



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL APPEAL NO. ITA E078 OF 2020

KENYA REVENUE AUTHORITY.....APPELLANT

-VERSUS-

MALUKI KITILI MWENDWA.....RESPONDENT

(Being an appeal against part the judgement of the Tax

Appeals Tribunal dated 9th July 2020 in Tax Appeals Tribunal).

JUDGMENT

Introduction

1. This appeal seeks to overturn the decision of the Tax Appeals Tribunal (the TAT) rendered on 9th July 2020 in TAT No. **121** of 2017, Maluki Kitili Mwendwa v Kenya Revenue Authority.
2. The background to this appeal is that the appellant profiled the Respondent to determine his tax status and established he was not filing tax returns. The appellant used his bank statements from Commercial Bank of Africa and Barclays Bank of Kenya Limited to determine his tax liability and issued him with a default assessment for the years 2009, 2010, 2011, 2012, and 2014 for non-filing of self-assessment returns. It also issued him with an amended assessments for the years 2013 and 2015. The total sum was **Kshs. 195,891,196/=** inclusive of penalty and interests.
3. The Respondent objected to the assessment, but vide an Objection Decision dated 17th July 2017, the Commissioner dismissed the Objection. The Respondent appealed the TAT arguing that the appellant erred in fact and in law by seeking to bring to charge funds deposited in its bank account; that the assessment was excessive, erroneous and not based on any material facts. He faulted the appellant for seeking to bring to charge proceeds arising from the sale of capital property sold on behalf of a third party. He contended that the appellant erred in fact and law by assuming and or presuming that the said funds are income which is taxable in accordance to the Income Tax Act[1](ITA).
4. He also faulted the appellant for treating internal bank transfers between the appellant's bank accounts as taxable source under section 3(2) of the ITA thereby arriving at an excessive and erroneous assessment of taxes. Lastly, he faulted the appellant for failing to acknowledge that the income he earned during his tenure at National Environmental Management Authority (NEMA), was correctly accounted for and taxes paid accordingly.
5. Upon considering the respective party's positions, the TAT distilled **3** issues, namely;

i. Whether Section 29(5) of the Tax Procedures Act 2015 was properly applied"

ii. Whether the Respondent erred in law and in fact by raising estimated demand on the bank deposits in the Appellants accounts in Barclays Bank and Commercial Bank of Africa"

iii. Whether Capital Gains Tax occurred and are due from the Appellant from sale of land"

6. Regarding the first issue, the TAT concluded that the Respondent failed in his obligations to file the returns and that the appellant was right in assessing the Respondent for 5 years, hence, section 29(5) of the Tax Procedures Act^[2] (the TPA) was properly applied. Regarding the second issue, (which is the core finding being challenged), the TAT stated: -

36. Pursuant to Section 29(1) of the Tax Procedures Act and following failure by the Appellant to furnish self-assessment returns, the Respondent used information found in the Appellant's bank account to assess taxes payable by the Appellant. In so doing, it treated deposits found therein as undeclared taxable income.

Section 29(1) of TPA provides that

'Where a taxpayer has failed to submit a tax return for a reporting period In accordance with the provisions of a tax law, the Commissioner may, based on such information as may be available and to the best of his or her judgment, make an assessment..... '

39. In *Nick KIKALOS and Helen Kikalos, v. United States of America, No. 2:98 CV 618. 313 F. supp. 2d 876 (2003)* It was held that:

"Courts routinely accord deference to the Commissioner in the reconstruction of a taxpayer's income Noting that 'the Commissioner may use any reasonable method of calculation where the taxpayer fails to produce or maintain adequate records from which actual income may be ascertained. Other Circuits have stated that the "court must accept the Commissioner's method of reconstructing income so long as it is rationally based In the ordinary case, the determination of taxable income by the Commissioner is presumptively correct and the court.

41. In *Mbuthia Macharia v Annah Mutua Ndwiga & another Civil Appeal No. 297 of 2015 [2017] eKLR* the Court of Appeal when dealing with the issue of burden of proof observed as follows:

'The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence''

42. This burden was never discharged by the Respondent, who for avoidance of doubt was conducting an investigation into the Appellant's tax affairs. The Respondent had the tools and ability to investigate the claim by the Appellant by examining the records of Chania Enterprises. Instead the Respondent asked for further evidence that the Appellant was authorized to collect proceeds on
was of the view that in asking for documents from a
taxpayer the Respondent should take into account the particular circumstances surrounding a business entity and not ask for documents which may not be there. During the hearing the Tribunal heard that the Appellant was the head of the family which owned the business and that the Directors had authorized the Appellant to collect the proceeds on the behalf of the business.

7. The TAT partly allowed the appeal and ordered that fine be imposed on the Respondent for failure to file returns for the years 2009, 2010, 2011, 2012 and 2014. It quashed the Objection decision dated 17th July 2017 and ordered each party to bear its costs.

The appeal

8. The appellant appealed partly against the said decision citing the following grounds: -

i. ***That*** the TAT erred in law and in fact by shifting the burden of proof to the Appellant contrary to express provisions of Section 56 (1) of the Tax Procedures Act 2015 and Section 30 of the Tax Appeals Tribunal Act 2013.

ii. ***That*** the TAT erred in law in rendering a decision that contravenes the express provisions of section 107 of the Evidence Act chapter 80 Laws of Kenya.

iii. ***That*** the TAT erred in law in holding that the burden of proof had shifted to the Appellant based on unsubstantiated assertions

by the Respondent.

iv. ***That*** the TAT erred law in failing to differentiate between an assertion and proof and hence delivered a judgement that contravenes a well-established principle of law that "whoever alleges must proof".

v. ***That*** the TAT erred in fact and law in failing to consider that the Respondent only availed the sale agreements during the appeal

stage and therefore the Respondent was not in a position to investigate them further.

vi. ***That*** the TAT erred in law in failing to appreciate the age-old legal principle of separate legal personality between a company and its directors.

9. The appellant prays that this court sets aside the part of the Tribunal's Judgement where it held that the appellant ought to have addressed its default and amended assessment demand to Chania enterprises limited. It urges this court to uphold the appellant's default assessment for the years 2009, 2010, 2011, 2012 and 2014 and amended assessments for the years 2013 and 2015 as contained in the appellant's Objection Decision dated 17th July, 2017. It also prays that the Respondent to bear the coast of the Appeal.

The appellant's advocates submissions

10. During the hearing, Mr. Lemiso, the appellant's counsel condensed the above grounds into one, namely; whether the Respondent discharged the burden of proof that the assessment was erroneous by providing evidence. He submitted that Section 56(1) of the TPA read together with Section 30 of the Tax Appeals Tribunal Act[3] (the TAT Act) places the burden on the taxpayer to prove that a tax decision is incorrect. Mr Lemiso reiterated the Respondent's explanation with regards to the said monies which was: -

a. ***That*** the Respondent is a director in a company known as Chania enterprises Limited (herein after Chania) which owned approximately 300 acres of land in Thika.

b. ***That*** in 2009 Chania decided to sell the entire parcel of land.

c. That unfortunately, the company was unable to find a purchaser who would buy the entire parcel of land. The company therefore opted to subdivide the land and sell it in smaller portions depending on demand of the prospective purchasers.

d. That the Respondent sourced potential buyers on behalf of Chania for the subdivided portions of land.

e. That it is the purchasers of the land that made deposits in the Respondent's bank account at different intervals until they completed paying the whole purchase price.

f. That the Respondent received the deposits on behalf of Chania and upon full settlement of the purchase price for all the parcels of land, the said funds were to be transferred to Chania.

g. That in view of the above, the credit entries reflected in the Respondent's bank accounts were indeed from sale proceeds of land to which the appellant erroneously brought to charge.

11. Mr. Lemiso submitted that from the above it is clear that the Respondent's defense, which the TAT erroneously upheld, is that the money in its accounts belonged to Chania and for that case, it was not chargeable to tax. He argued that the TAT while determining the matter failed to appreciate the doctrine of separate legal personality between Respondent and Chania enterprises limited. He argued that in law, Chania is a separate legal entity with the ability to run its own affairs independent of the Respondent. For this proposition, he cited *Victor Mabachi & Another v Nurturn Bates Ltd*^[4] which held: - "...a company as a body corporate, is a *persona juridica*, with separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil."

12. Mr. Lemiso argued that if at all Chania authorized the Respondent to receive the sale proceeds from the alleged land transactions then it would have been paramount for the directors of Chania to do a board resolution to that effect, hence, the Respondent ought to have provided the Resolution. He cited *Mbuthia Macaharia v Annah Mutua Ndinga & another*^[5] in which the Court of Appeal held that:- "*the legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden, Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.*"

13. He argued that the TAT failed to appreciate that the legal burden is discharged by way of evidence. He argued that the Respondent only provided sale agreements which did not mention that the Respondent was to receive the money on behalf of the company and cited section 107 of the Evidence Act.^[6] He relied on *Pili Management Consultants v Kenya Revenue Authority*^[7] in which the court opined that instead of declaring a nil return, the tax payer could have declared the presence of the money and then explain to the Commissioner why tax was not payable on the money.

The Respondent's advocates submissions

14. The Respondent's counsel submitted that under Section 56 (2) of the TPA, this court's jurisdiction is to determine Appeals from the TAT on questions of law only. He urged the court to be guided by *Patrick Sosio Lekakeny v Tomito Alex Tampushi & 3 others*^[8] which held that this courts statutory jurisdiction is to determine an appeal on questions of law only.

15. Regarding the question whether the TAT erred in shifting the burden of proof from the Respondent to the appellant, counsel submitted that section 56 of the TPA is emphatic that the burden of proof in an appeal lies on the taxpayer and section 30 of TAT Act provides that "in a proceeding before the Tribunal, the appellant has the burden of proving where an appeal relates to an assessment, that the assessment is excessive; or in any other case, that the tax decision should not have been made or should have been made differently."

16. He submitted that the TAT was fully cognizant of the above provisions when it stated "it is not in doubt that under Section 56 of the TPA, the burden of proof in an Appeal lies on the taxpayer." He submitted that the TAT never shifted the burden of proof from the Respondent to the appellant. He argued that the burden and/or obligation was at all material times placed upon the Respondent to prove that the said amounts were not undeclared taxable income. He argued that the Respondent was required to adduce cogent evidence so as to discharge the initial legal and evidential burden placed upon it under section 56 of the TPA which was adduced in

the form of Sale Agreements and a Summary of land transactions showing the amounts received from each purchaser.

17. Counsel submitted that the the initial burden placed upon the Respondent under section **56** of the TPA was the legal burden. Such initial legal burden, he argued, was discharged by the Respondent to the Tribunal's satisfaction when he produced the Sale Agreements and Schedule of land transactions. He argued that the mandate to determine what constituted sufficient evidence rests with the TAT and not either of the parties. He argued that by insisting on the production of particular evidence, in the form of a board resolution, the appellant is arrogating to itself the mandate of the TAT to assess and determine the probative value of the evidence placed before it. He submitted that the TAT was satisfied with the documentary evidence tabled by the Respondent. He pointed out that the TAT having been satisfied by the Respondent's initial documentary evidence stated that once the taxpayer puts forward the relevant facts and circumstances, the burden must shift to the Respondent to rebut the proof and placed reliance on *Mbuthia v Annah Mutua Ndwiga & another*.^[9]

18. It was the Respondent's advocates submissions that the TAT correctly noted that the Respondent tendered sufficient evidence in the form of the Sale Agreements and a summary of land transactions showing the amounts received from each purchaser, to support its assertion that the amounts found in the bank accounts were proceeds of sale of land by Chania Investments Limited, where the Respondent is a director, and therefore not undeclared taxable income. He argued that the appellant was required to rebut the evidence put forward by the Respondent in the course of the Appeal which constituted the shifting evidential burden. He cited the Supreme Court in *Raila Amolo Odinga & another v IEBC & 2 Others*^[10] which stated the following regarding on the burden of proof: -

"Though the legal and evidential burden of establishing the facts and contentions which will support a party 's case is static and remains constant through a trial with the plaintiff however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no

further evidence were introduced.

The foregoin analysis therefore settles the issue of burden of proof. For clarity, the legal burden of proof in a case is always static and rests on the Claimant throughout the trial. It is only the evidential burden of proof which may shift to the defendant depending on the nature and effect of evidence adduced by the Claimant. (Our emphasis)

19. He also cited sections **107, 108, and 109 & 112** of the Evidence Act which provide for both the legal and evidential burdens. Counsel submitted that the TAT did not contravene section **107** of the Evidence Act and cited *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another*^[11] which held: -

"As a general proposition the legal burden of proof lies on the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the Evidence Act Cap 80.... There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is

captured in sections 109 and 112 of the Act. ' (our emphasis)

20. Counsel submitted that the TAT correctly appreciated the law in its application of section 56 of the TPA, section 30 of the TAT Act and section 107 of the Evidence Act. He submitted that the Respondent discharged the burden of proof to the required standard and cited *Palace Investment Limited v Geoffrey Kariuki Mwendwa & another*^[12] which cited with approval Denning J. in *Miller v Minister of Pensions*^[13] that the burden of proof must carry a reasonable degree of probability but not so high as is required in a criminal case.

Determination

21. The pertinent issue in this appeal as I see it the question of the taxpayer's burden of proof in tax cases. The party with the obligation of persuasion-what Wigmore termed the risk of non-persuasion-is said to bear the burden of proof.^[14] The effect of non-persuasion on a party with the burden of proof is that the particular issue at stake in the litigation will be decided against the party. Generally, the taxpayer has the burden of proof in any tax controversy. The tax payer must demonstrate that the commissioner's assessment is incorrect. The taxpayer has a significantly higher burden. The taxpayer must prove the assessment is incorrect. This position enjoys statutory backing courtesy of section 56 (1) of the TPA which provides that in any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect. As if to underscore the import of the above provision, the legislature deployed the word "shall" in the said section meaning that the provision is couched in peremptory terms.

22. There is also section 30 of the TAT Act which is more explicit. It provides that: -

30. Burden of proof

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.

23. A significant factor adding to the taxpayer's burden in tax cases is the presumption of correctness which attaches to the Commissioner's assessments or determinations of deficiency.^[15] The commissioner's determinations of tax deficiencies are presumptively correct. Although the presumption created by the above provision is not evidence in itself, the presumption remains until the taxpayer produces competent and relevant evidence to support his position.^[16] If the taxpayer comes forward with such evidence, the presumption vanishes and the case must be decided upon the evidence presented, with the burden of proof on the taxpayer.

24. Under our system of self-reporting of tax liability, the taxpayer initially decides the extent and amount of his/her statutory obligation to pay tax. The taxpayer in such cases generally possesses the objective evidence. Certainly, with the exception of filed returns and information provided by the taxpayer, the Revenue authority is in a poor position to establish an affirmative case. The common-law allocation of the burden of proof to the party in possession of the evidence is clearly appropriate.^[17] It has been argued that the allocation of the burden of proof to the party in possession of relevant knowledge surely meets this goal.^[18]

25. By placing the burden of proof on the party in possession of relevant information, the possibility of destruction of adverse information is minimized and time is saved by making that party responsible for culling through its own records to meet its burden. Placing the burden of proof on the government in tax cases would detract from these goals. Taxpayers might be tempted to destroy adverse relevant evidence and tax collection costs would increase because of the Revenue Authority's difficulty in finding relevant information.^[19]

26. Perhaps I should mention that the uniqueness of tax laws is underscored by the fact that even where the constitutionality of such provisions has been challenged, courts have consistently held that placing the burden upon the tax payer is not unconstitutional nor is it contrary to Parliament's intent.^[20] There is a distinction between the legal burden of proof and the evidential burden of prove. These are two different concepts. The Evidence Act places the burden of proving the existence any fact in issue on the party who asserts. The evidential burden exists in the form of a tactical onus to contradict, weaken or explain away the evidence that has been

led. It is the latter form of burden which may shift from one party to the other. The appellant placed emphasis on the legal burden of prove placed upon the Respondent by the law and forgot that the moment the Respondent explained the source of the funds, the evidential burden shifted to them to adduce evidence in rebuttal.

27. Placing the burden of proof in tax cases on the tax payer reflects the unique nature of the tax system. This is evident from the three-fold justifications for placing the burden on the tax payer. These are: - (a) the presumption of correctness; (b) the government's need for revenue' and, (c) the taxpayer's possession of evidence.

28. Regarding the presumption of correctness, the most significant justification for placing the burden of proof on the tax payer is the practical consideration that the Commissioner cannot sustain the burden because he does not possess the needed evidence. Under the system of self-reporting tax liability, the taxpayer possesses the evidence relevant to the determination of tax liability. It is simply fair to place the burden of persuasion on the taxpayer, given that he knows the facts relating to his liability, because the commissioner must rely on circumstantial evidence, most of it coming from the taxpayer and the taxpayer's records. The taxpayer must present a minimum amount of information necessary to support his position. This safety valve seems to place the burden of production on the taxpayer without relieving the Commissioner of the overall burden of proof. The tax payers evidence must meet this minimum threshold.

29. Regarding the second justification, a presumption of correctness arises from the Commissioner's determination/assessment. The presumption remains until the taxpayer produces competent and relevant evidence to support his/her position. When the taxpayer comes forward with such evidence, the presumption vanishes and the case must be decided upon the evidence presented. The question before me is whether the tax payer produced competent evidence to support his position thereby discharging the burden placed upon him by the law.

30. The third justification is the Government's Need for Revenue. The government's need for a steady flow of revenue may be the most genuine, if not the most frequently cited, reason for placing the burden of proof on the taxpayer. In *Bull v United States*,^[21] the Court frankly discussed this concern as follows: -

"Taxes are the lifeblood of government and their prompt and certain availability an imperious need. Time out of mind, therefore, the sovereign has resorted to more drastic means of collection. The assessment is given the force of a judgement, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt Thus, the usual procedure for recovery of debts is reversed in the field of taxation. Payment precedes defense and the burden of proof, normally on the claimant, is shifted to the taxpayer."

31. A tax system in which the burden of proof is borne by the government does little to encourage the preservation of records held by the taxpayer. On the contrary, such a system would lend itself to easy concealment of tax obligation. Plato's observation that "where there is an income tax, the just man will pay more, and the unjust less"^[22] would become an unfortunate reality should Parliament or this court decide to shift the burden of proof to the Commissioner.

32. By now it is trite that a taxpayer always has the burden of proof in tax proceedings regardless of whether it is a review of an objection decision or an appeal. It should be noted that the burden of proof is a different concept to the standard of proof. The taxpayer's burden of proof comprises two parts: – establishing, with evidence, the underlying facts on which the law is to operate (and in this regard, the standard of proof to which each fact must be proved is relevant);^[23] and – that the operation of the law when applied to those facts establishes that the assessment is excessive or erroneous.

33. Talking about discharging the burden of proof, the formulation preferred in *George v Federal Commissioner of Taxation*^[24] is that "the burden lies upon the taxpayer of establishing affirmatively that the amount of taxable income for which he has been assessed exceeds the actual taxable income which he has derived during the year of income" and that "...in order to carry that burden he must necessarily exclude by his proof all sources of income except those which he admits. His case must be that he did not derive from any source taxable income to the amount of the assessment." The manner in which a taxpayer can discharge the burden varies with circumstances.

34. "Burden of Proof" is a legal term used to assign evidentiary responsibilities to parties in litigation. The party that carries the burden of proof must produce evidence to meet a threshold or "standard" in order to prove their claim. If a party fails to meet their burden of proof, their claim will fail. "Burden of Proof" at the Tax Court is somewhat unique. At the Tax Court, a taxpayer is

required to disprove an assessment by the Commissioner. In other words, a Tax payer challenging a tax assessment will need to collect and present evidence in order to disprove the Commissioner's position. This is the basic principle. However, there are some situations where this responsibility or "onus" is reversed. The onus may also shift based on the stage of the proceedings and the actions taken by the parties.

35. The Supreme Court of Canada in *Johnston v Minister of National Revenue*^[25] decided that the onus is on the taxpayer to "demolish the basic fact on which the taxation rested." Again, the Supreme Court of Canada provided guidance on this issue in *Hickman Motors Ltd. v Canada*^[26] which held that the onus is met when a Taxpayer makes out at least a *prima facie* case. *Prima facie* is another legal term that literally means "on its face." To prove a case "on its face" you must provide evidence that, unless rebutted, would prove your position. According to the said decision, a *prima facie* case is made when the taxpayer can produce unchallenged and uncontradicted evidence. Once the taxpayer has made out a *prima facie* case to prove the facts, the onus then shifts to the Revenue Authority to rebut the *prima facie* case. If the Revenue Authority cannot provide any evidence to prove their position, the taxpayer will succeed.

36. However, where the assumptions made by the Revenue Authority are exclusive and peculiarly within its knowledge, a corrective measure must be applied to the typical onus of proof. If the taxpayer has no knowledge with respect to the assumptions made by the Revenue Authority, it would be unfair to require the taxpayer to disprove them. This was the holding in *Canada v Anchor Pointe Energy Ltd.*^[27] However, decided cases are in agreement that the burden of establishing the facts justifying the assessment of the penalty is on the Revenue Authority.

37. The above being the law, the question is whether the Respondent established with evidence, that the tax assessment was erroneous or the tax was not due. The Respondent tabled sale agreements and schedule of properties sold to show that the funds paid through his accounts were proceeds of sale of various pieces of land he sold on behalf of a limited liability company. The TAT was persuaded that the Respondent had discharged the burden of proof and even cited authorities in support of its finding. The appellant now seeks to impugn the TAT's acceptance of the Respondent's explanation suggesting that it was erroneous. Counsel suggested that the Respondent should have gone further to produce board resolutions. However, this argument collapses on two fronts.

38. First, as Lord Denning held in *Miller v Minister of Pensions*,^[28]

'The...{standard of proof}...is well settled. It must carry a reasonable degree of probability...if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'

39. The burden placed upon the Respondent by the law was to establish a *prima facie* case. He tendered sale agreements which demonstrated the source of the funds. The agreements were not contested and even if they were the TAT believed the testimony. In civil cases, the measure of proof is a preponderance of probabilities. Where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other is false. The question to be decided will always be: which of the versions of the particular witnesses is more probable considering all the evidence as well as all the surrounding circumstances of the case.

40. In *Stellenbosch Farmers Winery Group Ltd & Another v Martell & Others*^[29] the South African Supreme Court of Appeal explained how a court should resolve factual disputes and ascertain as far as possible, where the truth lies between conflicting factual assertions. It stated:-

"To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In

the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

41. From the above dicta, the lesson that comes out is that where versions collide, the three aspects of credibility, reliability and probability are intermixed, and all three must be examined. This endeavor is not to be equated with box-ticking but to underscore the breadth of the field to be covered. The focal point of the exercise remains to find the truth. The TAT was persuaded that the Respondent's testimony was credible, reliable and probable. In short, on a balance of probabilities, it was satisfied that from the material before it, there was sufficient evidence to show that the taxes were not due.

42. It is trite that an appeal court is bound by the trial court's findings of credibility, unless they were found to be affected by a material misdirection or to be clearly wrong. The appeal court will only reverse these findings where it is convinced that the findings are wrong. I am unable to find any misdirection by the TAT in regard to the finding of credibility or contradictions on the part of the Respondent.

43. The second ground upon which the appellant's attempt to assail the TAT's finding on this piece of evidence is that the appellant is urging this court to overturn the decision primarily on findings of fact(s). Ordinarily, appeal courts in our law are reluctant to interfere with factual findings made by trial courts, more particularly if the factual findings depended upon the credibility of the witnesses who testified at the trial. Trial courts have advantages that appeal courts do not have. The former are steeped in the matter; they observe witnesses, and are able and required to assess probabilities as they manifest within the circumstances prevailing, and as they apply to the particular witnesses testifying. In the result, unless the factual findings of the trial court are clearly wrong, or unless the trial court will have misdirected itself, those findings are not to be upset on appeal. Wessels CJ said:

'The trial judge is not concerned with what is or is not probable when dealing with abstract business men or normal men, but is concerned with what is probable and what is not probable as regards the particular individuals situated in the particular circumstances in which they were.' [30]

44. In our system, as in many similar systems of appeal, the cold record placed before the appeal court does not capture all that occurred at the trial. The disadvantage is that the appeal court is denied the opportunity of observing witnesses testify and drawing its own inferences from their demeanor and body language. On the contrary, this is the advantage enjoyed by every trial court. Hence an appeal court must defer to the trial court when it comes to factual findings. In *Powell & Wife*, Lord Wright formulated the principle thus:

"Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judges, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case."

45. The TAT had the benefit of hearing the parties. It had the benefit of assessing the sale agreements. It weighed the credibility of the evidence. All that was required was evidence to support the fact the source of the funds and to confirm that the assessment was erroneous. The appellant argues that the Respondent ought to have produced a company resolution. The counter argument is that the Respondent having known the source of funds had the option of assessing the company since as he argued, the company is a legal entity. The evidence met the threshold of discharging the burden placed upon the Respondent by the law.

Conclusion

46. Flowing from my discussion and analysis above, I find that the appellant's appeal is totally unmerited. I find no basis at all to disturb the TAT's decision. The upshot is that the appellant's appeal is dismissed with costs to the Respondent.

Orders accordingly

SIGNED, DATED AND DELIVERED VIA E-MAIL AT NAIROBI THIS 12TH DAY OF AUGUST 2021

John M. Mativo

Judge

[\[1\]](#) Cap 470, Laws of Kenya.

[\[2\]](#) Act No. 29 of 2015.

[\[3\]](#) Act No. 40 of 2013.

[\[4\]](#) {2013} e KLR.

[\[5\]](#) {2017} e KLR.

[\[6\]](#) Cap 80, Laws of Kenya.

[\[7\]](#) Civil Appeal 154 OF 2007.

[\[8\]](#) {2018} e KLR.

[\[9\]](#) {2017} e KLR.

[\[10\]](#) {2017} e KLR

[\[11\]](#) {2004} e KLR

[\[12\]](#) {2015} e KLR.

[\[13\]](#) {1974} 2 ALL ER 372.

[\[14\]](#) F. JAMES & G. HAZARD, CIVIL PROCEDURE § 7.6, at 314 (3d ed. 1985); C. MCCORMICK, EVIDENCE § 336, at 947-48 (1984); 9 J. WIGMORE, EVIDENCE § 2485, at 285 (J. Chadbourne rev. 1981).

[\[15\]](#) Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 Hastings L.J. 239 (1988).

[\[16\]](#) A & A Tool & Supply Co. v. Commissioner, 182 F.2d 300, 304 (10th Cir. 1950).

[17] Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 *Hastings L.J.* 239 (1988).

[18] *Ibid.*

[19] *Ibid.*

[20] 254 F.2d 416 (2d Cir. 1958).

[21] 295 U.S. 247 (1935).

[22] Plato quoted in B. WOLFMAN & J. HOLDEN, *supra* note 3, at xviii

[23] *FCT v Thomas* [2018] HCA 31 at [84] and [85] per Gageler J.

[24] {1952} HCA 21.

[25] {1948} S.C.R. 486.

[26] {1997} 2 SCR 33.6

[27] 2007 DTC 5379, 2007 FCA 188.

[28] {1947} 2ALL ER 372.

[29] 2003 (1) SA 11 (SCA) at para 5.

[30] *Matsheva v S* (A342/2015) [2016] ZAGPJHC 89 (29 April 2016).



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