

Kenya Revenue Authority vs David Mwangi Ndegwa , (Civil Appeal No 65 of 2019) [2025]

Judgement Alert Issue No. 1 of 2025

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Background

The Court of Appeal in a judgement issued on 21st March 2025 determined that Value Added Tax (VAT) was payable on sale of commercial property.

The Commissioner of Domestic Taxes (herein the Appellant/KRA) lodged an appeal at the Court of Appeal after being dissatisfied with the decision of the High Court that set aside a demand for VAT on the basis that the wording of VAT Act, 2013 was ambiguous in respect of whether VAT was chargeable on the sale of land whether the premises thereon were residential or commercial.

KRA had been ordered to refund the VAT that the taxpayer had already paid upon purchase of the commercial property.



Brief Background of the Case at the High Court

David Mwangi (the Respondent/taxpayer) purchased property together with the buildings erected on the property for Kes 70,000,050.00. The Commissioner at the time demanded VAT which was paid by the Taxpayer under protest to the tune of Kes 11,200,080.00 being 16% VAT of the purchase price.

The Taxpayer appealed to the High Court stating that no VAT was payable on the sale or purchase of land regardless of whether the buildings erected on the land were residential or commercial and further requested that the VAT already paid in protest be refunded.

The Commissioner(KRA) on the other hand argued that VAT was payable and was lawfully levied as per the provisions of paragraph 8 of part II of the First Schedule of the VAT Act.

High Court Decision

The High Court eventually ruled that due to the ambiguity in the VAT Act,2013 the Commissioner had no right to levy VAT on the sale of commercial property

Brief Background of the Case at the Court of Appeal

The Commissioner having lost the case at the High Court lodged an appeal at the Court of Appeal and summarized its argument into 4 key points;

1. The Commissioner argued that the High Court was wrong in stating that the definition of land in the Constitution included buildings. The Land Act had created a distinction between land and buildings where the Land Act stated that land was as defined by Article 260 of the Constitution while buildings are defined to mean any structure or erection of any kind whatsoever.
2. That waiver/variation of taxes can only be done by legislation and that in the matter no legislation had waived VAT on commercial buildings meaning that it was payable.
3. The Commissioner further argued that there was no ambiguity in the VAT Act as the specific exemption of residential premises existed and it therefore followed that any other premises not specifically exempted from tax like residential premises was subject to VAT.
4. The Commissioner argued that the VAT was not refundable given that the law only allowed for a claim of refund of tax paid in error if the refund claim was made within 12 months from the date the tax became payable which was not the case in this matter.

Brief Background of the Case at the Court of Appeal

The Taxpayer in a rejoinder to the Commissioners argument at the Court of Appeal stated the following key points;

The Taxpayer argued that after including sale of land among the VAT exempted supplies. Parliament did not see the need to specifically include 'sale of buildings' in the list because the definition of land in the Constitution also included the buildings on the land given that the buildings were on the surface of the earth. As the Constitution defines land to include the surface of the earth and the subsurface rock.

That the specific reference to residential premises in paragraph 8 of the VAT Act,2013 must be read together to mean the supply of land or residential premises are exempt from VAT, and that what is exempted from VAT is supply by letting.

That sale of buildings was not a legal term and that exempting sale of land from VAT but subjecting sale of buildings thereon to VAT is a legal absurdity because one cannot sell land without necessarily selling the buildings standing on it.

The Taxpayer argued that ambiguities in tax law ought to be construed in favour of the Taxpayer.

The Taxpayer further argued that the time limitations of Section 30 in respect of VAT refunds did not apply as the VAT was paid in duress.

Issues for determination & the Court's finding

Whether commercial premises are exempt from VAT and whether there was an ambiguity in the 1st Schedule of the VAT Act?

The Court noted that the High Court was wrong in its decision in regards to the definition of land in the VAT Act, 2013. The VAT Act, 2013 defines land to include buildings erected thereon.

Noting that the definition of land in the Constitution ought to be applied depending on the context and that there was no particular legislation such as the VAT Act, 2013 defining land differently from the definition in the Constitution.

The Court stated that the specific exclusion of the supply of residential premises from VAT without any mention of supply of commercial premises, must mean that unlike residential premises, supply of commercial premises are not exempt from VAT.

The Court noted that there was no ambiguity in paragraph 8 of Part II of the First Schedule as the appeal was not based on the ambiguity that exists in mixed use premises.

The Court stated that the issue of refund was not applicable as it had found that the VAT had been levied legally.



Implication of the judgement

The judgement from the Court of Appeal is a reprieve on the contentious issue of the applicability of VAT on commercial premises. Given that the judgement recognizes that VAT is applicable on selling of land with commercial premises, businesses will now have to factor in VAT payments when acquiring property.

We note that this position is subject to change if the taxpayer proceeds to the Supreme Court however, we remain ready to communicate the same with our clients if the position changes.



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