



**Mreri v Commissioner of Domestic Taxes (Tax Appeal E088 of 2023)
[2024] KEHC 10231 (KLR) (Commercial and Tax) (15 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10231 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
TAX APPEAL E088 OF 2023
PM MULWA, J
AUGUST 15, 2024**

BETWEEN

DAVID OBONYO MRERI APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

RULING

Introduction and Background

1. On 2nd June 2023, the Tax Appeals Tribunal dismissed the appellant's appeal and affirmed the respondent's (the Commissioner) objection decision dated 25th April 2022 and tax assessment of Kshs. 33,262,275.00. The appellant, being dissatisfied with the tribunal's decision has lodged an appeal with this court. He has also moved the court by the Notice of Motion dated 6th November 2023 brought under Order 42 Rules 27 and 28, Order 51 Rule 1 of the *Civil Procedure Rules* 2010, sections 1A, 1B, 2A, 3A and 78(1)(d) of the *Civil Procedure Act* and Article 159(2) (b) of the *Constitution*.
2. The appellant seeks to be granted leave to file a Supplementary Record of Appeal to bring into the court record additional documentary evidence as listed in the application.
3. The application is supported by the grounds on its face and the affidavits of the appellant sworn on 6th November 2023 and 15th January 2024 respectively. It is opposed by the Commissioner through the replying affidavit of Sheila Mary Odawa, serving the respondent's Investigations, Enforcement and Intelligence & Strategic Operations Department, sworn on 21st November 2023.
4. The application was canvassed by way of written and oral submissions.



5. The appellant argues that he has come across new evidence that will be crucial in the determination of the appeal including Agency Notices of various dates and all the documents listed as (a) – (q) in both the body of the application and the supporting affidavit.
6. The appellant further contends that the new evidence was neither in his possession nor knowledge and therefore could not have been produced during the proceedings at the tribunal with reasonable diligence for use at the trial. That the additional evidence is vital in the hearing and determination of the appeal as it is directly relevant to the matter before the court. He avers that the new evidence does not attempt to fill gaps in the evidence or make a fresh case in the appeal and prays that the court takes the additional evidence as annexed to the application.
7. According to the appellant at all material times between 2017 and October 2023 he was blocked by the Commissioner from accessing his iTax portal and therefore could not have access to documents that could have been in his custody. That the aforementioned agency notices demand payment of different amounts which are inconsistent with the finding of the tribunal.
8. The appellant submits that it will be in the interest of justice and fairness that the orders sought be granted and that the Commissioner will not suffer any prejudice if the additional new evidence is adduced.
9. On his part, the Commissioner depones that the application is meant to delay the hearing and determination of the appeal and is an outright abuse of the court process. That the documents sought to be adduced have been in the custody and possession of the appellant at all material times during the consideration of the objection and during the appeal at the tribunal and cannot be adduced at this advanced stage.
10. The Commissioner avers that the appellant but has failed to demonstrate how the additional documents, especially the agency and demand notices, are relevant to the determination of the instant appeal noting that the Commissioner is at liberty to proceed with enforcement of the Tribunal's judgment in the absence of orders for stay. That the same arise from enforcement measures undertaken by the Commissioner.
11. The Commissioner further states that the documents comprising of the confirmation assessment notices issued in November 2022, tax compliance certificate issued in 2018, the appellant's pin certificates, details from the iTax system, certificate of registration for income tax dated October 2022, police abstract and audited financial statements were within the custody and possession of the appellant at all material times during the pendency of this suit at the tribunal.
12. According to the Commissioner it will be highly prejudiced and may create a bad precedent if the appellant is allowed to introduce the subject documents. That Section 56(2) of the [Tax Procedures Act](#) provides that appeals to the Court from the Tribunal shall be on a question of law only and granting the orders sought will be contra-statute since it will re-open contested factual issues which were not considered by the Commissioner and at the tribunal.
13. And further that the appellant was afforded sufficient opportunity at the objection stage to adduce all the necessary documents for examination by the Commissioner, yet he failed to do so, and therefore cannot seek to rely on the new documents during the second appeal stage.
14. It was the Commissioner's submission that the appellant's attempt to adduce new documents at this stage is in contravention of the procedure on objections and appeals provided at Part VIII of the [Tax Procedures Act](#) and a violation of the Commissioner's right to a fair hearing guaranteed by Article 50 of the [Constitution](#).



15. The Commissioner states that the Court in exercising its discretion to allow additional evidence must do so judiciously and the Appellant is required to provide explanations as to why the documents were not adduced in evidence before the Commissioner at objection stage and at the Tribunal during the hearing. For these reasons, the Commissioner urges the court to dismiss the application.

Analysis and Determination

16. The main issue falling for determination is whether the appellant ought to be allowed to introduce additional evidence at this stage.

17. As contended by the appellant under Section 78 of the *Civil Procedure Act*, an appellate court has power to take additional evidence or to require the evidence to be taken. This position is supported by Order 42 rule 27 of the *Civil Procedure Rules* which provides as follows:

27.

- (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.

18. I equally agree with the Commissioner that the decision as to whether or not to admit additional evidence on appeal is an exercise of judicial discretion. Like all other discretions, the same must be exercised judiciously and not capriciously, the only caveat being that in admitting further evidence, the court must record the reason for allowing such adduction. (See *Ken Iron and Steel Ltd v Commissioner of Investigations and Enforcement* [2022] eKLR).

19. The Supreme Court, in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* (2018) eKLR laid down the governing principles on allowing additional evidence by an appellate court as follows:

- “(a) the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
- (b) it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
- (c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
- (d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;



- (e) the evidence must be credible in the sense that it is capable of belief;
- (f) the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
- (g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
- (h) where the additional evidence discloses a strong prima facie case of willful deception of the Court;
- (i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.
- (j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.
- (k) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.”

20. Going through the application and the documents sought to be introduced by the appellant, I am persuaded to belief that the same were always within the custody and knowledge of the appellant and that some bear no relevance to the present appeal. The agency notices sought to be introduced were issued post-appeal of the tribunal’s decision. This was within the power of the Commissioner under section 42 of the *Tax Procedures Act* which entitles it collect taxes owing from any person to a taxpayer. Since the tribunal confirmed the assessment and there was no stay order from the court, the Commissioner was at liberty to issue the said agency notices to the appellant’s debtors or persons owing or holding money for the appellant.
21. If at all the appellant is dissatisfied with the contents or manner the agency notices were issued, then it is at liberty to appeal the same to the Tribunal as this court, in *Krystalline Salt Limited v KRA* NRB HC JR No. 359 of 2018 and *Commissioner of Domestic Taxes v Pevans EA Limited & 6 others* (Tax Appeal No. E003 of 2019) (Commercial and Tax) held that an agency notice is an appealable decision to the tribunal within the meaning and definition of an ‘appealable decision’ under Section 3(1) of the *Tax Procedures Act*.
22. On the contention that the appellant was locked out of his iTax account between 2017 and October 2023, I find that the same was never raised by him before the tribunal in as much as it was information that he always knew. In any event, I find that from its objections to the Commissioner, it never complained that it had no access to its iTax account and was therefore unable to access certain documents.
23. If anything, the objections confirm that the appellant indeed had access to the iTax account. For example, in his objection of 12th January 2022, he was able to furnish the Commissioner with his income tax returns which have a date stamp of 13th January 2022.



24. It is therefore my finding that the additional documentary evidence sought to be introduced by the appellant was always within his possession and that the same could have been obtained with reasonable diligence for use at the trial at the tribunal. I further find that the agency notices bear no relevance to the present appeal.

Conclusion and Disposition

25. From the foregoing, the appellant's application dated 6th November 2023 must fail. Consequently, the same is dismissed with costs.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF AUGUST 2024.

P. MULWA

JUDGE

In the presence of:

Ms. Obura h/b for Mr. Seko for Appellant/applicant

Mr. Kithinji h/b for Kareithi for Respondent

Court Assistant: Lilian

