



REPUBLIC OF KENYA



**Airkenya Express Limited v Commissioner, Customs and Border Control (Tax Appeal E160 of 2021) [2023] KEHC 18331 (KLR) (Commercial & Admiralty) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18331 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND ADMIRALTY**

**TAX APPEAL E160 OF 2021**

**A MABEYA, J**

**MAY 31, 2023**

**BETWEEN**

**AIRKENYA EXPRESS LIMITED ..... APPELLANT**

**AND**

**COMMISSIONER, CUSTOMS AND BORDER CONTROL ..... RESPONDENT**

*(Being an appeal against the Judgment of the Tax Appeals Tribunal  
at Nairobi dated 16/7/2021 in Tax Appeal Number 170 of 2020)*

**RULING**

1. Before Court is an application dated February 13, 2023. It was brought under sections 1A, 1B, and 3A of the [Civil Procedure Act](#) and Order 8 Rule 3 of the [Civil Procedure Rules](#).
2. The application sought leave to file a fresh record of appeal or in the alternative a supplementary record of appeal.
3. The grounds for the application were set out on the face of the application and in the supporting affidavit sworn by Dr Jotham Okome Arwa on February 13, 2023. It was contended that upon the filing of the instant appeal, the matter was referred to arbitration whereby the applicant produced three documents not previously within its possession at the filing of the appeal.
4. The applicant now sought leave to file those documents before this Court which include the respondent's letter dated September 7, 2020, the Trade Advisory Note on The Standards (Verification of Conformity to Standards and Other Applicable Regulations) Order 2020, and Legal Notice No 78 of 2020.
5. The respondent opposed that application vide the replying affidavit sworn by Maureen Okite on February 20, 2023. The respondent contended that the ADR proceedings were conducted on a



“without prejudice” basis and deliberations and documentations therein could not be adduced in Court if no settlement was reached.

6. It was further contended that the documents were not introduced before the Tribunal and that by virtue of sections 56(2) of the *Tax Procedures Act*, appeals to the High Court from the Tax Appeals Tribunal were on issues of law. That the documents were evidentiary in nature and their factual basis ought to have been interrogated by the Tribunal.
7. That there was inordinate delay in bringing the application from the time the appeal was filed and that the respondent would suffer prejudice if the application was allowed. That the applicant had ample time to bring all documents at the objection review stage and appeal stage before the tax Tribunal but failed to do.
8. The application was argued orally. Counsel’s submissions as well as the pleadings have been carefully considered by this Court. The main issue for determination is whether the applicant ought to be granted leave to file a fresh or supplementary record of appeal to incorporate documents not previously filed with the appeal.
9. Under section 78 of the *Civil Procedure Act*, the High Court exercising appellate jurisdiction 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: -

“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* also envisages admission of further evidence by providing that: -

“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. The decision whether to allow additional evidence is discretionary and ought to be exercised judiciously. In *Mohamed Abdi Mahamud v Ahmed Abdullahi Mobamad & 3 others; Ahmed Ali Muktar (Interested Party)* SCK Petition No 7 of 2018 [2019] eKLR, the Supreme Court of Kenya set out the guiding principles on allowing additional evidence. They include: -
  - 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.”
12. But for the letter dated September 7, 2020, the applicant did not explain why the two other documents being the Trade Advisory Note on The Standards (Verification of Conformity to Standards and Other Applicable Regulations) Order 2020, and Legal Notice No 78 of 2020 were not produced before the tribunal.
  13. The applicant admits that the said documents are public documents thus were always accessible to it. However, no effort was made to produce and rely on these documents until the 2<sup>nd</sup> appeal stage. Any arguments as relates these documents ought to have been made before the Tribunal for its consideration.
  14. As for the letter dated September 7, 2020, Counsel for the applicant submitted that the respondent’s letter was addressed to another taxpayer and was thus not in its possession. That in it, the respondent admitted that IDF was not payable. These are not matters of law and are indeed factual.
  15. If the contents of the letter were beneficial to the applicant, the same ought to have been produced before the Tribunal to give the author of the letter an opportunity to explain the circumstances under which it was written.
  16. Further, having not been addressed to the applicant, it is doubtful whether the letter is directly related to the suit herein.



17. To allow the letter at this stage would be to afford the applicant an opportunity to make a fresh case in this appeal and patch up the weak points in its case. Undoubtedly, this would prejudice the respondent. Though the applicant produced the documents during the mediation proceedings, it is not clear the circumstances which now made it possible for the applicant to be in possession of the letter at this stage and not earlier.
18. In any event, the respondent averred that the mediation proceedings and the documents exchanged therein were on a without prejudice basis and could not be used in a court of law except in circumstances where there was a settlement. This fact was not disputed or challenged.
19. Finally, this Court must add that its jurisdiction is provided for under section 56(2) of the *Tax Procedures Act* which provides that: -

“ An appeal shall be on a question of law only.”
20. In *Paleah Stores Limited v Commissioner of Investigations and Enforcement* (Tax Appeal E009 of 2021) [2022] KEHC 249 (KLR) (Commercial and Tax) (25 March 2022), the court held that: -

“ An appeal limited to matters of law does not permit the appellate court to substitute the Tribunal’s decision with its own conclusions based on its own analysis and appreciation of the facts. The admission of documentary evidence in the circumstances of this case particularly where the issue of documents was a live issue before the Tribunal would require the court to engage in an analysis and appreciation of the factual issues which is a matter entirely within the province of the Tribunal. On the other hand, whether or not the Tribunal ought to have allowed additional evidence to be presented is a matter which this court may address as a matter of law.”
21. Whether or not the respondent wrote the contents of that letter was a factual issue to be determined by the Tribunal which would have then determined whether or not the respondent was bound by the contents thereof.
22. Allowing the introduction of the letter at this stage would require this court to venture into the facts of the case as opposed to restricting itself to matters of law. The Tribunal rendered its judgment without the benefit of analyzing the supplementary documents sought to be introduced. It would be wrong to admit the fresh evidence which the Tribunal did not consider in its judgment.
23. The Court is not satisfied that the documents sought to be produced are necessary for determination of the appeal. Consequently, there is no merit in the application.
24. The upshot is that the application dated February 13, 2023 is not merited and the same is dismissed with costs to the respondent.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF MAY, 2023.**

**A MABEYA, FCIarb**

**JUDGE**

