

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL AT NAIROBI
TAX APPEAL NO. 110 OF 2019

NJAMA WAMBUGU.....APPELLANT

VERSUS

**COMMISSIONER OF INVESTIGATIONS AND
ENFORCEMENT.....RESPONDENT**

JUDGEMENT

BACKGROUND

1. The Appellant, Messrs Njama Wambugu is a Kenyan Resident and holder of a taxpayers Personal Identification Number (PIN) A0012003871.
2. The Respondent is a principal officer of Kenya Revenue Authority (KRA) and which Authority is established under the Kenya Revenue Act (Cap 469) and is charged with the mandate of assessment, collection and receipt of revenue as an agent of the government of Kenya.
3. The Respondent carried out a Tax audit on the Appellant for the years of income 2013 to 2017 and vide its dated 12th October, 2018 served the Appellant with their findings and demanded income tax of Kshs. 27,378,672.00.
4. The Appellant through his tax agent gave his notice of objection vide a letter dated 17th October, 2018. There were various meetings held between the parties and in the meetings the Appellant provided additional

information. It is from this additional information that the Respondent issued an additional assessment vide its letter dated 29th November, 2018 for Kshs. 61,793,367.00. This was on unreported income, inclusive of penalty and interest.

5. The Appellant objected to the demand for the sum of Kshs. 61,793,367.00, inclusive of interest and penalty vide his letter dated 21st December, 2018.
6. The Respondent gave its objection decision dated 19th February, 2019 confirming the additional assessment of Kshs. 61,793,367.00 for the years of income 2013 – 2017.
7. Further to its objection decision dated 19th February, 2019, the Respondent wrote to the Appellant vide its letter dated 27th February, 2019 demanding a Bank Guarantee of Kshs. 39,627,989.00 within the next seven days from 27th February, 2019, being the date of the notice. The purpose of the Bank guarantee was to secure the payment of principal taxes amounting to Kshs. 29,553,838.00 and accrued interest of Kshs. 10,074,151.
8. On 4th March, 2019 the Appellant filed before the High Court, **Petition No.79 of 2019, Njama Wambugu and 4 others vs Kenya Revenue Authority and another**. In the Petition the Appellant sought a Conservatory Order staying the Respondent's decision made on 27th February, 2019 notifying the Appellant to furnish the Respondent with Bank Guarantees totalling Kshs. 39,627,989.00 within seven days.
9. Vide a Ruling delivered on 20th June, 2019 the High Court in Petition No.79 of 2019 granted an order staying the Respondent's said decision.

10. Having been aggrieved by the Respondent's Objection Decision dated 19th February, 2019 the Appellant filed a Notice of Appeal to the Tax Appeal Tribunal on 4th March, 2019 and proceeded to file the Memorandum of Appeal together with the Statement of Facts on 15th March, 2019 and served both documents on the Respondent.

APPELLANT'S CASE

11. The Appeal is premised on the following grounds;

- a) That Respondent erred in law and fact by not responding to his objection dated 17th October, 2019 and instead issued an additional assessment without due regard to the provisions of the Tax Procedures Act 2015.
- b) That the Respondent did not take into account all the documentation, information and explanations provided in order to appreciate all the issues presented before arriving at the assessment.
- c) That the Respondent's failure to consider all the facts and the information provided in the Appellant's case is tantamount to breaching the rules of fairness and natural justice.
- d) That the income tax additionally assessed amounting to Kshs. 61,793,367.00 inclusive of penalties and interest is excessive and erroneous.
- e) That the Respondent erred in facts by raising an income tax assessment based on the bank balance variances as a basis to charge additional income tax.

- f) That the excess total additional assessment raised of Kshs. 61,793,367.00 inclusive of penalties and interest is unwarranted since it is not backed by the sections and provisions of Income Tax Act Cap 470 (ITA) and the Tax Procedures Act, 2015 (TPA).

- 12. The Appellant sought the following prayers;
 - a) That the excess tax assessment be annulled and set aside
 - b) That the objection filed by the Appellant be upheld.

RESPONDENT'S CASE

- 13. The Respondent avers that at all times it was well guided by the law in assessing the Appellant for additional assessment and relied on Section 59(2) of the Tax Procedures Act which authorizes it to obtain information from third parties.
- 14. Upon being served with the investigation findings, the Appellant was granted numerous opportunities to provide documents to support his tax position. The Appellant on 5th October 2018 provided an analysis of his bank deposits though it was not backed by any documentary evidence.
- 15. The Respondent avers that the decision to use the indirect method of using banking deposits was guided by the fact that the documents availed as to the tax affairs of the Appellant created a variance and an analysis of the bank statements further left several unexplained deposits.
- 16. The Respondent states that the Appellant's bank statements as well as the Appellant's reconciliation dated 5th October, 2018 revealed that the

Appellant had rent, dividends and employment income that had not been subjected to tax.

17. The Respondent, in light of the above, prays that the Tribunal upholds the objection decision dated 19th February, 2019 as the same was proper as provided under the Income Tax Act and the Tax Procedures Act and that the taxes demanded therein are due and payable.

ISSUE FOR DETERMINATION

18. The Tribunal having considered the documentation, pleadings and submissions of the parties is of the view that the issue for its determination is as hereunder:

Whether the assessment was based on applicable relevant law and all material facts considered?

ANALYSIS AND FINDINGS

19. The Tribunal having considered the above issue proceeds to analyse the same as hereunder.
20. The Respondent, on 12 October 2018 served the Appellant with a tax demand of Kshs. 27,378,672.00 being income tax for years of income 2013-2017. The Appellant gave its notice of objection to the said demand vide its letter dated 17th October, 2018. However, on 29th November 2018, the Respondent issued an additional assessment of Kshs. 61,793,367.00 which was inclusive of interest and penalty for the years of income 2013-2017.
21. The Tribunal will refer to the relevant Section 29(2) (e) of the Tax Procedures Act which states as follows; **“the Commissioner shall notify in**

writing a tax payer assessed under subsection (1) of the assessment and Commissioner shall specify (e) the due date for payment of the tax, penalty, and interest, being a date that is not less than 30 days from the date of service of the notice”.

22. In the Respondent’s letter dated 12th October, 2018 it reads in part, on page 5 as follows; **“arrange to settle the outstanding taxes and provide explanations where available within seven (7) days from the date of receipt of this demand letter”**. The Respondent by its own wording is referring to this letter as a demand yet the notice period given of seven days has no legal basis.
23. Following several meetings between the parties after the Appellant’s notice of objection dated 17th October, 2018, the Respondent issued an additional assessment vide its letter dated 29th November, 2018. We note that an additional assessment can only be issued where there was an earlier assessment and a demand for tax made. The Respondent’s letter dated 12th October, 2018 does not fall under any of the types of assessments described under Sections 28, 29, 30 and 31 of the Tax Procedures Act.
24. The Respondent’s letter dated 29th November, 2018 states in part, on page 1 as follows; **“we will send the assessment notices in due course. You are required therefore to treat this letter as a formal assessment. Note that if you wish to object to the additional assessment please do so in writing within 30 days of the date of service of the assessment notice in line with section 51 of the Tax Procedures Act, 2015”**.
25. From the above the Respondent commits to provide the assessment notices in due course and at the same time advising the Appellant to object within

30 days if he so wishes. The message from this letter tends to be confusing as it is not clear exactly how the Appellant is expected to proceed.

26. It is worth noting that the Respondent gave the Appellant seven days' notice to pay what it termed as additional assessment without affording the requisite statutory period for him to object to the demand. The Respondent's said action was capricious, arbitrary, unreasonable and in breach of the laid down legislation.

The Tribunal refers to the case of **Noor Maalim Hussein & 4 others vs. Minister of state for Planning, National Development and Vision 2030 and 2 others [2012] eKLR**, where the court held as follows; “if statutory power is exercised in a manner contrary to the drafters or against public interest, the power can be said to have been exercised capriciously, irrationally or unreasonably. Thus irrationality and unreasonableness would play a major role and we shall as courts continue to assert our traditional duty and intervene in situations where authorities like ministers and persons act in bad faith, abuse power, fail to take account relevant considerations or act contrary to legitimate expectations.”

27. The Tribunal having made a finding that there was no assessment as envisaged under Section 29 of the Tax Procedures Act, the purported additional assessment issued on 29th November, 2018 is invalid. It is clear that the notice dated 12th October, 2018 and the subsequent additional assessment are faulty, unprocedural and thus void as they did not comply with Section 29 of the TPA.

FINAL DECISION

28. The upshot of the above is that the Appeal is merited and the Tribunal makes the following Orders;

- a) The Appeal succeeds.
- b) The Respondent's Tax Assessment dated 29th November, 2018 for Kshs. 61,793,367.00 is hereby annulled and set aside.
- c) Each party to bear its costs.

DATED and DELIVERED at NAIROBI this 4th day of September, 2020.

**JOSEPHINE K. MAANGI
CHAIRPERSON**

**GEOFFREY KARUU
MEMBER**

**DELILAH KADZO NGALA
MEMBER**

**TANVIR ALI
MEMBER**