



**Commissioner of Domestic Taxes v Applewood Investments Ltd (Income Tax Appeal E211 of 2021) [2023] KEHC 26591 (KLR) (Commercial and Tax) (15 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26591 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E211 OF 2021  
DO CHEPKWONY, J  
DECEMBER 15, 2023**

**BETWEEN**

**COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT**

**AND**

**APPLEWOOD INVESTMENTS LTD ..... RESPONDENT**

*(Being an Appeal against the Judgement and orders of the Tax Appeals Tribunal delivered at Nairobi in Tax Appeal Tribunal case number 386 of 2020 on 29th October, 2021)*

**RULING**

1. This Ruling is in respect to the Notice of Motion dated 5<sup>th</sup> July, 2022 filed pursuant to Rule 15 of the Tax Appeals Tribunal (Appeals to the High Court) Rules 2015 and Article 159 (2) of the Constitution of Kenya. The Application is supported by the Affidavit of Marion Gitau an Advocate of the High Court of Kenya employed by the Appellant/Applicant herein sworn on 5<sup>th</sup> July, 2022. The Application is opposed through the Replying Affidavit of Jonah Njuguna Kariuki, a Company Auditor retained by the Respondent, sworn on 14<sup>th</sup> July, 2022.
2. The Application seeks the following orders:
  - a. That this Honourable Court be pleased to grant the Applicant herein leave to adduce additional documents for consideration at the hearing of the Appeal herein.
  - b. That costs of this application be in the cause.
3. The Applicant avers that the decision of the Tax Appeals Tribunal issued on 29<sup>th</sup> October, 2021 held that the objection decision subject to this appeal was issued outside the statutory 60 days and proceeded to set aside the objection decision and the additional VAT assessments.



4. The Applicant's however, contend that the objection decision had been issued on time as the Respondent who raised a late objection. The Applicant holds that it requested the Respondent for documents in support of the late objection through email correspondence on 28<sup>th</sup> April, 2020 and 19<sup>th</sup> June, 2020 and the Respondent availed the supporting documents on 21<sup>st</sup> February, 2020, 12<sup>th</sup> March, 2020, 22<sup>nd</sup> May, 2020 and 22<sup>nd</sup> July, 2020.
5. The Applicant argues that it inadvertently failed to attach the additional documents to show that the objection decision was issued on time which formed the decision of the Tax Appeals Tribunal. The Applicant is therefore seeking the court's leave to file the additional documents. According to the Applicant, if additional documents are not adduced, it will lose the ability to collect VAT sum of Kshs. 12,157,407.15 which will be detrimental to the government. For that reason, the Applicant urges the court to allow its application.
6. The Respondent, in opposition of the application filed a Replying affidavit sworn by its Company Auditor, holds the allegations that the objection decision was issued within the 60 days' timeline as falsehoods and deliberate attempts by the Applicant to mislead the court. The Respondent further avers that the purported additional documents are not related to the subject matter of the appeal. That the said documents were in the Applicant's custody and were produced by the Applicant in the Arbitration Forum which handled the matter on referral by the Tax Appeals Tribunal.
7. As such the Applicant has not given substantive reasons why the said documents should be produced at this second appeal stage which only deals with questions of law and not facts. The Respondent argues that it lodged the appeal in the Tribunal against the Applicant's decision to uphold additional automated assessment of Kshs. 12,157,407 being the principal VAT for the tax period of March, 2018 through a letter dated 10<sup>th</sup> January, 2020.
8. The Respondent states that the Applicant requested for additional documents through an email dated 22<sup>nd</sup> July 2020 which the Respondent argues it was after an inordinate delay. The Respondent added that the Appellant's email dated 19<sup>th</sup> June 2020 sought for reasons why the objection had been filed late. The Applicant responded after 161 days after it had lodged its objection. Logically, the response was outside the 60 days statutory time limit from the date of objection.
9. According to the Respondent, the additional documents alleged by the Applicant; that is Respondent Objection letter dated 20<sup>th</sup> February, 2020 was in respect to VAT inconsistency for the month of June, 2018, Respondent's Objection letter dated 11<sup>th</sup> March, 2020 related to VAT inconsistency for the months of August 2018 and October 2018; Respondent's email dated 12<sup>th</sup> May, 2020 was in respect to VAT inconsistencies for the month of October, 2018; Appellants' email dated 28<sup>th</sup> April, 2020 was in respect to VAT inconsistencies for the months of June, 2018, August, 2018 and October, 2018. Those additional documents are not related to the tax period of March, 2018 which was the subject of the objection before the Tax Tribunal and later this appeal. The documents related to months of June, August and October, 2018 which are irrelevant. The Respondent in the result urges the court to only consider the question of law and not to relook the evidentiary issues of facts and proceed to dismiss the application.
10. The Application was disposed off by way of written submissions. The Applicant's submissions dated 30<sup>th</sup> September, 2022 raise two issues for determination:
  - a. Whether the Appellant should be granted leave to adduce additional documents.
  - b. Whether the decision of the additional documents is prejudicial to the Respondent.



11. The Respondent's submissions dated 14<sup>th</sup> October, 2022 on the other hand raised one issue, whether this Honourable Court should be pleased to grant the Applicant herein leave to adduce additional documents for consideration at hearing of the appeal.
12. The Applicant has through a myriad of authorities supported its position that the court should allow the application for the reasons that the additional documents are correspondences between itself and the Respondent. That the documents do form the subject matter of the appeal hence unless they are produced, the Applicant submits it stands to lose its ability to collect government revenue of Kshs. 12,157,407.15. It is further submitted that granting the said orders will not be prejudicial to the Respondent.
13. The Respondent on its part submitted that admission of additional documents is allowed by court on discretionary basis which must be exercised cautiously and with sound principles. In that case, the Applicant has not demonstrated that the additional documents were not in its possession at the time of filing the appeal and in any event, the additional documents relate to a different tax period, not March, 2018 which is the subject of the appeal. Thus, the documents should not be allowed.

### **Analysis and Determination**

14. Having considered the application, the affidavits sworn in support, the main issue for the court's consideration is whether the court should grant the Applicant leave to adduce the additional documents. The Application is premised under Rule 15 of the [Tax Appeals Tribunal Rules 2015](#) which state:-
  15. Admission of other evidence  
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 wording of Rule 15 of [Tax Appeals Tribunal Rules 2015](#) shows that the court's powers are discretionary and not mandatory which discretion to admit new documents should be exercised cautiously and the documents must be crucial in the determination of the case but not meant to fill in gaps of the case. This was the decision in the case of *Wanjie & Others – v- Saikwa & Others* [1984] KLR 275, where Chesoni JA held in the issue 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”



16. In determining the principles required to admit additional documents at the Appeal both parties have cited the Supreme court of Kenya case in *Hon. Mohamed Abdi Mahamud and Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR, which held: -

“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 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”.
17. Looking at the circumstances of this case vis a vis the principles enumerated in the Supreme Court case above, it is clear that the additional documents were within the knowledge of the Applicant. That the documents were email correspondences between the parties and the Applicant has not given substantive reasons why it failed to attach them despite having them in its possession.
18. It is not enough for the Applicant to state that if the documents are not produced, it will lose its ability to collect government revenue, the Applicant should not be ignorant of the fact it is under obligation



to follow all the procedures stipulated by the law and the court must strike a balance between the parties based on the circumstances of each case.

19. Further, the court has gone through the additional documents the Applicant seeks to adduce and agrees with the Respondent's submissions that they relate to different tax periods such as May, 2018, June, 2018, August, 2018 October, 2018 and not March, 2018 which is the subject matter in question.
20. It is therefore the court's view that the Applicant is only trying to patch up the weak points of its case by adducing additional documents which are not relevant in the final determination of the appeal. In the circumstances, I find that the Notice of Motion Application dated 5<sup>th</sup> July, 2022 lacks merit and it is dismissed with costs.

It is so ordered.

**RULING DATED AND SIGNED AT KIAMBU THIS 13<sup>TH</sup> DAY OF DECEMBER , 2023.**

**D. O. CHEPKWONY**

**JUDGE**

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 15<sup>TH</sup> DAY OF DECEMBER , 2023.**

**ALFRED MABEYA**

**JUDGE**

