

Tax Masterclass (Vol. 1)

by Anant Bhatt LLP

The Complete Guide | Kenya

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Tax Masterclass (Volume 1)

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Tax Litigation

The Tax Appeals Tribunal (TAT) was established under the Tax Appeals Tribunal Act, 2013 as a specialized quasi-judicial body mandated to hear and determine disputes relating to taxation in Kenya. It serves as the forum of first instance in the resolution of tax disputes, and forms a critical component of Kenya's tax dispute resolution architecture. Parties aggrieved by tax decisions are ordinarily required to exhaust remedies before the TAT prior to approaching the courts.

Where litigants bypass the TAT and initiate proceedings directly in court, judges often decline to entertain the matter, referring it back to the Tribunal if it becomes apparent that the statutory pre-litigation process has been circumvented. This approach reflects the principle of exhaustion of administrative remedies and reinforces the Tribunal's centrality in Kenya's tax justice system.

Tax litigation in Kenya generally arises in three principal contexts:

1. Appeals from technical decisions of the Tax Appeals Tribunal
2. Challenges to administrative excesses or abuse of process by the Kenya Revenue Authority
3. Petitions alleging infringement of constitutional rights

1. Appeals from Technical Decisions of the TAT

Under the Tax Appeals Tribunal Act, 2013, parties aggrieved by the decision of the TAT may appeal to the High Court of Kenya. Such appeals are typically limited to questions of law or jurisdiction, and are civil in nature. The subject matter of these appeals often includes technical issues such as tax classification, procedural compliance, interpretation of tax statutes, and quantification of tax liability. The High Court, while exercising appellate jurisdiction in such cases, gives due regard to the expertise of the TAT on matters of fact and evidence.

2. Abuse of Process and Administrative Excesses by the KRA

In some cases, taxpayers may initiate judicial review proceedings before the High Court against the KRA, alleging abuse of power or administrative overreach. This typically occurs where the taxpayer believes that the KRA has acted ultra vires its statutory mandate—such as by conducting unlawful audits, issuing unjustified tax assessments, or violating fair administrative procedures.

Because such actions may result in immediate and irreparable prejudice, taxpayers sometimes bypass the TAT and proceed directly to court, seeking relief through judicial review. These applications are treated as civil proceedings and are adjudicated based on principles of administrative law.

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3. Infringement of Constitutional Rights

Taxpayers may also bring constitutional petitions where they allege that actions taken by the KRA or other public authorities have violated their rights under the Bill of Rights. Article 22 of the Constitution of Kenya, 2010 empowers any person to institute legal proceedings for the enforcement of fundamental rights and freedoms.
Among the most commonly invoked provisions in tax-related constitutional petitions is Article 47, which guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. Taxpayers have invoked this provision in cases involving arbitrary assessments, denial of fair hearing, or unreasonable delays in the processing of objections and appeals.

The Tax Appeals Tribunal plays a foundational role in the resolution of tax disputes in Kenya, with the courts assuming an appellate or supervisory role depending on the nature of the dispute. The tripartite framework of TAT appeals, judicial review, and constitutional petitions reflects a maturing legal ecosystem that balances technical expertise, administrative accountability, and constitutional safeguards. As Kenya continues to enhance its tax administration systems, the proper sequencing and use of these forums remains critical to ensuring fairness and predictability in tax dispute resolution.

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Legislative Framework

Tax litigation in Kenya is bifurcated into civil and criminal proceedings, each governed by distinct yet occasionally overlapping legal instruments. The litigation pathway adopted depends on the nature of the dispute—whether it pertains to liability, compliance, or conduct amounting to criminality such as tax evasion or fraud.

Civil

1. Civil Procedure Act.
2. Tax Procedures Act.
3. Tax Appeals Tribunal Act.
4. Tax Appeals Tribunal, Appeals to the High Court Rules 2015.
5. Tax Appeals Tribunal Procedure Rules 2015.
6. Court of Appeal Rules (CA Rules).

Civil Procedure Act (Cap. 21 Laws of Kenya)
Provides the foundational procedural framework for civil matters before Kenyan courts, including tax disputes escalated from the Tribunal to the High Court.

Tax Procedures Act, 2015
Consolidates and streamlines the administrative procedures relating to the assessment, collection, and enforcement of tax laws. It also sets out taxpayer rights and obligations during the audit and objection processes.

Tax Appeals Tribunal Act, 2013
Establishes the Tax Appeals Tribunal and outlines its jurisdiction, powers, and procedures for handling tax disputes as the forum of first instance.

Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015
These rules govern the procedure for appealing decisions of the TAT to the High Court, including timelines, documentation, and grounds of appeal.

Tax Appeals Tribunal Procedure Rules, 2015
Regulate proceedings before the TAT itself, detailing the filing of appeals, hearing procedures, evidence submission, and issuance of decisions.

Court of Appeal Rules
Govern further appeals from the High Court to the Court of Appeal, including procedural requirements, timelines, and permissible grounds for appeal.

Civil tax litigation proceeds through a hierarchical structure—commencing before the TAT, then escalating to the High Court, and potentially to the Court of Appeal.

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Criminal Tax Litigation

Criminal tax litigation arises where taxpayers are alleged to have committed offences such as tax evasion, false declarations, fraudulent refunds, or obstruction of tax officers. These proceedings are punitive in nature and aim at deterrence, punishment, and compliance enforcement. The following legal instruments provide the framework for criminal tax litigation:

Criminal
1. Criminal Procedure Code (Cap. 75 Laws of Kenya)
2. Tax Procedures Act, 2015
3. Tax Appeals Tribunal Act, 2013
4. Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015
5. Tax Appeals Tribunal Procedure Rules, 2015
6. Court of Appeal Rules

Criminal Procedure Code (Cap. 75 Laws of Kenya)
Governs the general procedures applicable to criminal prosecutions, including arrest, bail, trial, sentencing, and appeals in tax-related offences.

Tax Procedures Act, 2015
In addition to administrative procedures, this Act also creates specific tax offences and prescribes criminal penalties, including fines and imprisonment, for violations such as failure to file returns, obstruction, and fraud.

Tax Appeals Tribunal Act, 2013
While primarily applicable to civil proceedings, the Act also interfaces with criminal matters where preliminary tax assessments or determinations are relevant to the prosecution.

Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015
May be relevant in instances where criminal proceedings involve contestation of prior tribunal decisions or require reference to earlier appellate findings.

Tax Appeals Tribunal Procedure Rules, 2015
Useful where criminal allegations stem from proceedings initially commenced in the TAT or where procedural violations form the basis of the criminal complaint.

Court of Appeal Rules
Applicable to appeals from criminal convictions or sentences arising from tax-related prosecutions where legal errors or constitutional questions are in issue.

Criminal tax litigation is usually initiated by the Director of Public Prosecutions (DPP), based on investigations by the KRA, the Directorate of Criminal Investigations (DCI), or the Ethics and Anti-Corruption Commission (EACC), depending on the nature of the offence. Prosecutions are conducted in accordance with the rules of criminal procedure and the constitutional rights of the accused.

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Tax Evasion & Other Offences

Tax evasion constitutes a serious criminal offence under Kenyan law, attracting penalties that may include fines, imprisonment, or both. The offence encompasses a range of deliberate acts or omissions by a taxpayer that result in the unlawful reduction or avoidance of tax liability. The governing statute, principally the Tax Procedures Act, 2015, provides a detailed framework for the detection, prosecution, and punishment of tax evasion offences.

A person is guilty of the offence of tax evasion if, without reasonable excuse, they engage in any of the following acts:

1. Failure to Provide a Full and True Return
A taxpayer is required to file a complete and accurate tax return within the prescribed statutory timelines. The deliberate failure to do so, where it results in underreporting or non-reporting of income or tax due, constitutes a prosecutable offence.

2. Failure to Keep Records and Proper Books of Account
Taxpayers are legally obligated to maintain adequate and accurate records of transactions, income, and expenses for a specified period (usually five years). The intentional failure to maintain such records may be construed as an attempt to obscure taxable activity and constitutes tax evasion.

3. Failure to Produce Documents for Inspection
When requested by the Commissioner of the Kenya Revenue Authority (KRA), a taxpayer must produce relevant records and documents for examination. Non-compliance without reasonable cause may indicate concealment and is punishable as tax evasion.

4. Failure to Account for Tax as Required by Law
Where the law imposes a duty to collect, withhold, or remit tax—such as PAYE, VAT, or withholding tax—the failure to properly account for or remit such amounts to the KRA is deemed a serious breach and may attract criminal prosecution.

5. Making an Incorrect Return by Omitting or Understating Income
Deliberate omission or understatement of income or taxable supplies in a tax return—intended to reduce tax liability—constitutes a direct act of tax evasion. Such conduct demonstrates an intention to deceive the revenue authority.

6. Making an Incorrect Statement in a Return
Any false or misleading declaration made knowingly in a tax return—whether relating to income, deductions, allowances, or any other material aspect of tax computation—is criminalised under the tax laws.

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7. Providing Incorrect Information Affecting Another Person's Tax Liability
Providing false or misleading information that affects the tax liability of another person—such as in relation to employment, partnerships, or agency relationships—is equally prohibited. This provision targets collusive or fraudulent tax arrangements.

8. Preparation or Maintenance of False Books of Account
Any person who prepares, maintains, or authorises the maintenance of books of account that do not reflect the true financial position of a taxpayer commits an offence. This includes falsifying invoices, ledgers, or supporting documentation.

9. Use of Fraud or Authorisation of Fraud
The intentional use of deceit, misrepresentation, or concealment to evade tax—whether directly or indirectly—is among the most serious forms of tax evasion. This includes not only committing fraud personally but also aiding, abetting, or authorising fraudulent conduct.

Legal Consequences and Enforcement

The Kenya Revenue Authority, through its Investigations and Enforcement Department and in collaboration with the Director of Public Prosecutions (DPP), actively pursues tax evasion cases. Convictions can lead to substantial penalties, including:

- Fines of up to two times the tax evaded
- Imprisonment for up to ten years, depending on the offence
- Asset recovery proceedings under the Proceeds of Crime and Anti-Money Laundering Act

Taxpayers are encouraged to voluntarily comply with tax obligations and to utilise the Voluntary Tax Disclosure Programme (VTDP) where available, to mitigate penalties and avoid prosecution.

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Pre-Court / Pre-Tribunal Process

Kenya's tax administration system is grounded in a self-assessment regime, which obliges taxpayers to calculate, report, and remit taxes due. However, the Kenya Revenue Authority (KRA), acting through the Commissioner, retains broad powers to verify compliance, issue assessments, and initiate administrative or legal action in the event of non-compliance. We can now outline the core processes governing civil and criminal tax enforcement, including administrative determinations, dispute resolution procedures, and the elements of criminal tax offences.

CIVIL LAW

Assessments, Objections, and Administrative Remedies

Under the Tax Procedures Act, 2015, the Commissioner of the KRA is empowered to assess tax liabilities where there is reason to believe that a taxpayer has failed to properly declare or remit taxes. This occurs through the issuance of a notice of assessment.

Once a notice of assessment is served, the taxpayer has two options:

1. Accept the assessment, in which case the tax must be paid as demanded.
2. Object to the assessment by filing a formal notice of objection.

To be valid, an objection notice must:

- Clearly state the grounds of objection, and
- Be received by the Commissioner within 30 days from the date the notice of assessment was issued.

Upon receipt, the Commissioner may:

- Amend the assessment in line with the taxpayer's objections, or
- Refuse to amend, maintaining the original position.

If dissatisfied with the outcome, the taxpayer may escalate the matter to the Tax Appeals Tribunal (TAT). This must be done by:

- Filing a notice of appeal within 30 days of the Commissioner's decision, and
- Submitting the memorandum of appeal, statement of facts, and the Commissioner's decision within 14 days thereafter.

Alternative Dispute Resolution (ADR)

To promote efficiency and reduce litigation backlog, the KRA has institutionalized Alternative Dispute Resolution (ADR) as a supplementary dispute resolution mechanism. ADR in Kenya is voluntary, participatory, and involves a facilitated negotiation between the taxpayer and the Commissioner.

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ADR can be initiated by either party and may occur at any stage of the dispute process, including during proceedings before the TAT or the High Court. A party seeking ADR must:

- Submit a written request to engage in ADR, and
- Provide a settlement proposal outlining the terms of potential resolution.

Upon receiving such a request, the TAT or court may stay proceedings (including any existing orders) for the duration of the ADR engagement.

Parties are guided by mutually agreed rules of engagement, alongside applicable legal and procedural standards. Supporting documents must be disclosed in full to enable a meaningful and fair resolution. Taxpayers may appear personally or through a representative, including legal counsel or a tax adviser.

ADR is increasingly viewed as a pragmatic, cost-effective, and less adversarial means of resolving tax disputes.

CRIMINAL LAW

Tax Evasion and Defences

In cases involving fraudulent or intentional wrongdoing, tax non-compliance may escalate to criminal tax litigation. The principal offence is tax evasion, which is criminalized under the Tax Procedures Act and prosecuted in accordance with the Criminal Procedure Code.

A person is guilty of tax evasion if they intentionally engage in any of the following:

- Non-disclosure of income or information relevant to tax liability
- Fraudulent misrepresentation in tax returns or declarations
- Non-payment of taxes lawfully due

These acts must be deliberate and without reasonable excuse to attract criminal liability.

Available Legal Defences

Certain defences may absolve or mitigate liability in criminal tax proceedings. These include:

1. Genuine lack of awareness
    - Often invoked by senior management in corporate prosecutions, this defence requires proof that the individual could not have known about the offence and took remedial steps upon discovery.
2. Ambiguity in the law
    - Where unclear or conflicting legal provisions led to a reasonable misinterpretation by the taxpayer, this may negate culpability.
3. Legitimate expectation based on KRA representations
    - If the taxpayer acted on a representation made by the KRA—creating a legitimate expectation that their conduct was lawful—they may assert a defence against prosecution.

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Early Dispute Resolution Through Plea Agreements

Under the Criminal Procedure Code, Kenya permits plea bargaining as a form of early resolution in criminal tax cases. The accused person, through their legal representative, may negotiate with the prosecution to reach a plea agreement, which may involve:

- Reduction of the charge to a lesser offence
- Withdrawal or stay of charges
- A promise not to pursue additional charges
- Agreement on restitution or compensation

Plea agreements provide flexibility and efficiency in resolving criminal tax disputes while enabling the recovery of revenue for the state.

Kenya's tax enforcement landscape comprises a structured civil framework for assessments and appeals, alongside criminal sanctions for serious non-compliance. The emergence of ADR and plea agreements reflects a growing emphasis on negotiated outcomes and dispute de-escalation. For both individuals and corporations, understanding these mechanisms—and engaging them strategically—remains essential for ensuring compliance, reducing exposure, and maintaining a cooperative relationship with the Kenya Revenue Authority.

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TRIAL PROCESS

Tax litigation in Kenya can take the form of either civil proceedings—typically appeals and judicial review applications—or criminal prosecutions for offences such as tax evasion and fraud.

The processes governing these proceedings are structured under various legal instruments, primarily the Tax Procedures Act, the Tax Appeals Tribunal Act, and the Criminal Procedure Code. We can now outline the hearing format and procedural flow for both civil and criminal tax matters.

Forum of First Instance and Nature of Hearings

The Tax Appeals Tribunal (TAT) is the forum of first instance for civil tax disputes. A taxpayer may approach the Tribunal after exhausting the administrative procedures provided by the Kenya Revenue Authority (KRA).

TAT proceedings are conducted in private, and only the parties to the dispute are permitted to attend.

In contrast, High Court proceedings—such as appeals from the TAT or constitutional petitions—are generally conducted in public, unless a party successfully applies for the matter to be heard in camera due to its sensitive nature.

A. Proceedings Before the Tax Appeals Tribunal (TAT)

(1) Notice of Appeal
A taxpayer must submit a written notice of appeal to the TAT within 30 days of receiving the Commissioner's decision on an objection.

(2) Filing Supporting Documents
Within 14 days of filing the notice of appeal, the appellant must submit multiple copies (usually nine) of:

- The memorandum of appeal (outlining the grounds of appeal),
- A statement of facts, and
- The KRA's objection decision.

(3) Registry Notification
Within seven working days, the TAT Registry must notify the Secretary to the Tribunal of the appeal particulars. A copy of the notice of appeal must also be served on the Commissioner within two days of filing.

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(4) Response by the Commissioner
The Commissioner is required to file, within 30 days, the following:
- A statement of facts,
- A statement of reasons for the objection decision, and
- All supporting documentation.

(5) Hearing and Determination
- The Tribunal sets a hearing date, with a minimum 14-day notice to both parties.
- Evidence may be presented orally, by affidavit, or as directed by the Tribunal.
- The Tribunal may summon witnesses, request documents, or engage independent experts.
- The Tribunal can also facilitate out-of-court settlements, and has the authority to issue a costs award at the conclusion of proceedings.

B. Appeals to the High Court

(1) Notice and Memorandum of Appeal
A notice of appeal must be followed, within 30 days, by the filing of a memorandum of appeal and supporting documentation with the High Court Registrar. The appeal is entered into the register of tax appeals.

(2) Fee Requirement
Filing fees must be paid in full within 14 days of notification; failure results in abatement of the appeal.

(3) Response by the Commissioner (Respondent)
A statement of facts in response must be filed within 30 days of service of the memorandum of appeal.

(4) Hearing Procedure
- The Registrar notifies parties of the hearing date at least 15 days in advance.
- The appellant and witnesses are heard first, followed by cross-examination
- The respondent's case is then presented, with cross-examination and re-examination.
- Parties may make oral or written submissions before the Court renders its decision.

Role of Adjudicators in Civil and Criminal Tax Matters

A. In Civil Tax Proceedings

The Tribunal or Judge is empowered to:
- Hear and determine the matter,
- Notify parties of hearing dates,
- Direct the conduct of proceedings,
- Summon witnesses and request documents,
- Issue stay orders on disputed decisions,
- Take evidence on oath and adjourn hearings,
- Proceed in the absence of a party who had adequate notice

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B. In Criminal Tax Proceedings

In criminal matters, the trial court (typically a subordinate court) assumes a similar role but with additional functions:

- Take the plea of the accused,
- Hear prosecution's case and determine whether a prima facie case exists,
- If so, require the accused to enter a defence,
- Hear the defence case,
- Render a verdict and sentence accordingly.

Commencement of Proceedings

A. Civil Law

Tax litigation typically begins before the TAT after an administrative dispute has been escalated from KRA. However, where constitutional rights are alleged to have been violated, a taxpayer may initiate proceedings directly in the High Court by filing a constitutional petition.

- The petition must cite the constitutional provisions breached and the nature of injury.
- The High Court accepts oral, written or informal petitions, though an oral application must be reduced to writing.
- The petition is supported by an affidavit, and any relevant documents must be annexed.
- The petitioner must serve the respondent within 15 days, and the Attorney General (or state agency) responds by replying affidavit within 14 days; other respondents must respond within 7 days.

Filing Fee: A nominal filing fee of KES 20,000 (approx. USD 200) is required to lodge a civil tax appeal.

Tax Payment: A taxpayer is not required to pay disputed tax before appealing.

Penalties and Interest: These stop accruing upon objection and may be waived upon application, subject to determination by the Commissioner.

B. Criminal Tax Litigation

Criminal prosecutions are handled by the Director of Public Prosecutions (DPP). However, under Section 40 of the Tax Appeals Tribunal Act, a duly authorized KRA officer may prosecute tax offences in subordinate courts with the approval of the DPP.

Procedure

(1) Initiation
The process begins with a complaint to the police—filed by a member of the public or by a public agency such as the KRA.

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(2) Investigation and Statement Collection
Witnesses and complainants record written statements. The police then investigate and, if appropriate, forward the case file to the DPP.

(3) Charging
The DPP reviews the file and, where a prosecutable offence is disclosed, authorizes charges to be filed in court.

The matter then proceeds under the Criminal Procedure Code, as outlined above in Section III(B).

Tax litigation in Kenya is governed by a multi-tiered framework that allows for both private and public hearings, depending on the forum and nature of the dispute. The TAT serves as the primary forum for civil appeals, while the High Court and subordinate courts handle appeals, constitutional matters, and criminal prosecutions. The procedural rules ensure fair hearing, transparency, and access to justice, while safeguarding the rights of both taxpayers and the State.

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GOVERNMENT RESPONSE

Kenya has undertaken significant reforms to enhance the efficiency, fairness, and accessibility of its tax dispute resolution mechanisms. These developments are particularly evident in the civil law domain, where legislative and institutional changes have aimed at streamlining procedures, encouraging early resolution, and reducing the litigation burden on courts. Conversely, criminal tax enforcement remains sparingly applied and largely secondary to administrative sanctions.

Civil Law: Strengthening Dispute Resolution Mechanisms

The increase in the volume and complexity of tax disputes in Kenya has prompted the government to adopt a multi-faceted approach to tax administration reform. The overarching objective is to reduce the number of disputes progressing to court, encourage voluntary compliance, and facilitate efficient dispute resolution. The key reforms are outlined below:

1. Introduction of Alternative Dispute Resolution (ADR)

To reduce the cost and adversarial nature of tax litigation, the government has introduced a formal Alternative Dispute Resolution (ADR) mechanism. ADR provides both the Kenya Revenue Authority (KRA) and taxpayers an opportunity to resolve disputes amicably and expeditiously, without resorting to protracted litigation. This process is voluntary, and discussions are facilitated by neutral officers from the KRA's ADR unit, in line with agreed procedures and timelines.

2. Enactment of the Tax Procedures Act, 2015

The Tax Procedures Act was enacted to harmonise tax administrative provisions previously scattered across various tax statutes. It consolidated and clarified dispute resolution procedures, thereby providing a unified legal framework for handling tax assessments, objections, appeals, and penalties. The Act also strengthened the taxpayer's rights to be heard, to appeal, and to seek redress under a simplified process.

3. Establishment of the Tax Appeals Tribunal (TAT)

The Tax Appeals Tribunal was constituted under the Tax Appeals Tribunal Act, 2013, with the aim of consolidating multiple tax-specific tribunals into a single specialised forum for tax disputes. The Tribunal consists of 20 members, drawn from the legal, accounting, finance, and economics professions. Each hearing is presided over by a panel of at least three members, ensuring that decisions are informed by a multidisciplinary understanding of tax law and practice.
This structural reform has enabled:

- Faster resolution of tax disputes,
- Improved professionalism in adjudication, and
- Reduced backlog in the High Court.

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4. Enhanced Taxpayer Education and Recruitment Initiatives

To promote tax compliance and awareness, the KRA has intensified its public education campaigns. These efforts include workshops, online resources, media outreach, and taxpayer engagement forums aimed at clarifying tax obligations, explaining dispute resolution options, and building trust between taxpayers and the authority.

Objective of Reforms

These reforms collectively seek to:

- Divert non-complex disputes away from the courts,
- Ensure that only matters requiring judicial intervention are litigated,
- Enhance the efficiency and accessibility of the dispute resolution process,
- Support voluntary compliance through education and dialogue.

The result is a more responsive and modern tax administration system aligned with international best practices.

Criminal Law: Reserved and Cautious Enforcement

In contrast to civil enforcement, criminal prosecution for tax offences remains rare in Kenya. The Kenya Revenue Authority generally prefers to recover unpaid taxes, interest, and penalties through administrative procedures rather than pursuing criminal sanctions.
While the Tax Procedures Act and the Penal Code provide for criminal liability in cases of tax evasion, fraud, and obstruction of tax officers, the prevailing approach has been to:

- Assess the unpaid tax,
- Impose interest and penalties, and
- Pursue settlement and compliance over prosecution.

This practice reflects a policy of reserving criminal prosecution for aggravated or deliberate misconduct, such as organised tax fraud or repeat offences.

There have been no recent procedural changes affecting the prosecution of criminal tax cases. However, under Section 40 of the Tax Appeals Tribunal Act, authorised KRA officers may appear before subordinate courts to prosecute tax-related offences, provided they have the approval of the Director of Public Prosecutions (DPP).

Kenya's evolving tax enforcement framework demonstrates a clear policy preference for administrative and civil dispute resolution over criminal sanctioning. Through the introduction of ADR, the establishment of a unified Tribunal, and the consolidation of procedures under the Tax Procedures Act, the country has taken significant steps toward a more accessible, fair, and efficient tax system.

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BURDEN OF PROOF

The concept of burden of proof lies at the heart of all litigation, determining which party is responsible for proving the facts necessary to establish their case. In Kenyan tax law, the applicable standard and burden differ significantly depending on whether the matter is pursued under civil or criminal law. This distinction reflects broader legal principles governing administrative justice and the presumption of innocence in criminal prosecutions.

Civil Law: Taxpayer Bears the Burden

In civil tax litigation, the burden of proof rests squarely with the taxpayer. This is consistent with Kenya's self-assessment tax regime, which presumes that the taxpayer has the best access to the facts concerning their income, deductions, and tax remittance history.

A. Tax Assessment Disputes

Where a taxpayer challenges an assessment issued by the Kenya Revenue Authority (KRA), it is the taxpayer's duty to prove that the tax has been paid or that the assessment is erroneous. This involves presenting documentary evidence, such as:

- Payment receipts,
- Bank confirmations,
- Accounting records, or
- Filed returns and reconciliation statements.

The Tax Appeals Tribunal and courts require actual evidence of payment or compliance, and mere assertions or general denials are insufficient to discharge this burden.

B. Judicial Review and Constitutional Petitions

Where a taxpayer files a judicial review application or a constitutional petition, the burden is similarly on the taxpayer to prove:

1. The specific administrative excess or illegality allegedly committed by the KRA, and
2. The precise harm, injustice, or infringement likely to result if the relief sought is not granted.

For instance, in a constitutional petition invoking Article 47 (right to fair administrative action), the petitioner must:

- Identify the decision or action being challenged,
- Demonstrate that it was unlawful, unreasonable, or procedurally unfair, and
- Show how it violated a constitutional right or caused unjust prejudice.

C. Standard of Proof

In all civil tax matters, including:

- Appeals before the Tax Appeals Tribunal,
- Judicial review applications, and
- Constitutional petitions,

the standard of proof is on a balance of probabilities. This means that the taxpayer must establish that it is more likely than not that the facts they assert are true.

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Criminal Law: Prosecution Bears the Burden

In contrast, where a taxpayer is charged with a criminal tax offence—such as fraud, evasion, or deliberate non-disclosure—the burden of proof lies with the prosecution, typically led by the Director of Public Prosecutions (DPP).

A. Standard of Proof

The applicable standard is proof beyond reasonable doubt, which is the highest standard in law. The prosecution must establish, to the exclusion of any reasonable doubt, that the accused:

- Committed the act in question, and
- Possessed the necessary mens rea (criminal intent), such as:
  - Intent to defraud,
  - Deliberate misrepresentation, or
  - Wilful failure to disclose income or remit tax.

This is consistent with the constitutional presumption of innocence under Article 50(2)(a) of the Constitution of Kenya, 2010, which guarantees every accused person the right to be presumed innocent until proven guilty.

B. No Shift of Burden

In criminal tax prosecutions, the burden never shifts to the accused. The taxpayer is not required to prove their innocence. The court must acquit if the prosecution fails to establish all essential elements of the offence beyond reasonable doubt.

The burden and standard of proof in tax matters depend fundamentally on the nature of the proceeding. In civil tax litigation, the taxpayer must prove their case on a balance of probabilities, whether challenging an assessment or seeking constitutional relief. In criminal matters, the prosecution carries the heavy burden of proving guilt beyond reasonable doubt. These rules ensure that tax enforcement remains fair, proportionate, and anchored in established principles of justice.

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MAIN STAGES

Tax litigation in Kenya follows distinct procedural stages depending on whether the matter is pursued under civil or criminal law. Understanding the sequence of events in each type of proceeding is essential for both practitioners and taxpayers.

Below is an outline of the typical steps involved in civil and criminal tax litigation before Kenyan courts.

Civil Law Proceedings: Tax Appeals and Constitutional Petitions

In civil tax litigation—whether an appeal before the Tax Appeals Tribunal, a matter before the High Court, or a constitutional petition—the process is largely governed by the Tax Procedures Act, the Tax Appeals Tribunal Act, and the Civil Procedure Act.

A. Stages of Civil Proceedings

(1) Lodging and Service of Appeal Papers
The process begins with the filing of the appeal or petition, including all requisite documents (such as the memorandum of appeal, statement of facts, and supporting affidavits). Once filed, the taxpayer must serve the respondent—typically the Kenya Revenue Authority (KRA)—within the statutory timeframes.

(2) Directions by the Court or Tribunal
After service, the court or tribunal will convene a directions hearing. At this stage, the presiding judge or tribunal panel issues procedural directions, which may include:

- Timelines for the exchange of written submissions,
- Whether oral submissions will be permitted,
- Any preliminary objections to be addressed,
- Scheduling of hearings or status conferences.

(3) Presentation of Submissions
The matter then proceeds to the hearing stage, where parties present their arguments either in writing or orally, in accordance with the directions previously issued.

- Written submissions are the norm in appellate and judicial review proceedings.
- Oral hearings may be granted where factual issues are in dispute or where constitutional matters require clarification.

(4) Judgment
The court or tribunal will issue a reasoned decision based on the submissions and evidence presented. Where applicable, it may also issue orders as to costs, interest, or other remedies.

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Criminal Law Proceedings: Prosecution of Tax Offences

Criminal tax matters—such as those involving fraud, evasion, or obstruction—are prosecuted under the Tax Procedures Act, the Penal Code, and the Criminal Procedure Code. These cases are typically initiated by the Director of Public Prosecutions (DPP) following investigations by the KRA or the police.

B. Stages of Criminal Proceedings

(1) Drafting of the Charge Sheet
The prosecution prepares a charge sheet that outlines the specific tax offence(s) allegedly committed. The charge must be clear, lawful, and indicate the nature and particulars of the offence, such as:

- Failure to remit tax,
- Submission of false returns,
- Use of fraudulent documentation.

(2) Plea Taking
The accused person is brought before the court to enter a plea. The court will record whether the plea is:

- Guilty, in which case sentencing may proceed, or
- Not guilty, in which case the matter is scheduled for full hearing.

(3) Prosecution's Case
The prosecution then presents its case through:

- Examination of witnesses,
- Introduction of documentary or forensic evidence, and
- Cross-examination by the defence.

(4) Ruling on Whether There Is a Case to Answer
After the prosecution closes its case, the court must determine whether a prima facie case has been established.

- If no case to answer is found, the court acquits the accused under Section 210 of the Criminal Procedure Code.
- If a case is established, the accused is called upon to present their defence.

(5) Defence Case
The accused may testify or call witnesses. The prosecution is entitled to cross-examine all defence witnesses. After the defence closes its case, final submissions may be made.

(6) Judgment and Sentencing
The court delivers a verdict of guilty or not guilty. If convicted, the court proceeds to sentencing, which may involve:

- Imprisonment,
- Fines (including double the tax evaded), or
- Orders for compensation or restitution

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DOCUMENTARY EVIDENCE

The disclosure of documents plays a critical role in both civil and criminal tax litigation, enabling the resolution of disputes through the fair presentation of evidence. Kenyan tax law imposes extensive disclosure obligations on taxpayers, particularly given the self-assessment framework under which the tax system operates. This article outlines the scope of document disclosure in civil proceedings, highlights special investigative powers granted to the Kenya Revenue Authority (KRA), and discusses disclosure in the context of criminal tax cases.

CIVIL TAX PROCEEDINGS

In civil tax disputes—whether before the Tax Appeals Tribunal or the High Court—a taxpayer is required to disclose all documents relevant to the period and subject matter under dispute. These documents form the evidentiary basis for assessing compliance, establishing liability, or refuting an assessment made by the Commissioner.

Standard Disclosure Requirements

The following categories of documentation are typically required for disclosure in civil proceedings involving tax matters:

- Financial statements for the relevant accounting period(s);
- Tax computations, including schedules showing the basis for deductions or credits claimed;
- Proof of payment, such as official tax receipts or bank confirmation of remittance;
- Filed tax returns (e.g. VAT, PAYE, income tax) covering the assessment period;
- Any other document or record deemed relevant by the Tribunal or Court, including invoices, contracts, payroll records, or correspondence with the KRA.

The obligation to disclose is broad and may extend beyond documents initially relied upon by the taxpayer to any materials relevant to the dispute or inquiry, whether favourable or adverse.

Access and Inspection by the Commissioner

Under the Tax Procedures Act, the Commissioner enjoys statutory authority to inspect books, records, and premises of any taxpayer. This access is not subject to limitations and applies regardless of whether a civil dispute is ongoing. Specifically, the Commissioner may:

- Require the taxpayer to produce records for inspection;
- Enter premises and inspect documents without prior notice in some cases;
- Make extracts or copies of books or records relevant to the inquiry.

This underscores the legal obligation of taxpayers to maintain proper books of account and make them available upon request.

Special Rules and Investigative Powers

Where the Commissioner or an authorized officer reasonably suspects a tax offence, certain enhanced investigatory powers may be exercised—typically with the authority of a warrant issued by a competent judicial officer.

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Investigatory Powers Under Warrant

In such cases, the Commissioner or authorised officer may:

1. Enter premises to search for money, documents, or articles relevant to the inquiry;
2. Open or remove containers, boxes, or packages suspected of containing relevant items;
3. Seize and retain documents, funds, or property necessary for the inquiry or for use in civil or criminal proceedings;
4. Access bank records, subject to certain limitations:
    - Only copies or extracts of bank-held documents may be obtained;
    - Signed receipts must be issued to the taxpayer for all items seized.

These powers are broadly defined under the tax laws and are essential for detecting, investigating, and prosecuting tax fraud or evasion.

Unrestricted Access for Tax Purposes

The Commissioner retains the right to:

- Enter and inspect any lands, buildings, or premises, and
- Access all books, records, and documents, whether held by public officers, corporate entities, or private individuals.

This power is exercisable for any purpose under the taxing statutes and is not restricted to specific disputes or inquiries.

CRIMINAL TAX PROCEEDINGS

In criminal tax litigation, the rules governing document disclosure generally mirror those applicable in civil proceedings. However, certain differences arise from the nature and scope of criminal investigations.

Standard of Disclosure

There are no special rules requiring different standards of document production solely because the matter is criminal. Both the prosecution and the defence are expected to present all relevant documents that support or refute the charges brought.

However, the Commissioner's investigatory powers are often exercised more expansively in criminal cases, particularly where the taxpayer is suspected of:

- Gross negligence,
- Wilful evasion, or
- Fraudulent conduct.

In such instances, the KRA is not subject to the standard five-year time limit for tax assessments. This means that in criminal proceedings:

- The taxpayer may be required to produce records spanning a longer time period (potentially well beyond five years),
- Subject to the availability of those records and the reasonableness of the request.

This approach allows for a more thorough reconstruction of the taxpayer's financial affairs in cases of suspected long-term fraud.

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WITNESS EVIDENCE

The conduct of trials in tax-related matters is subject to distinct procedural and evidentiary rules, depending on whether the case is framed as a civil claim—including judicial or constitutional review—or as a criminal prosecution. While the underlying subject matter may involve taxation, the form of the trial and the treatment of evidence differ significantly in accordance with the rules of civil and criminal procedure in Kenya.

Nature of Evidence at Trial

A. Civil Proceedings

The nature of the evidence in civil tax litigation depends on the procedural mode by which the case is instituted:

1. Judicial Review and Constitutional Petitions
   - Evidence is generally presented by way of affidavit.
   - A party may apply to cross-examine the deponent of an affidavit. If the court grants this request, the deponent is required to appear in court and give oral evidence under oath.
   - This ensures procedural fairness, particularly where disputed facts arise.
2. Civil Claims Instituted by Plaint
   - Witnesses are required to provide witness statements, which must be filed in court ahead of the hearing.
   - At trial, witnesses are expected to attend court and give oral testimony, during which they may be cross-examined by the opposing party and re-examined by their own counsel.

This dual approach ensures that both affidavit-based proceedings (such as judicial review) and fact-intensive civil claims receive tailored evidentiary treatment.

B. Criminal Proceedings

In criminal tax cases, the process of gathering evidence differs from civil matters:

- Witness statements are not formally filed with the court prior to trial.
- Instead, the complainant, investigating officers, and other relevant persons provide recorded statements to the police during the investigation phase.
- These statements assist in building the prosecution's case but are not considered formal witness statements in the civil sense.
- At trial, witnesses are required to attend court and provide oral testimony, subject to cross-examination.

The focus in criminal trials is on live testimony, presented in open court, to safeguard the rights of the accused, including the constitutional right to challenge the evidence against them.

Witness Preparation

While the preparation of witnesses is an essential aspect of trial strategy, Kenyan law imposes strict limits to ensure fairness and prevent manipulation of testimony.

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A. Civil Proceedings

There is no codified procedure for preparing witnesses in civil cases, but the following principles apply:

- Witness coaching is prohibited. This includes rehearsing specific answers or altering the substance of testimony.
- However, a witness may be:
  - Informed of courtroom procedure,
  - Briefed on the sequence of events, and
  - Prepared for cross-examination by explaining the general nature of adversarial questioning.

Witness preparation must aim to facilitate honest, confident, and relevant testimony, without influencing the substance of what the witness will say.

B. Criminal Proceedings

The same principles governing witness preparation in civil cases apply to criminal cases:

- Coaching is not permitted.
- Witnesses may be oriented to court procedure and advised on what to expect during examination and cross-examination.
- The objective is to ensure truthful and untainted evidence is provided.

Hearsay Evidence

The rules relating to hearsay—statements made outside court that are offered to prove the truth of the matter asserted—apply with equal force in civil and criminal tax litigation.

A. Civil Trials

- Direct oral evidence must be presented where facts are contested.
- A hearsay statement is generally inadmissible if it is:
  - Made by someone not called as a witness, and
  - Offered to prove the truth of the facts contained in the statement.
- However, if the statement is introduced not to prove the truth of its contents but simply to prove that the statement was made, then it is not considered hearsay and may be admissible.

Examples of admissible non-hearsay include:

- Proving the existence of a warning or instruction,
- Showing knowledge or belief held by a party at a certain time.

B. Criminal Trials

The rules governing hearsay evidence in criminal proceedings are identical to those in civil trials:

- The accused has a constitutional right to confront the evidence presented against them.
- Only first-hand, admissible testimony is allowed, unless the hearsay falls under an established exception (such as dying declarations, business records, or spontaneous utterances, as may be recognized under Kenyan evidentiary law).

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EXPERT EVIDENCE

The use of expert evidence is a critical component of complex litigation, including disputes involving taxation, finance, and accounting. Both civil and criminal trials in Kenya permit the introduction of expert testimony, subject to procedural rules that ensure fairness, reliability, and evidentiary value. Additionally, trial closure procedures differ between civil and criminal forums, reflecting the distinct objectives and pacing of the respective legal systems.

CIVIL TRIALS

In civil tax proceedings—such as appeals before the Tax Appeals Tribunal or constitutional petitions before the High Court—expert evidence may be introduced to support complex factual arguments, including accounting discrepancies, valuation disputes, or industry standards.

A. Introduction of Expert Reports

- Expert reports are governed by the same rules as ordinary witness statements.
- A party must file all witness statements, including expert reports, at the time of filing suit.
- However, parties may also file expert witness statements separately, provided they do so at least 15 days prior to the pre-trial conference, as allowed by procedural rules.

Where the matter proceeds by affidavit evidence (such as in judicial review or constitutional petitions), the expert will present their evidence in the form of a sworn affidavit. The opposing party may apply to cross-examine the expert on the contents of the affidavit, in which case the expert must attend court and provide oral evidence.

B. Special Considerations for Expert Evidence

The admissibility and weight of expert evidence in civil trials depend on specific criteria:

- The individual must possess specialist expertise in the field relevant to the dispute (e.g., tax law, forensic accounting, or finance).
- The opinion must be substantially based on that expertise, and not merely a general or lay opinion.
- Expert evidence is generally considered final and self-standing; it does not require corroboration unless contested or found lacking in credibility.

These standards ensure that expert witnesses contribute to the court's understanding of technical matters without overstepping into the judicial function of decision-making.

CRIMINAL TRIALS

Expert witnesses also play a key role in criminal tax prosecutions, particularly in proving complex elements such as fraud, deliberate non-disclosure, or financial manipulation.

A. Use of Expert Witnesses

- Either the prosecution or the accused person may call expert witnesses.
- Common experts in criminal tax cases include forensic accountants, IT specialists (in cases involving digital records), or valuation experts.

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B. Introduction of Expert Reports

- Where an expert has prepared a report, the witness must appear in court and produce the report during trial.
- Upon production, the court will mark the expert report as an exhibit, forming part of the official trial record.
- The expert is subject to cross-examination on the contents of the report by the opposing side.

C. Standards of Admissibility

The criteria for the use of expert evidence in criminal trials mirror those in civil cases:

- The expert must possess recognised expertise in the relevant domain.
- The opinion must be grounded in verifiable knowledge and must relate to issues beyond the scope of ordinary judicial understanding.
- Expert evidence does not require independent corroboration but may be scrutinised for bias, methodology, or relevance.

Closing the Case in Civil Trials

At the conclusion of a civil trial, parties are typically invited to make closing submissions, summarising their positions and addressing the key legal and factual issues.

Written and Oral Submissions

- In Kenya, it is standard practice for courts to direct parties to file written submissions, which are then highlighted orally at a scheduled hearing.
- The oral highlighting may occur in open court or in chambers, at the discretion of the judge.
- This hybrid system was introduced to expedite proceedings and manage congested court schedules.

Alternatively, parties may waive oral argument and rely entirely on written submissions, especially where the matter involves limited factual dispute or is purely legal in nature.

Closing the Case in Criminal Trials

In criminal proceedings, closing submissions are delivered at two distinct stages, reflecting the burden on the prosecution to prove guilt beyond reasonable doubt.

A. Post-Prosecution Submissions (Case to Answer)

- Once the prosecution has closed its case, the court will invite both parties to make submissions on whether the evidence establishes a prima facie case against the accused.
- If the court determines that no case to answer exists, the accused is acquitted under Section 210 of the Criminal Procedure Code.

B. Final Submissions After Defence Case

- If the court finds that there is a case to answer, the accused is called upon to present their defence.
- Upon conclusion of the defence case, both sides are invited to make final submissions—addressing whether the evidence supports a conviction or acquittal.
- The court then delivers judgment and, where applicable, sentencing.

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DECISION, JUDGEMENT OR ORDER

The delivery of judgment marks the culmination of tax litigation and serves as the official articulation of the court's or tribunal's findings. In Kenya, judgments in civil and criminal tax proceedings follow structured formats that reflect the nature of the dispute, the applicable procedural law, and constitutional guarantees of fair trial and transparency.

Judgments in Civil Tax Cases

Civil tax proceedings—whether before the Tax Appeals Tribunal or the High Court—are governed by the Civil Procedure Act and the Civil Procedure Rules, which prescribe the form, content, and manner in which a judgment must be rendered.

A. Required Content of a Civil Judgment

A valid judgment in a civil tax case must include the following essential components:

(1) A concise statement of the case

This outlines the nature of the dispute, the parties involved, and the procedural background leading to the judgment.

(2) A list of the points for determination

These are the legal and factual issues the court or tribunal must resolve (e.g. whether an assessment was lawful, whether procedural fairness was observed, or whether the taxpayer met their burden of proof).

(3) The court's decision on each point

A ruling on every issue identified must be clearly recorded, either in favour of the taxpayer or the revenue authority.

(4) The reasons for each decision

The court must provide a clear explanation for its conclusions, referencing the applicable law, facts, and evidence presented during trial.

B. Formal Requirements and Timelines

- Judgments must be pronounced in open court, ensuring transparency in judicial decision-making.
- Pronouncement must occur either immediately or within 60 days of the conclusion of the trial, as mandated by the Civil Procedure Rules.
- Each judgment must be dated and signed by the presiding judge or tribunal panel, forming an official record of the decision.

These requirements safeguard the principles of natural justice, openness, and accountability in civil proceedings.

Judgments in Criminal Tax Cases

Criminal proceedings—such as prosecutions for tax evasion, fraudulent misreporting, or obstruction—are adjudicated under the Criminal Procedure Code (Cap. 75). The form and delivery of criminal judgments are tailored to protect the rights of the accused and ensure clarity of the court's findings.

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A. Pronouncement of Judgment

Following the close of proceedings and the conclusion of submissions, the trial court will either:

- Set a specific date for judgment, or
- Issue judgment on notice.

On the appointed day, the magistrate or judge delivers the judgment in open court, and must read it to the accused person in a language that they understand, in line with constitutional rights under Article 50 of the Constitution of Kenya.

The judgment culminates in a pronouncement of either:

- Conviction, or
- Acquittal, pursuant to Section 251 of the Criminal Procedure Code.

B. Required Structure of a Criminal Judgment

A comprehensive criminal judgment typically includes:

(1) Title of the Case

Denoted as Republic v [Name(s) of Accused].

(2) Charges

The precise offences as stated on the charge sheet must be reiterated, including applicable sections of the law.

(3) Procedural Summary

A description of significant procedural developments, such as applications, rulings, or changes to charges.

(4) Factual Narrative

A chronological account of the evidence presented by both the prosecution and the defence, including witness testimony.

(5) Issues for Determination

Clear articulation of the legal or evidentiary questions the court must resolve.

(6) Summary of Arguments

A fair outline of the key submissions advanced by the prosecution and the defence.

(7) Holdings on Each Issue

The court's determination of each issue in dispute.

(8) Applicable Legal Principles

The rules of law that guide the court's findings, including statutory provisions and case law.

(9) Court's Reasoning (Ratio Decidendi)

A reasoned explanation linking the facts to the legal principles applied.

(10) Obiter Dicta (Optional)

Non-binding commentary or observations made by the court, often on policy or procedural matters.

(11) Final Decision

The outcome of the case: whether the accused is guilty or not guilty, and the verdict rendered for each count or charge.

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APPEALS

The appellate process is a fundamental safeguard in Kenya's tax dispute resolution framework, offering aggrieved taxpayers the opportunity to challenge decisions made by the Tax Appeals Tribunal (TAT) or lower courts. Appeals in civil tax matters must be grounded in points of law, and the procedures governing such appeals are strictly defined under the applicable statutes and procedural rules.

Right to Appeal in Civil Tax Proceedings

Under Kenyan law, a taxpayer has a statutory right of appeal in respect of decisions made by the Tax Appeals Tribunal, the High Court, and the Court of Appeal. However, the scope of this right is subject to the following key limitations:

A. Grounds of Appeal

- A taxpayer may only rely on the grounds stated in the original objection filed with the Kenya Revenue Authority (KRA) in response to an assessment or decision.
- New grounds may be introduced only with leave (i.e. permission) of the Tribunal or the Court.
- This rule is designed to ensure that issues are raised and addressed at the earliest opportunity, promoting judicial efficiency and fairness to both parties.

B. Scope of Appeals to Superior Courts

- Appeals to the High Court and subsequently to the Court of Appeal are limited to questions of law only.
- This means that appellate courts do not re-evaluate factual findings made by the Tribunal or the trial court, unless such findings are shown to involve a legal error or misapplication of the law.

Procedure to Appeal in Civil Law

A. Appeals to the High Court

An appeal to the High Court from a decision of the Tax Appeals Tribunal or a lower court follows a prescribed process:

(1) Filing the Memorandum of Appeal

- The appeal is commenced by filing a memorandum of appeal, which sets out the specific grounds of appeal in separately numbered paragraphs.
- The memorandum must clearly state the reasons the appellant objects to the decision being appealed.

(2) Timeframe for Lodging the Appeal

- The appeal must be lodged within 14 days of the date of the decision being challenged.
- Upon filing, the appellant has 30 days to list the matter before a judge for directions.

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(3) Case Management Directions
- At the directions hearing, the judge will:
  - Determine how evidence and exhibits will be presented,
  - Give orders concerning the typing and preparation of the record, and
  - Ensure that all necessary documents are included in the court file.

(4) Required Documents for Appeal to be Set Down for Hearing
Before allowing the appeal to proceed, the judge must confirm that the following are properly on record:
- The memorandum of appeal
- The pleadings in the trial court or tribunal
- The trial judge's or magistrate's notes
- Transcripts of any oral proceedings
- Affidavits, exhibits, maps, and any other documents tendered in evidence
- The judgment, order, or decree being appealed

(5) Written Submissions in Lieu of Appearance
- A party who does not intend to appear in person or through counsel may file a written declaration to that effect and submit written arguments in support of or in opposition to the appeal.
- These submissions must be served on the opposing party within seven days of filing.

(6) Hearing of the Appeal
- The respondent is served with notice of the hearing date.
- On the hearing date:
  - The appellant is heard first,
  - The respondent replies, and
  - The appellant may give a final reply, if necessary.
- The matter then proceeds in line with directions previously issued by the judge, culminating in a decision.

The appellate process in civil tax litigation in Kenya is highly structured, ensuring procedural fairness, legal precision, and accountability. While the right to appeal is guaranteed, it is narrowly tailored to questions of law and is contingent on strict adherence to procedural requirements. For taxpayers and legal practitioners alike, a clear understanding of these rules is essential to effectively navigate the tax appeals system and preserve rights of redress.

