



REPUBLIC OF KENYA



Mastermind Tobacco (K) Limited v Commissioner of Investigations & Enforcement (Income Tax Appeal E030 of 2021) [2023] KEHC 2724 (KLR) (Commercial and Tax) (31 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2724 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E030 OF 2021**

A MABEYA, J

MARCH 31, 2023

BETWEEN

MASTERMIND TOBACCO (K) LIMITED APPELLANT

AND

COMMISSIONER OF INVESTIGATIONS & ENFORCEMENT ... RESPONDENT

RULING

1. Before Court is the application dated March 16, 2022. It is brought under Articles 50(1) and 159(2) (d) of the *Constitution* of Kenya, Sections 1A, 1B, 3A and 78 of the *Civil Procedure Act* and Order 51 Rule 1 of the *Civil Procedure Rules 2010*.
2. The appellant sought leave to produce additional evidence with respect to the Inspection and Verification reports dated June 2, 2016, May 6, 2016, March 12, 2016, January 15, 2016, January 15, 2016, November 15, 2016, April 16, 2016, June 24, 2016, September 25, 2016 and March 31, 2016. The appellant also sought leave to produce the Electronic Cargo tracking system reports which according to it were used to confirm that the consignment of goods had reached the border for inspection and verification.
3. The grounds were set out on the face of the application and on the supporting affidavit of Robert Mutuma sworn on March 16, 2022. It was stated that the Tribunal was called upon to determine whether the consignments in issue were exported and therefore zero rated. According to the appellant, the certificates of exports were satisfactory evidence of export and the same were produced by the appellant however the Tribunal ruled that the appellant had not proved that the consignment of goods were actually imported.
4. That the Tribunal had introduced a new criterion which demanded of the appellant to produce further documents. It was the appellant's contention that it did not have the inspection and verification reports



- at the time of the hearing and prayed for the Court to admit them as they would assist the Court reach a just determination. It was averred that the appellant would suffer great prejudice if the orders sought were not granted.
5. The respondent opposed the application by a replying affidavit of Victor Andambi Chabala sworn on March 3, 2023. The respondent's contention was that it had on several occasions issued the appellant with notices requesting for documents and information with respect to its export consignments to show proof of exportation. That despite issuing the appellant with several reminders, the appellant failed to produce the same.
 6. The respondent contended that the application did not satisfy the provisions of Rule 9 as read with rule 15 of the [Tax Appeals Tribunal](#) and Order 42 rule 27 of the Civil Procedure Rules 2015. That the applicant failed to produce documents as required by section 30 of the VAT Act and section 23 of the [Tax Procedures Act](#).
 7. It was therefore contended that the application was an abuse of the court process since the appellant had at the Tribunal and at the tax demand stage failed to adduce the required evidence. That if the orders sought were granted, then there would be no finality in the matter.
 8. The application was canvassed by written submissions which I have considered.
 9. The appellant submitted that the Tribunal had been called upon to determine whether the consignment of goods was actually imported and the appellants position was that in order to prove its case, it relied on high court decisions where it was previously held that Certificates of Export were enough to prove export. Counsel submitted that the evidence which the applicant sought to introduce would dispose the main issue in the appeal on proof of export of the consignment of goods. It was submitted that at the time of the hearing at the Tribunal, the appellant did not anticipate a change by the requirement of proof of export. That the additional evidence would assist the Court in the resolution of the contested issues.
 10. On the other hand, it was submitted for the respondent that the power to grant leave to adduce evidence at an appeal stage should be after consideration of some factors. That Rule 9 and 15 of the Tax Appeals Tribunal Rules, 2015 should be read together with Order 42 rule 27 of the Civil Procedure Rules 2015. That according to Order 42 rule 27 of the civil Procedure Rules, evidence at an appeal stage was limited to those matters that aid the judgment and where there was proof that the trial court had refused to admit evidence. It was submitted that the applicant did not demonstrate that it was not in possession of the evidence as at the time the matter was before the Tribunal.
 11. Counsel submitted that the appellant ought to have been aware of its tax obligations and kept a record of all the documents in accordance to section 30 of the [VAT Act](#) and section 54A of the [Income Tax Act](#). Counsel further submitted that the applicant was merely filling gaps in its evidence and addressing its weak points of the case at the appeal stage.
 12. The Court has considered the opposing contentions and the submissions of the respective parties. The question for determination is whether the applicant has made a case for grant of leave to file additional evidence.
 13. 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”.
14. 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”.
15. The applicant sought to have the Inspection and Verification Reports issued on diverse dates admitted as evidence. The reasons advanced were that prior to the decision of the Tribunal, the Certificates of Export were satisfactory evidence of export. The appellant was of the view that the Tribunal introduced a new criterion of determining whether goods had been exported where more documentation was required to show proof of export. The appellant contended that the new evidence would assist the Court in its final determination of the matter.
16. On its part the respondent observed that the appellant on numerous occasions had been asked to produce the said documents but chose to disregard the respondent despite several reminders. It was further contended that the admission of documents ought to be limited to matters that aid the judgment and proof that the trial court had refused to admit the evidence.
17. In *Wanjie & Others v Saikwa & Others* [1984] KLR 275, Chesoni JA observed of admitting additional evidence on appeal thus: -
- “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”
18. In *Commissioner of Income Tax v Total Kenya Limited* [2021] eKLR the Court observed 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.”



19. Based on the foregoing dictums, it is clear that the power to allow additional evidence is discretionary upon consideration of various factors. In this case, it is not disputed that the additional evidence had not been forwarded to the respondent and neither was it before the Tribunal. The appellant contended that it failed to rely on the documents because courts had previously used a different approach in determining proof of export.
20. It is in view of the foregoing, clear that the documents were always in the possession of the appellant. The only problem is that it did not know that they were crucial in proving its case. It is therefore clear that the need for the additional documents only arose after the judgment of the Tribunal was delivered in favour of the respondent.
21. In my view, the application has been necessitated by the need to conform with the judgment of the Tribunal rather than aid the Court in determination of the case. It is not for the Courts or Tribunals to direct parties how to prove their cases. If the appellant chose to rely on insufficient material and failed to place before the Tribunal, the necessary evidence in support of its case, it cannot turn around and seek to do so on appeal.
22. The Court cannot aid a party on how to do its case. The appellant has to live with the consequences of having withhold that portion of the evidence from the Tribunal. This is not a case that falls within the parameters where additional evidence can be permitted on appeal.
23. Accordingly, I find the application to be without merit and dismiss the same with costs.
24. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2023.

A MABEYA, FCIarb

JUDGE

