



Dutch Flower Group Kenya Limited v Commissioner of Domestic Taxes (Income Tax Appeal E095 of 2022) [2024] KEHC 10173 (KLR) (Commercial and Tax) (16 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10173 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E095 OF 2022**

**A MABEYA, J
AUGUST 16, 2024**

BETWEEN

DUTCH FLOWER GROUP KENYA LIMITED APPLICANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

RULING

1. Before Court is an application dated 20/9/2023. The same was under Article 50 of *the Constitution* of Kenya, Rules 10 and 17 of the Tax Appeals Tribunal (Appeals to the High Court Rules, 2015). It sought leave for the applicant to call additional witness as well as additional evidence in the appeal.
2. In support, the applicant relied on the grounds set out on the face of the Motion and the supporting affidavit sworn by JAMES KAMAU on even date. The applicant contended that it filed the application for filing additional evidence in order to demonstrate that the input tax claimed throughout the refund application was incurred by it not the overseas contractors.
3. That the additional evidence contained invoices for the period covered by the refund application and excerpts of the relevant VAT Returns. It further contended that the proposed additional documents did not introduce new or inconsistent cause of action as they related to the same material facts, issues and circumstances which precipitated the cause of action. That the proposed addition of supplementary evidence was made in good faith in order to enable the Court to appreciate the real issues between the parties.
4. The respondent opposed the application vide a replying affidavit of Shairin Hadia Athman on 4/10/2023. It was contended that the application was a violation of the rules of procedure on objections and appeals as provided for by the *Tax Procedures Act*. That the issue before Court was the interpretation of section 13(5) to ascertain whether an Agent could claim Input Tax on behalf of the



- Principal. That the applicant failed to disclose any technical issue that would require the testimony of an expert witness.
5. The application was canvassed by way of written submissions which I have duly considered. It was submitted for the applicant that this Court has the discretion to admit additional evidence that was relevant in the determination of the appeal. That the documents and evidence sought to be adduced would enable the Court to understand the nature of the applicant's business and the transactions that gave rise to the VAT refund claims. Further, that the respondent had in his possession, the documents sought to be produced and that therefore, he would not be prejudiced if the application was allowed.
 6. For the respondent, it was submitted that the applicant had failed to meet the threshold for grant of leave to adduce additional evidence. That the documents sought to be produced were in the applicant's possession before the proceedings in the Tribunal and it was therefore not additional new evidence.
 7. It was further submitted that the issues of fact had already been determined by the Tribunal and the appellate Court could only depart from the findings of the facts on special circumstances. That all the applicant wanted was to fill in the gaps at the appellate stage. That the applicant had not met the threshold for granting leave to file supplementary evidence.
 8. The Court has considered the opposing arguments in the pleadings and the submissions of the respective parties. The question for determination is whether the applicant made a case for grant of leave to file additional evidence
 9. Order 42 Rule 27 of the Civil Procedure Rules provides: -
 - “(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if –
 - a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
 - b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.
 - (2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission”.
 10. Rule 15 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015 provides: -

“The Court may, at the time of hearing of an appeal, admit other documentary or oral evidence not contained in the statement of facts of the appellant or respondent should it consider it necessary for determination of the appeal”.
 11. In *Wanjie & Others v. Sakwa & Others* [1984] KLR 275, Chesoni JA observed that: -

“This rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find it needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were used for the purpose of allowing the parties to make out a fresh case



or to improve their case by calling further evidence. It follows that the power given should be exercised very sparingly and great caution should be exercised in admitting fresh evidence”.

12. In *Commissioner of Income Tax v Total Kenya Limited* [2021] eKLR, the court held that: -

“From the foregoing, it is clear that the power to admit additional evidence is discretionally. However, it should be exercised restrictively. The evidence sought to be adduced must not have been in the possession of the applicant or could have been obtained with due diligence. That the evidence should be needful and not meant to patch up an applicant’s case on appeal. Finally, the power should be exercised sparingly but for the ends of justice.”
13. In the present case, the appellant has sought to call an expert witness and be allowed to produce additional documentary evidence which include invoices in support of the costs and exerts of the VAT returns. It contention is that the documents do not introduce any new cause of action and that it is in the possession of the respondent. That in the premises, the respondent would suffer no prejudice.
14. The decision to grant leave for additional of new evidence is in the discretion of the Court. However, like all other discretions, the same has to be exercised judiciously and not capriciously. It has to be exercised within the narrow parameters set out in the dictums set out above.
15. It was not in dispute that the witness sought to be called was available at the time the proceedings before the tribunal took place. It was also not in dispute that the documents sought to be produced were in the possession of the applicant at all material time even at the time of the proceedings before the Tribunal.
16. There was no explanation that was offered as to why the witness was not called or the evidence produced before the Tribunal. I see no need to allow evidence that was available to the parties prior to this appeal. It would seem that the need to call on additional evidence only arose after the judgment and in this case, it is meant to patch up the weak points of applicant’s case rather than aid the Court in determination of the case.
17. In view of the foregoing, I find the application to be without merit and dismiss the same with costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF AUGUST, 2024.

A. MABEYA, FCI Arb

JUDGE

