rental income and not paid all due tax. In the absence of this evidence the Tribunal has to find on this issue in favour of the Respondent. The Tax law shifts the burden on the Tax payer when a demand is made and in the absence of cogent and tangible evidence the burden on the tax payer cannot be discharged as is the case herein, a fact that is confirmed in the Appellant's own submissions that he is yet to provide information and will keep providing them in due time.
17. The Tribunal finds that the Appellant has handled this matter in a very casual manner as he has failed to comply and avail documents that would assist in determining this Appeal.
18. Again it must be appreciated that in line with the policy of the Tribunal and even the operative laws and regulations not to shut out a litigant from being heard, and to drive him from the seat of judgment without a hearing, the Tribunal shall stand to be guided by section 26 of the TAT, Act 2013 which provides;

***The Tribunal shall ensure that every party to proceedings is given a reasonable opportunity to —***

***(a) present his case; and***

*(b) Inspect any documents in relation to the proceedings and make submissions.*

And Section 30 of TAT Act 2013 which 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,*

19. The Tribunal finds that the claim by the Appellant that the Respondent did not request for information relating to Withholding tax to be whimsical and an afterthought as the responsibility rests with the Tax payer to provide all information to the Respondent that will assist in arriving at a correct assessment. The Tribunal can only deduce from this action that the Appellant is guilty of wilfully neglecting to all documents at the time of the initial assessment in 2008 and 2009 and the Appellant cannot attempt to lay blame on the Respondent.
20. The Tribunal sympathizes with the Appellant but in absence of proper documentation one is left without a choice but to rely on the respondents' findings.

## **TRIBUNAL DECISION**

21. The Tribunal having heard from both parties and gone through the written submissions and analyzing the evidence presented before it wish to pronounce itself considering the findings hereinabove, it follows:

22. That the Applicant's case must fail to the extent of the issues not concede by the Respondent, subject to the Respondent allowing the following expenses on rates, management fees, accountancy fees, mileage, security, water and sewerage amounting to Kshs.14,808,001/= being the allowable expenses.
23. That the withholding tax for the year 2005 is not time barred as the Appellant failed to avail the requisite information to the Respondent resulting in the assessment of Tax and ultimate confirmation thereof when the information was availed and the Appellant cannot purport claim lapse of time whereas it was his responsibility to avail the same and the provisions of Section 56(3) of the Income Tax Act allows the Respondent to demand for the tax when the information comes to its knowledge as a result of the conduct of the Appeal who willfully withheld the same.
24. The Appeal partially succeeds and directs the Respondent to deduct the allowable expenses as held hereinabove and issue a fresh assessment thereafter.
25. The Appellant do pay the following outstanding taxes being withholding tax on Contractual fees and Corporation tax including interest and penalties.
26. Each party to bear their own costs.

DATED and DELIVERED at NAIROBI this 2<sup>ND</sup> DAY of MAY, 2017

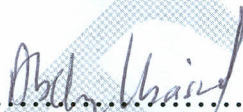
In the presence of:-

SAMUEL KIRIKA from KANG'ETHE & ASSOCIATES  
and MR WAITHAKS for the Appellant

PAUL K. MWANGI, JERAYA KWAMBOKA  
and DORIS NAMAII for the Respondent



.....  
LILIAN RENEE OMONDI  
CHAIRPERSON



.....  
ABDULBASID AHMED  
MEMBER



.....  
GABRIEL KITENGA  
MEMBER



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DANIEL TANUI  
MEMBER



.....  
BONIFACE DIMMO  
MEMBER