



Republic v Commissioner of Kenya Revenue Authority & 4 others; Galot (Exparte Applicant); London Distillers (K) Ltd (Exparte); Tribunal (Interested Party) (Judicial Review Miscellaneous Application E119 of 2021) [2023] KEHC 21892 (KLR) (Judicial Review) (27 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21892 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E119 OF 2021**

JM CHIGITI, J

JULY 27, 2023

BETWEEN

REPUBLIC APPLICANT

AND

**THE COMMISSIONER OF KENYA REVENUE AUTHORITY 1ST
RESPONDENT**

THE DIRECTORATE OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

THE CHIEF MAGISTRATES COURT AT NAIROBI 4TH RESPONDENT

THE HON. ATTORNEY GENERAL 5TH RESPONDENT

AND

MOHAN GALOT EXPARTE APPLICANT

AND

LONDON DISTILLERS (K) LTD EXPARTE

AND

THE TAX APPEALS TRIBUNAL INTERESTED PARTY



RULING

1. Before this court is a Notice of Motion Application dated November 10, 2022 brought under Sections 1A, 1B, 34, 63(c) and (e) of the Civil Procedure Act, Cap 21 Laws of Kenya, and Order 40 of the Civil Procedure Rules. In the main, the Application sought for: Leave be granted to the them (Applicants) to adduce further evidence by way of the judgement by the 1st Interested Party dated November 4, 2022 rendered in TAT No. 408 of 2021 London Distillers (K) Ltd vs The Commissioner of Investigation and Enforcement of the Kenya Revenue Authority; and for Costs of this application be provided for.
2. The Application was supported by the grounds on the face of it, and by the grounds in the Supporting Affidavit dated November 10, 2022 and a Supplementary Affidavit dated January 12, 2023 - both affidavits deponed by Mohan Galot.
3. It was the Applicants case that at the time of the institution of the instant proceedings, they had disclosed that there were pending proceedings before the Tax Appeals Tribunal vide TAT No. 408 of 2021 London Distillers (K) Ltd vs The Commissioner of Investigation and Enforcement of the Kenya Revenue Authority. Additionally, that at the time of the institution of the instant proceedings, they had disclosed that all the 18 counts of alleged tax evasion - as contained in the Charge Sheet in respect of which we were arraigned before the 4th Respondent, the Chief Magistrates Court at Nairobi vide Criminal Case No. E802 of 2021 Republic vs Mohan Galot and London Distillers (K) Ltd - emanated from the Tax Assessment by the 1st Respondent, contained in its letter dated June 9, 2021 which they had then challenged; and was the subject of the said Appeal vide TAT No. 408 of 2021 London Distillers (K) Ltd vs The Commissioner of Investigation and Enforcement of the Kenya Revenue Authority.
4. According to the Applicants, the substratum of the instant proceedings is to impugn the decision by the Respondents in instituting the criminal charges against them - vide Criminal Case No. E802 of 2021 Republic vs Mohan Galot and London Distillers (K) Ltd - whereas the determination of the Respondent's challenge to the 1st Respondent's objection decision to the assessment was then subject of TAT No. 408 of 2021 London Distillers (K) Ltd vs The Commissioner of Investigation and Enforcement of the Kenya Revenue Authority; and material thereto is the fact that the 2nd Respondent's alleged tax liability had not yet crystallised.
5. The Applicants posited that by the decision of this Court rendered on July 28, 2022 this Honourable Court had already recognized the fact of the pendency of the proceedings before the Tax Appeals Tribunal - vide TAT No. 408 of 2021 London Distillers (K) Ltd vs The Commissioner of Investigation and Enforcement of the Kenya Revenue Authority - prior to the subsequent institution of the criminal charges against them - vide Criminal Case No. E802 of 2021 Republic vs Mohan Galot and London Distillers (K) Ltd - where the figure alleged to have been evaded is the same figure subject of the said proceedings then before the Tax Appeals Tribunal.
6. It was the Applicants position there have now been some material developments in the Tax Appeals Tribunal vide the said TAT No. 408 of 2021 London Distillers (K) Ltd vs The Commissioner of Investigation and Enforcement of the Kenya Revenue Authority, which are material to the determination of the issues in dispute between the parties herein; to which that the Tax Appeals Tribunal has now on November 4, 2022 rendered its verdict on the 2nd Respondent's Appeal vide the said TAT No. 408 of 2021 London Distillers (K) Ltd vs The Commissioner of Investigation and Enforcement of the Kenya Revenue Authority.



7. Notably, that in the said judgement by the Tax Appeals Tribunal at para 180, the Interested Party herein has found as a fact that the 1st Respondent had not justified either in law or otherwise its Corporation Tax, Excise Duty, and VAT assessment on the 2nd ex parte Applicant.
8. To the Applicants, it was the said objection decision by the 1st Respondent that precipitated the institution of the criminal charges against the ex parte Applicants. Consequently, that it is therefore clear that the in depth analysis by the Interested Party, as contained in the said judgement, is material evidence to enable this Honourable Court in its quest towards the substantive determination on the issues in contention between the parties herein.
9. The Applicants averred that it was for the foregoing reasons that they swear this Affidavit in support of the application for leave to be allowed to adduce further evidence, in the nature of the judgement delivered by the 1st Interested Party.
10. Moreover, as stated in the Applicant's Supplementary Affidavit, that the Memorandum of Appeal does not raise any single serious substantive issue, does not evince any arguable, and that the same has no reasonable or overwhelming chances of success as alleged by the Respondent.
11. In response to and opposing the Application, the 3rd Respondent filed their Grounds of Opposition dated November 23, 2022 relying on the grounds:
 1. That the Applicants attempt to arrest the judgement scheduled for 25 November, 2022 is in contravention of Article 159 of *the Constitution* and Section 1A and 1B *Civil Procedure Act*.
 2. That the Judicial Review Proceedings does not require the determination of the Tax Appeals Tribunal to make a finding on the Applicants application.
 3. That the Tax Appeals Tribunal decision is not binding upon the 3rd Respondent's decision to charge which is anchored on pegged on Article 157 of *the Constitution* and the evidence availed.
 4. That The Applicant's application is an abuse of the court process and as such it should be disallowed.
 5. That in view of the foregoing I pray that the Application dated November 10, 2022 be dismissed with costs.
12. In further opposition to the Application, the 1st Respondent filed their Replying Affidavit dated December 19, 2022 sworn by Godfrey Mwerera, the Investigations Officer appointed by the 1st Respondent. It was conceded that indeed the Tax Appeals Tribunal, the Interested Party herein, rendered its judgment in TAT No. 408 of 2021: London Distillers (K) Ltd vs. The Commissioner of Investigation and Enforcement, Kenya Revenue Authority on November 4, 2022.
13. That the 1st Respondent, being dissatisfied with the said judgment in its entirety filed a Notice of Appeal on December 2, 2022; Further, that the 1st Respondent has filed its Memorandum of Appeal and Record of Appeal on December 16, 2022 - which that the intended Appeal raises serious substantive issues, is arguable, and has overwhelming chances of success.
14. According to the 1st Respondent, the Interested Party erred in law by misapplying the law and facts and arriving at an erroneous decision, which decision the 1st Respondent seeks to be set aside in its entirety. That the decision of the Interested party in TAT No. 408 of 2021: London Distillers (K) Ltd vs. The Commissioner of Investigation and Enforcement, Kenya Revenue Authority did not in any way address the criminal charges in Criminal Case No. E802 of 2021: Republic vs Mohan Galot and



London Distillers (K) Ltd, and as such, the 4th Respondent is still properly seized to hear and determine the criminal charges against the Applicants.

15. The 1st Respondent, maintained that the judgment which the 1st Applicant seeks to adduce, does not in any way exonerate the Applicants from the criminal charges without the benefit of a trial. That at the right time, the Applicants will be afforded an opportunity to defend themselves, cross-examine witnesses, and adduce evidence in support of their case - in the Criminal Case before the 4th Respondent.
16. The 1st Respondent holds the position that if the 1st and 3rd Respondents are prohibited from prosecuting the Applicants - in relation to tax offences, it will amount to frustrating the constitutional and statutory duties of the Respondents.
17. It was the 1st Respondent's claim that over the years, it has been experiencing challenges in effectively assessing, collecting, and accounting for all tax revenues due to various acts, omissions or vices perpetrated by taxpayers which result in deliberate and/or incorrect lower tax declarations with resultant loss of substantial government revenue.
18. That it is on these issues of tax evasion that the Applicants have been charged before the 4th Respondent, and the Tax Appeals Tribunal judgment has no bearing on the Criminal Case since the Trial Court, the 4th Respondent herein, ought to make its determination on the criminal culpability of the Applicants: to which the 1st Respondent swore the Affidavit in opposition to the Application dated November 10, 2022 and prayed that the same be dismissed with costs to them (1st Respondent).
19. To buttress their cases, parties filed their rival written submissions. On one hand, the Applicants in their written submissions – dated April 11, 2023 – posited, in sum, that the said decision sought to be adduced was rendered on November 4, 2022 after the instant proceedings had been lodged way back on August 4, 2021 and this Honourable Court has at all material times been aware of the pendency of the said proceedings before the Interested Party, and the relevance thereof having been signalled by the ex parte Applicants.
20. Furthermore, the decision sought to be adduced as evidence was rendered on November 4, 2022 and the instant application having been lodged shortly thereafter and more particularly on November 10, 2022 was therefore done without any delay whatsoever.
21. Notably, that the judgement not being available at inception of these proceedings, could thus not have been adduced then. That evidence sought to be adduced has an important influence to the case made out by the ex parte Applicants, as a trial has already been conducted to determine whether or not there are any taxes due and payable; and if so, whether the ex parte Applicants put in motion actual processes towards the evasion of the taxes whose quantum have been ascertained.
22. The Applicants argued that the Courts do allow Application to adduce further evidence, after it is satisfied that sufficient reasons have been advanced - as to why the additional evidence was not adduced at trial, and that the failure was not deliberate. Importantly, that until judgment is finally delivered, proceedings are very much alive entitling any party to even apply for amendment of pleadings before judgment. Reliance was placed in the cases of Joseph Ndungu Kamau vs John Njihia [2017] eKLR, Kenya Commercial Bank Limited vs Nicholas Ombija [2009] eKLR, Susan Wavinya Mutavi v Isaac Njoroge & another [2020] eKLR, Samuel Kiti Lewa vs Housing Finance Co. of Kenya Ltd & another [2015] eKLR, Techbiz Limited vs Royal Media Services Limited [2021] eKLR, and Raila Odinga and 5 Others Versus I.E.B.C. and 3 Others [2013] eKLR.



23. That the governing principals of allowing additional evidence are well enumerated in the case of Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamed & 3 others (2018) eKLR.
24. Further, that the 1st and 3rd Respondents have not raised the issue/claim of prejudice. Conversely, that, the ex parte Applicants are bound to suffer double jeopardy and extreme prejudice, if the same evidence being the decision by the Interested Party - the body competent and having statutory underpinning - is overlooked and the same evidence interrogated afresh with the view to having the criminal Court arrive at a different finding that there were actually taxes due and payable by the 2nd Respondent, whereas the Interested Party had found otherwise.
25. On the other hand, the 1st Respondent in their written submissions - dated May 12, 2023 – contended that the fact that the Tax Appeals Tribunal rendered its judgment in this matter, which judgment is currently under appeal at the High Court, does not quash the Applicants criminal trial at the Magistrate's court. That the jurisdiction of the Tribunal only covers civil aspects of tax disputes, but does not extend to criminal violations of the tax laws.
26. The 1st Respondent posited that as under Section 106 of *Tax Procedures Act*, No. 94 of 2015, jurisdiction to hear and determine tax offences is expressly conferred upon the subordinate (Magistrates) courts; and that on that basis, the Tax Appeals Tribunal's judgment did not make a finding on the Applicants culpability or lack thereof for the offences of tax evasion – as the Tribunal does not have that jurisdiction, but that it is the Magistrate Court only that has been statutorily granted the jurisdiction to try tax offences.
27. It was the 1st Respondents position that the Tax Appeals Tribunal and the Magistrates Court have different jurisdictions when it comes to civil and criminal aspect of tax matters, respectively: and that both have competent concurrent jurisdictions to hear and determine matters within their respective jurisdictions.
28. That in the subject Criminal proceedings in MCCR No. E802 of 2021, the Applicants have been charged with 4 counts of various tax offences, and that these are offences which the Magistrate's Court is correctly seized off, thus that this Honourable Court ought to allow the trial court to make its determination thereon.
29. Therefore, that contrary to the Applicant's assertions, the judgment by the Tribunal rendered in TAT No. 408 of 2021: London Distillers (K) Ltd vs. The Commissioner of Investigation & Enforcement of the Kenya Revenue Authority did not address the criminal culpability of the Applicants for tax evasion neither did it make a finding that the decision to prosecute the Applicants in MCCR No. E802 of 2021 is illegal, unfair, and/ or irrational, ill motivated. or malicious as alleged by the Applicants.
30. According to the 1st Respondent, the Applicants are seeking to challenge the merits of the tax demand of Kshs. 2,055,304,414.00 issued on them, as well as the merits of the decision to have them prosecuted for tax evasion, - as opposed to challenging the process that was followed by them (1st Respondent) leading to their (Applicants) prosecution for tax evasion - which goes outside the scope of Judicial Review.
31. The 1st Respondent posited that it is well settled law that Judicial Review is concerned with the process and not the merits of a decision. In other words, that a Judicial Review Court is concerned with the lawfulness of the decision making process, and not the merits of the decision which is the preserve of the Appellate Court. Relied on Section 7 of the *Fair Administrative Action Act*; and the cases of the Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo [2015] eKLR; Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300; Council



of Civil Unions v Minister for the Civil Service [1985] AC 2; Re Application by Bukoba Gymkhana Club [1963] EA 478 at 479; Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Saracen Media Limited [2018] eKLR; and Republic v Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 others [2013] eKLR.

32. The 1st Respondent maintains that guided by the above judicial pronouncements, the question therefore which this Honourable Court ought to address is whether lawful procedure was followed by 1st Respondent in issuing the tax demands on the Applicants, and also whether the decision to prosecute the Applicants was legal, rational and procedural - to which the 1st Respondent responds to the affirmative. As per the 1st Respondent, the Applicants have failed to prove that the process of arriving at the decision to prosecute them for tax evasion in MCCR No. E802 of 2021 was arrived at illegally, irrationally, or procedural impropriety committed. Relied on Section 107 of the [Evidence Act](#); and the case of Alfred Kioko Muteti v Timothy Miheso & another [2015] eKLR.
33. Notably, the 1st Respondent submitted that the judgment which the Applicants seek to adduce does not in any way exonerate them (Applicants) from the criminal charges without the benefit of a trial. Further, that the Tax Appeals Tribunal judgment has no bearing on the criminal case since the criminal trial Court, the 4th Respondent herein, has the requisite jurisdiction to hear and establish the criminal culpability or lack thereof of the Applicants for tax evasion. That the Applicants will be afforded an opportunity to defend themselves, cross-examine witnesses, and adduce evidence in support of their case in the Criminal Case before the 4th Respondent.
34. As per the 1st Respondent, if 1st and 3rd Respondents are prohibited from prosecuting the Applicants - in relation to tax offences - that amounts to frustrating the constitutional and statutory duties of the Respondents. Therefore, that the Application dated 10th November, 2022 seeking leave to adduce the Tribunal's judgment in TAT No. 408 of 2021: London Distillers (K) Ltd vs. The Commissioner of Investigation & Enforcement of the Kenya Revenue Authority is devoid of merit and the same should be dismissed in its entirety with costs to the Respondents.
35. Additionally, the 3rd Respondent in their written submissions dated - May 15, 2023 - contended that the Application to introduce the said Tax Appeals Tribunal judgment is an attempt to arrest the judgement pending in this matter. It was the 3rd Respondent's submission that the Application is a delaying tactic that affects the timely disposal of the substantive Judicial Review Application. That even though the court has the discretion to grant the orders sought herein, there is no nexus that has been demonstrated by the Applicant.
36. The 3rd Respondent contended that the judgement by the Tax Appeals Tribunal, in favour of the Applicant's herein, does not automatically become a ground for this court to consider in the final determination of this case. That the determination of the Judicial Review Proceedings does not require the input from the Tax Appeals Tribunal judgement.
37. The 3rd Respondent held the position that the facts presented at the Tax Appeals Tribunal, by the Applicant, are totally different from what parties have canvassed in Judicial Review proceedings therefore, that the impact of the judgement by the Tax Appeal's Tribunal is minimal on the pending judgement before this honourable court.
38. Further, that the Tax Appeals Tribunal decision is not binding on the 3rd Respondent's decision to charge. That the 3rd Respondent, acted within the provisions of [the constitution](#) and other relevant laws in approving that the Applicants herein be charged for tax evasion offences. That the Applicants herein have not demonstrated in any manner how the 3rd Respondent has acted ultra vires or in bad faith while exercising his Constitutional mandate under Article 157 of [the Constitution](#) of Kenya.



39. Therefore, that the evidence sought to be adduced is unreliable and contested as the Tax Appeals Tribunal's decision has been appealed against by the 1st Respondent. As such, that the Applicant cannot rely on it because the Respondents have not exhausted the remedies against the decision. Relied on the case of *Dorothy Nelima Wafula v Hellen Nekesa Nielsen & Paul Fredrick Nelson* [2017] eKLR,
40. Thus, that the Application before this honourable court lacks merit, and amounts to an abuse of the court process; therefore, that the Application dated November 10, 2022 should not be entertained by the court, but ought to be dismissed.
41. I have carefully considered the Application, responses thereto, annexures, rival submissions by counsel, and the authorities cited. I find the following issues crystalizes for determination: Whether the Application to adduce further evidence is merited, in the circumstances?
42. It is clear that the new evidence which the Applicant seeks to introduce, was not available at the time of instituting the judicial review proceedings. The judgment – which is sought to be adduced as evidence - was delivered on November 4, 2022; while the judicial review proceedings were instituted on August 4, 2022. This instant Application, seeking leave to adduce evidence, was dated November 10, 2022. It is clear, that the Applicant took steps early enough in their Application, thus avoiding delay.
43. In its submissions, the 1st Respondents submits that in the Criminal proceedings in MCCR No. E802 of 2021, the Applicants have been charged with 4 counts various tax offences which include: -
- i. Omitting from tax returns production volumes of 164,593 litres of Ready to Drinks and 2,902,661 litres of spirit which ought to have been included contrary to Section 97(a) as read with Section 104(3) of the *Tax Procedures Act*, 2015;
 - ii. Failure to pay tax, (that is Excise Duty amounting to Kshs. 524,425,063.00 for the year 2016) contrary to Section 95 as read with Section 104 of the *Tax Procedures Act*;
 - iii. Omitting from tax returns production volumes of 3,564 litres of ready to drink and 4,330,720 litres of spirit which ought to have been included contrary to Section 97(a) as read with Section 104(3) of the *Tax Procedures Act*, 2015 and;
 - iv. Failure to pay tax, (that is Excise Duty amounting to Kshs. 814,531,858.00 for the year 2017) contrary to section 95 as read with Section 104 of the *Tax Procedures Act*, 2015.
44. This court is in agreement with the 1st Respondents submissions that these are offences which the Magistrate's Court is correctly seized off. The court also notes the fact that the counsel for the 4th and 5th Respondents told the court that they were not opposing the application.
45. This to me simply confirms that the trial court is ready and willing to proceed with the hearing of the criminal case against the Applicants. This to me, will ultimately promote the right to fair hearing which this court upholds. At this stage, the court it is not being called upon to determine the substantive judicial review application.
46. What the court is dealing with is an application to allow the admission of additional evidence. As such the principles that the 1st Respondent raises and relies on in its submissions, do not have a bearing to the application to admit new evidence.
47. The Supreme Court in the case *Mohamed Abdi Mahamud Vs. Ahmed Abdullahi Mohamed & 3 Others* (2018) eKLR set out the governing principals of allowing additional evidence as follows: -

“We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya 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 wilful 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.”

48. Civil Appeal No. 13 of 2018 *Ainu Shamsi Hauliers Limited Versus Anastacia Ndinda Mwanzia* (suing as Administrator of the Estate of Harrison Mwendwa Karili [2018] e-KLR where C. Kariuki – J., held that no Court of Law should be deprived of information which will assist it reach a fair and first determination of a case. Counsel also relied on C.A. 93 of 2016 (Court of Appeal at Mombasa between Tana and Athi River Development Authority Versus County Government of Tana River [2018] eKLR where the Court set out the threshold for allowing additional evidence and stated inter alia that in allowing additional evidence, the Court should not allow a fresh case but for the Court to arrive at a proper determination.
49. *The Administrator of His Highness the Aga Khan Platinum Jubilee Hospital Versus Munyambu C.A. No.18 of 1983* where the Court of Appeal set two pre-condition for adducing additional evidence and held, inter alia: That the evidence sought to be adduced could not be obtained with reasonable diligence during the cause of the trial and that it will have an important influence and is credible enough.



50. In *Raila Odinga and 5 Others Versus I.E.B.C. and 3 Others* [2013] eKLR, the Supreme Court added its voice on reception of additional evidence in the context of Presidential election and Stated:

“The other issue the Court must consider when exercising its discretion to allow a further affidavit, is the nature, context and extent of the new material intended to be produced and relied upon. If it is small and limited so that the other Party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the evidence is such as to make it difficult or impossible for the other Party to respond effectively the Court must act with abundant caution and care. In the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of addition evidence”

51. The same Supreme Court in *I.E.B.C. Vs Robert K. Nyengi* [2015] eKLR, considered an application for leave to file a document out of time in the context of an election Petition and stated that it is essential for a Court in exercising its discretion to admit additional evidence to ensure no prejudice is occasioned to a party if the evidence is admitted.

52. In *John Kiplangat Barbaret and 8 Others Versus Isaiah Kiplangat Arap Cheloget* [2016] eKLR, the Court of Appeal allowed adduction of additional evidence in the form of a Survey Map for Land Registration Number Narok/CIS-Mara/Limotio/54 showing a portion of the suit land occupied by the Appellants; and also admitted additional evidence of the Air Cartography Map of 1971 showing the Settlement status in Sagamian area.

53. In the instant appeal and application by the Respondent/Applicant, I have evaluated and considered each of the items of additional evidence sought by the Applicant against the detailed guidelines and criteria laid down by the Supreme Court in the *Mohamed Abdi Mohamud Versus Ahmed Abdullahi Mohamed and 3 others* [2018] case.

54. I observe that the clear guidelines issued by the Supreme Court directed at Appellate Courts, this Court included, are not conjunctive.

55. However, an applicant must substantially comply with the guidelines. Whether the additional evidence will impact the result of the case is a matter to be determined on merit upon the evaluation of the additional evidence with all other evidence on record.

56. In order to determine whether or not to allow the application, this court is bound by the Judgment the principles set by the in *Saisi & 7 others v Director of Public Prosecutions & 2 others* (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) wherein the Supreme court held as follows:

“75. In order for the court to get through this extensive examination of section 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the court must embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly “in the circumstances of the case”, without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. However, it is our considered opinion that it should be limited to the examination of uncontroverted evidence. The controverted evidence is best addressed by the person, body or authority in charge. To borrow the words of the Court of Appeal in *Judicial Service Commission & another v Lucy Muthoni Njora*, Civil Appeal 486 of 2019; [2021] eKLR there is nothing doctrinally or legally



wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process only leads to intolerable superficiality. This would certainly be against article 259 of [the Constitution](#) which requires us to interpret it in a manner that inter alia advances the rule of law, permits the development of the law and contributes to good governance.

76. Be that as it may, it is the court's firm view that the intention was never to transform judicial review into full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to do so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in section 11(1) and (2) of the Fair Administrative Actions Act. Third, the court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in section 11(1)(e) and (h) of the [Fair Administrative Action Act](#). The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this court held in the case of *Kenya Vision 2030 Delivery Board v Commission on Administrative Justice, Attorney General and Eng Judah Abekah*, SC Petition 42 of 2019; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised."

57. The Applicant is seeking Leave to be granted to the Plaintiff/Applicant to adduce further evidence by way of the judgement by the 1st Interested Party dated 04:11:2022 in TAT. No. 408 of 2021 *London Distillers (K) Ltd vs The Commissioner of Investigation and Enforcement of the Kenya Revenue Authority*.

The 1st respondent further submits as follows;-

58. The Court in *Alfred Kioko Muteti v Timothy Miheso & another* [2015] eKLR held that a party can only discharge its burden upon adducing evidence. Merely making pleadings/ allegations is not enough.

59. In conclusion therefore, the 1st Respondent submits that the judgment which the Applicants seek to adduce does not in any way exonerate them from the criminal charges without the benefit of a trial.

60. Further, the Tax Appeals Tribunal judgment has no bearing on the criminal case since the criminal trial Court, the 4th Respondent herein, has the requisite jurisdiction to hear and establish the criminal culpability or lack thereof of the Applicants for tax evasion.



61. That at the right time, the Applicants will be afforded an opportunity to defend themselves, cross-examine witnesses and adduce evidence in support of their case in the Criminal Case before the 4th Respondent.
62. Thus in the absence of proof that the decision to prosecute the Applicants is illegal, unfair and/or irrational, the Application dated November 10, 2022 to adduce the Tribunal's judgment in TAT No. 408 of 2021: London Distillers (K) Ltd vs. The Commissioner of Investigation & Enforcement of the Kenya Revenue Authority is devoid of merit and the same should be dismissed in its entirety with costs to the Respondents.
63. Through these arguments, the 1st respondent is inviting this court to usurp the powers and jurisdiction of the criminal trial court and arrive at conclusions. This court has no mandate to ascertain or determine the impact that the additional evidence will have on the outcome in the criminal case. To do so, would amount to the suppression of the powers of the court that is seized of the criminal case.
64. This court makes a finding that the judgment emanating from the tax appeals tribunal relates to the Applicant and the tax issues that form the subject matter that is before the trial court and it is relevant to the impugned proceedings before this court.
65. The 1st respondents further submits that if 1st and 3rd Respondents are prohibited from prosecuting the Applicants in relation to tax offences, it will amount to frustrating the constitutional and statutory duties of the Respondents. By this line of submission, the 1st respondents are inviting this court into the arena of speculation.
66. This court declines, and refuses to accept the argument that allowing the application will amount to frustrating the constitutional and statutory duties of the Respondents. The court does not thrive in conjecture. The court has a duty to uphold the rule of law and the principles of fair hearing under Article 50 of *the Constitution*. I find this argument as baseless.
67. The Applicant before this honorable court is not seeking for orders to prohibit the prosecution in the trial court. The trial court will arrive at its decision based on merit upon hearing the evidence as tendered by the prosecution and the accused persons in due course.
68. The 1st respondent does not show this Honorable Court how the Respondents duties will be frustrated if the application is allowed. In any event the 1st Respondents can challenge the judgment that will emanate from a trial court at the High Court should the trial court acquit the Applicants. Allowing the application will promote the right to fair Administrative action under Article 47 of the *constitution of Kenya*.
69. I am satisfied that substantially, the additional evidence sought to be adduced by the Applicants largely meets the criteria and guidelines laid out by the Supreme Court in the Mohamed Abdi Mohamad Versus Ahmed Abdullahi Mohamed and 3 others (supra) case.
70. Article 48 of *the Constitution* promotes access to justice; while Article 50(2)(k) of *the Constitution* states that every accused person has the right to a fair trial, which includes the right to adduce and challenge evidence. Additionally, the Respondent has not demonstrated that they would suffer any prejudice, should the new evidence be adduced.

Order:

The Notice of Motion Application dated November 10, 2022 is merited and the same is allowed.

Given the circumstances of this matter, each party to bear its own cost of this suit.



Dated, signed and delivered at Nairobi this 27th day of July 2023

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J. CHIGITI (SC)

JUDGE

JR. MISC. NO. E119 OF 2021 RULING 6 | Page

