



Builders Junction Limited v Commissioner of Investigations and Enforcement (Income Tax Appeal E073 of 2021) [2022] KEHC 10162 (KLR) (Commercial and Tax) (29 July 2022) (Ruling)

Neutral citation: [2022] KEHC 10162 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E073 OF 2021**

EC MWITA, J

JULY 29, 2022

BETWEEN

BUILDERS JUNCTION LIMITED APPLICANT

AND

**COMMISSIONER OF INVESTIGATIONS AND
ENFORCEMENT RESPONDENT**

RULING

1. The applicant, Builders Junction Limited, (Builders Junction), took out a motion on notice dated October 14, 2021, under sections 1A, 1B, 3A and 6 of the *Civil Procedure Act* and order 42 rule 27 of the *Civil Procedure Rules*, rules 15, 17 and 20 of the *Tax Appeals Tribunal (Appeals to the High Court) Rules*, rules 16 and 17 of the *High Court (Organization and Administration) General Rules, 2016*, seeking leave to produce additional evidence, namely, documents in support of the transactions comprising VAT payment slips, VAT monthly returns and e-acknowledgments of VAT return receipts.
2. The motion is premised on the grounds on its face, the affidavit of Mohamed Hussein, written submissions dated February 3, 2022, and supplementary submissions dated March 16, 2022. According to Builders Junction, the respondent, Commissioner of Investigations and Enforcement, (the Commissioner), conducted investigations and issued a tax demand for Kshs. 2, 421,440 followed by an assessment dated 24th May 2018. Builders Junction objected to the assessment in a letter dated 21st June 2018. The objection was however dismissed in an objection decision dated July 26, 2018.
3. Builders Junction lodged an appeal before the Tax Appeals Tribunal (TAT) against the objection decision. On May 13, 2021, the TAT dismissed that appeal, giving rise to the present appeal before this court and the present application.



4. Builders Junction asserts that even though all documents were given to its tax advisers and the same documents were also sent to the commissioner, its tax advisers failed to place those documents before the TAT, notwithstanding that the documents were necessary for a fair determination of the dispute before the TAT.
5. Builders Junction states that it genuinely believed that the documents had been sent to the Commissioner and also lodged with the TAT. Builders Junction further states that given the sheer volume of the objection and the subsequent appeals, its tax advisers had delegated some of the tasks to assistants who were inexperienced, thus the omission of the documents from the appeal before the TAT.
6. Builders Junction argues that under rule 15 of the [*Tax Appeals Tribunal \(Appeals to the High Court\) Rules*](#), this court has discretion to admit other documentary or oral evidence not contained in the statement of facts of the appellant or respondent should it consider it necessary for the determination of the appeal. Builders Junction urges the court to exercise this broad-necessity driven discretion and not to be hamstrung by decisions in other areas of law in which the discretion has been granted in more limited terms either by the text itself or practice.
7. According to Builders Junction, the authenticity of the transactions turned on the non-availability of the documents that though given to its tax advisers, they were not placed before the TAT. Builders Junction argues that it should not be the function of tax administration, including appeals process, to deny a tax payer a benefit it is genuinely entitled and tax statutes which confer benefits or exceptions are always liberally interpreted in favour of a tax payer, so as to promote the activities incentivized by those benefits or exemptions. In this regard, Builders Junction relies on a decision by the Supreme Court of India in *Commissioner of Income Tax v Sbaan Finance (P) Limited* 1998(2) SC 464. Builders Junction also cites [*Commissioner of Income Tax v Total Kenya Limited*](#) [2021] eKLR, where the court granted leave to produce additional evidence against a decision of the TAT.
8. According to Builders Junction, an application to adduce additional evidence should only be denied if the evidence is not necessary or is prejudicial to the respondent. Builders Junction asserts that the appeal before the TAT was dismissed on the basis that there was insufficient evidence to support the objection, even though the Commissioner had been provided with VAT payment slips, VAT monthly returns and e-acknowledgment of VAT return receipts as proof of purchases. The documents were however omitted by the tax adviser.
9. Builders Junction argues that it should not suffer due to errors of its professionals, and relies on [*Belind Murai & others v Amoi Wainaina*](#) [1978] LLR 2782(CALL) and [*Philip Chemwolo & another v Augustine Kiibede*](#), (1982-88) KAR 103.
10. It is Builders Junction's case, that the additional evidence sought to be produced will not prejudice the respondent, and relies on *Wanjie & others v Sakwa* [1984] KLR 275.
11. Builders Junction asserts that the decision by the TAT was on the basis that sufficient proof had not been provided, which makes the documents sought to be adduced crucial for the determination of this appeal. Production of the documents will also not prejudice the Commissioner in any way. Builders Junction argues that the Commissioner's witness (Mr. John Ekadah) who handled investigations did not identify any further or additional documents that were requested for but were not produced.

Response

12. The Commissioner has opposed the application through written submissions dated February 23, 2022. The Commissioner contends that additional evidence should only be allowed where the



threshold in order 42 rule 27 is met. That is; where the court from whose decree the appeal is preferred, has refused to admit such evidence which ought to have been admitted; or the court to which the appeal has been preferred, requires any documents to be produced or witness examined to enable it pass judgment, or for any other substantial cause. Where the court allows additional evidence, reasons have to be recorded for such admission.

13. The Commissioner argues that Builders Junction has not shown that the TAT refused to admit the evidence or that at the time of the appeal, Builders Junction did not have the documents sought be admitted as additional evidence. The Commissioner's position is that the documents Builders Junction seeks to produce as additional evidence were the core documents that were required by statute (S. 23 of the [Tax Procedures Act](#)) to be maintained and produced.
14. According to the Commissioner, section 43 of the [VAT Act](#) also requires a tax payer to keep records of every transaction made and avail those records for purposes of ascertaining tax liability and compliance. The same position, the Commissioner argues, obtains under section 54 of the [Income Tax Act](#), that a tax payer should keep records of all receipts and expenses for goods purchased and sold. Having failed to produce the documents before the TAT, there is no basis for faulting the TAT.
15. The Commissioner asserts that it would have been prudent for Builders Junction to produce the documents at the objection and appeal stages but did not do so. The Commissioner maintains, therefore, that the orders sought are discretionary and relies on *Tarmohamed & another v Lakhani & Co* [1958] EA 567 on the conditions to be met before an order for additional evidence can be given.
16. The [Commissioner again relies on National Cereals and Produce Board v Erad Supplies & General Contractors Ltd](#) (CA 9 of 2012); and The [Administrator, H, The Aga Khan Platinum Jubilee Hospital v Munyambu](#) [1985] KLR 127 for the argument that an appellate court should only admit evidence if the evidence is necessary and that additional evidence should not be admitted to enable a plaintiff make out a fresh case at the appeal stage.
17. The Commissioner contends that Builders junction has not demonstrated that the evidence could not be obtained with reasonable diligence for use at the trial and that the documents have the potential of influencing the outcome of the appeal. According to the Commissioner, Builders Junction had an opportunity to produce those documents at the objection and appeal stages but did not. The reasons given for seeking leave to adduce additional evidence at this stage are not plausible.
18. It is the Commissioner's plea that this court should apply a purposive application of tax laws and find that Builders Junction had a duty to avail the documents if they were against the objection decision. The Commissioner urges that the application be dismissed with costs.

Rejoinder

19. In a brief rejoinder through supplementary submissions dated March 16, 2022, Builders Junction argues that the Commissioner's submissions address the appeal and not the application. Builders Junction also argues that order 42 rule 27 is not the core rule under which additional evidence is admitted in a tax appeal matter and that order 42 rule 27 is not the same as rule 15 of the [Tax Appeals Tribunal \(Appeal to High Court\) Rules](#), but rule 20 of these Rules incorporates Civil Procedure Rules in a limited way.
20. Builders Junction maintains that there is express statutory authority to admit additional evidence whether documentary or oral in a tax appeal. Under rule 15, the court is not engaged in speculation as to what the documents sought to be adduced are for, but whether they are necessary.



Determination

21. I have considered the application, the response, submissions and the decisions relied by parties. Builders Junction seeks leave of this court to adduce additional evidence that was not produced before the TAT. According to Builders Junction the documents comprise VAT payment slips, VAT monthly returns and -e acknowledgement VAT receipts.
22. The Commissioner posits that Builders Junction had an opportunity to produce the documents before the TAT but failed to do so. The Commissioner also argues that under section 51 (8) of the *Tax Procedures Act*, it is the only one mandated by law to review documents and determine tax liability of a tax payer. If the application is allowed, it will suffer prejudice as it will not have the opportunity to review the documents and confirm their authenticity with the suppliers.
23. To allow to produce additional evidence on appeal or not is at the discretion of the court.
24. The principle underlying production of additional evidence at appeal stage whether in normal appeals or tax appeals have been stated in several decisions. For instance, in *Tarmohamed & Another v Lakhani & Company (supra)*, the Court stated that to justify reception of fresh evidence or new trial, it must be shown either, that the evidence could not have been obtained with reasonable diligence for use during the trial; that the evidence is such that, if produced, it would probably have an important influence on the result of the case, but it need not be decisive and that the evidence must be credible though it must not be incontrovertible.
25. Similarly, in *Wanjie & another v Sakwa & others* [1984] KLR 275; [1984] eKLR, the Court of Appeal had this to say on receipt of new evidence at appeal stage:

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 authorise the admission of additional evidence for the purpose of removing lacunae and filling up gaps in evidence.... 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 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.
26. Again, in *Mohamed Abdi Mahamud v Ahmed Abdulahi Mohamed & 3 others; Ahmed Ali Muktar (interested Party)* [2018] eKLR, the Supreme Court laid down the principles governing admission of additional evidence in appellate courts. These include the fact that the additional evidence must be directly relevant to the matter before court and for the interest of justice; the evidence must be such that if given, it would influence or impact upon the result of the verdict, although it need not be decisive and it must be shown that it could not have been obtained with reasonable diligence for use at the trial; that the evidence was not within the knowledge of, or could not have been produced at the time of hearing the suit by the party seeking to adduce the additional evidence.
27. These are the general principles that govern the considerations to be taken into account following a request to adduce additional evidence at the appellate stage. The additional evidence sought to be adduced should not be allowed if it is intended to fill gaps in a party's case at this stage and a party should demonstrate that he was not in the possession of the evidence or could not obtain it even after due diligence.



28. In the application at hand, Builders Junction does not state that the evidence was not in its possession. The argument is that although the evidence had been passed to its tax advisor, and the Commissioner, that evidence was not placed before the TAT during the appeal against the objection decision. Failure to produce the documents before the TAT was therefore attributed to inadvertency on the part of the tax advisor. Admittedly, accidental omission to adduce evidence is not one of the principles laid down by the Supreme Court in *Mohamed Abdi Mahamud v Ahmed Abdulabi Mohamed & 3 others; Ahmed Ali Muktar (interested Party) (supra)*. (see also *Wanjie & another v Sakwa & others (supra)*).
29. Builders junction has not argued that the evidence sought to be adduced could not be found even after due diligence which is one of the considerations the court has to take into account.
30. Responding to the argument by the Commissioner that this court deals with questions of law only and should not allow fresh evidence at this stage, Builders Junction takes the view that section 56(2) of the *Tax Procedures Act* should be read in isolation together with rule 15 of the *Tax Appeals Tribunal (Appeals to the High court) Rules* which allows the court at the time of hearing of an appeal to admit other documentary evidence or oral evidence not contained in the statement of facts of the appellant or respondent, should the court consider it necessary for determination of the appeal.
31. Builders Junction urges the court to exercise this broad-necessity driven discretion and should not be hamstrung by decisions in other areas of law where the discretion has been granted in more limited terms either by the text itself or practice.
32. This sounds a good argument but it is not entirely correct. The language of rule 15 is clear that the rule confers on this court discretion to decide whether or not to admit additional evidence. This discretion, like any other discretion, must be exercised judiciously and not capriciously and on clear and sound principles established in judicial decisions on exercise of discretion.
33. Dealing with rule 15 in *Ocean (EA) Limited v Commissioner of Domestic Services* [2018] eKLR, Tuiyot J, (as he then was), observed, correctly in my view, that where it is a party who wishes to call additional evidence, the latitude the court has under this rule should be more restrictive so as to avoid the process being used to re litigate a case on altered parameters.
34. A party has an opportunity to adduce evidence in his possession at the trial. Where such a party did not do so due to mistake, error or inadvertence, will not easily persuade the court to exercise the discretion under rule 15 and allow that production of additional evidence at appellate stage when that evidence was available in the first instance. This is because mistake, error or inadvertence are not exceptional circumstances contemplated in the principles laid down by both the Superior Courts as the basis for allowing additional evidence at appellate.
35. The commissioner argues that adducing evidence at this stage would be prejudicial because there would be no opportunity to verify the authenticity of those. This argument is not without merit. Had the evidence been adduced before the TAT, the Commissioner would have had the opportunity to verify them during the hearing of the appeal before the TAT where the documents would be examined or even submissions made on them. It would have been different had Builders Junction's case been that it had not been aware of that evidence and could not get it even after exercising due diligence.
36. The TAT decision was that there was insufficient evidence. Builders Junction's request to adduce documents, namely; VAT payment slips VAT monthly returns and e acknowledgement VAT return receipts is a general request without specifying particulars such as the date or month whose documents were not supplied to amount to additional evidence. As it is, the application, if allowed as prayed, will make it open to Builders Junction to produce fresh evidence which is not the same as additional



evidence. The import of this would be to allow a party to fill gaps at this stage of the case under the guise of adducing additional evidence.

Conclusion

37. Having considered the application and arguments by parties, I am not satisfied that the application has met the threshold for adducing new evidence at appellate stage. The evidence sought to be adduced was at all times in the possession of Builders Junction, this fact was within its knowledge and there was opportunity to produce that evidence before the TAT. Allowing that evidence at this stage will be prejudicial to the Commissioner.
38. For those reasons, the application dated October 14, 2021 is declined and dismissed. Each party will bear own costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY 2022

E C MWITA

JUDGE

