



**Paleah Stores Limited v Commissioner of Investigations and Enforcement (Tax Appeal E009 of 2021) [2022] KEHC 249 (KLR) (Commercial and Tax) (25 March 2022) (Ruling)**

Neutral citation: [2022] KEHC 249 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**TAX APPEAL E009 OF 2021**  
**DAS MAJANJA, J**  
**MARCH 25, 2022**

**BETWEEN**

**PALEAH STORES LIMITED ..... APPELLANT**

**AND**

**COMMISSIONER OF INVESTIGATIONS AND  
ENFORCEMENT ..... RESPONDENT**

*(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 22nd January 2021 in Tax Appeal No. 81 of 2017)*

**RULING**

1. On 22<sup>nd</sup> January 2021, the Tax Appeals Tribunal (“the Tribunal”) dismissed the Appellant’s appeal before it and affirmed the Respondent’s (“the Commissioner”) assessment of the tax payable by the Appellant for the years 2008-2014 as Kshs. 1,361,746,295.00 and Kshs. 7,891,387,842.00 being Corporation Tax and VAT, respectively, comprising of principal tax, penalties and interest.
2. The Appellant is dissatisfied with this decision by the Tribunal and has lodged an appeal with the court. It has also moved the court by the Notice of Motion dated 12<sup>th</sup> May 2021 and made under section 15 of the [Tax Appeals Tribunal \(Appeals to the High court\) Rules](#) 2015, section 53 of the [Tax Procedures Act](#), section 3A of the [Civil Procedure Act](#) and Article 159 of the [Constitution](#) seeking orders compelling the Commissioner to release to it all the original invoices, purchase ledgers, inventory records among other accounting documents in its possession or in the possession of its agents, department or other entities related to it and that the Appellant be granted leave to file a Supplementary Record of Appeal to bring into the court record additional evidence as contained in those documents in further support of its appeal herein.



3. The application is supported by the grounds on its face and the supporting affidavit of Patrick Njiru, the Appellant's director, sworn on 12<sup>th</sup> May 2021 and opposed by the Commissioner through the replying affidavit of its officer, Dominic Kengara sworn on 14<sup>th</sup> February 2022. The application was canvassed by way of written submissions which are on record where the parties have advanced their respective positions.
4. The main issue falling for determination is whether the Appellant ought to be allowed to introduce additional evidence at this appellate stage. 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:
  27. Production of additional evidence in appellate court [Order 42, rule 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.
5. As cited and submitted by the Appellant, 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".
6. The decision as to whether or not to admit additional evidence on appeal is an exercise of judicial discretion which must be exercised judiciously. The Supreme Court, in Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party) SCK Petition No. 7 of 2018 [2019] 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.
7. Bearing the aforesaid principles in mind, has the Appellant established a case for production of additional evidence in this appeal?
  8. The Appellant contends that on 8<sup>th</sup> March 2017, while responding to a demand by the Commissioner released its original invoices, purchase ledgers, inventory records among other accounting documents to the Commissioner to facilitate the determination of the Appellant's tax liability during the audit. The Appellant states that through its letters dated 26<sup>th</sup> February 2021 and 10<sup>th</sup> March 2021, it had previously demanded for release of the said original documents but the Commissioner has failed and/or refused to release them thus prejudicing and sabotaging the Appellant's chances of successfully presenting its case.
  9. The Appellant's states that the Commissioner failed to rely on the said information in determining its tax liability and its action of withholding the Appellant's original documents prejudiced its appeal before the Tribunal since these documents would have demonstrated that the Appellant had incurred expenses and consequently reduce its tax liability. The Appellant avers that the Commissioner, during the hearing of the appeal before the Tribunal admitted that such documents had been released to it and that they had not been availed for evaluation by the Tribunal which the Appellant states was in bad faith and as such, it is not in dispute that the Commissioner was aware that the taxes assessed were not accurate and fair.
  10. The Appellant submits that the Tribunal would have arrived at a significantly different finding specifically that the purchases and operating expenses were well supported had it perused and considered the documents and as such these documents are of great relevance to these proceedings. It urges that the Tribunal, notwithstanding its mandate under the Tax Appeals Tribunal Act failed to exercise its discretion to require that the documents in possession of the Commissioner be produced before it for evaluation in the determination of the taxes owed by the Appellant.
  11. The Commissioner does not dispute that while auditing the Appellant, it requested the Appellant to avail documents such as books of accounts, copies of submitted returns, assets schedule, purchase



records, bank details for the company and its directors so as to enable the Commissioner complete the tax investigations and audit. The Commissioner states that despite numerous requests to provide the supporting documentation, the Appellant failed to provide the requested information hence the Commissioner invoked its power under section 59 of the Tax Procedures Act and requested for information from the Appellant's bankers and suppliers and after analyzing this information, came up with further audit findings which was communicated to the Appellant through a letter dated 13<sup>th</sup> December 2016.

12. The Commissioner further states that the parties held discussions and exchanged correspondence with a view of resolving the tax investigation issues and that based on the information received from the Appellant, the Commissioner issued an additional tax assessment for both VAT and Corporation Tax through a letter dated 30<sup>th</sup> December, 2016. The Appellant objected to the additional assessment and subsequent to the Objection, the parties held various meetings and exchanged correspondences with a view of resolving the tax disputes and based on this, the Commissioner issued its Objection Decision dated 29<sup>th</sup> March 2017.
13. The Commissioner submits that the Objection Decision was based on all the available information and to the best of its judgment and that the Tribunal's judgment that dismissed the Appellant's appeal and affirmed the Objection Decision was on the ground that the Appellant provided incomplete documents hence could not prove its case and that in any event the input VAT claims were statutorily time barred.
14. The Commissioner avers that the Appellant's application to file documents that were not before the Tribunal is an abuse of the court process and that in the event this Court allows the application, it will usurp the jurisdiction of the Tribunal which is the first appellate body as stipulated in section 12 of the Tax Procedures Act, 2015. The Commissioner further posits that the Tribunal rendered judgment in this matter without the benefit of analyzing the supplementary documents that the Appellant seeks to introduce and consequently, this Court will find itself acting as the first appellate court should it allow the Appellant's application.
15. I have gone through the record of proceedings before the Tribunal and it is apparent that the issue of documents was at the center of the Appellant's submissions and in particular the exchange between the Tribunal members and Appellant's representative. The Chairperson of the Tribunal specifically asked why the Appellant never thought to attach the said documentation in its appeal before the Tribunal which the Appellant's representative told the Tribunal included invoices and bank statements together with other documentation obtained from third parties. When prodded further by the Tribunal, the Appellant's representative appeared to concede that the omission of not attaching those documents was a lack of diligence on the Appellant's part and that even in its pleadings in this appeal, the Appellant conceded to the use of the 'banking method' to ascertain its tax liability due to incomplete records.
16. Thus, apart from stating that these documents were shared with the Commissioner, the Appellant was not able to substantively explain why it could not attach the same to its appeal and yet these documents belonged to the Appellant and were within the Appellant's reach. I find that these documents and evidence could have been obtained with reasonable diligence for use before the Tribunal, were within the knowledge of the Appellant and could have been produced at the time of the hearing before the Tribunal.
17. I also decline to admit additional evidence as this would change the tenor of this appeal. The jurisdiction of this court is circumscribed by section 56(2) of the TPA which provides that "An appeal to the High Court or to the Court of Appeal shall be on a question of law only". 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.

18. I therefore dismiss the Appellant's application dated 12<sup>th</sup> May 2021 with costs to the Respondent.

**SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF MARCH 2022.**

**A. MABEYA**

**JUDGE**

Mr Wanga with him Ms Chepngeno instructed by Waweru Gatonye and Company Advocates for the Appellant.

Mr Mutua, Advocate instructed by the Commissioner of Investigations and Enforcement, Kenya Revenue Authority.

