



Heet Enterprises v Commissioner of Investigations and Enforcement (Income Tax Appeal E082 of 2021) [2022] KEHC 11901 (KLR) (Commercial and Tax) (12 August 2022) (Ruling)

Neutral citation: [2022] KEHC 11901 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E082 OF 2021**

A MABEYA, J

AUGUST 12, 2022

BETWEEN

HEET ENTERPRISES APPELLANT

AND

**COMMISSIONER OF INVESTIGATIONS AND
ENFORCEMENT RESPONDENT**

RULING

1. This is an application brought by the appellant seeking leave to produce additional evidence namely: the judgment delivered in Petition Number 167 of 2018 *Mohamed Ali t/a Top Model Apparels & 45 others v Kenya Revenue Authority* on 12/11/2020 during the pendency of the appeal before the Tax Appeals Tribunal (TAT) and documents in support of the impugned transactions comprising KRA assessment orders, invoices, KRA returns and general purchases and general rated sales.
2. The application is based on the grounds that the appellant has lodged the instant appeal against the tribunal's judgment of 28/5/2021; that the appellant's tax advisers failed to place before the TAT, documents which were necessary for the determination of the appeal and the appellant now seeks to be adduce the same as additional evidence.
3. In opposition, the appellant lodged a replying affidavit sworn on 15/9/2021 by the Assistant Manager in the independent review of objections unit within the Tax Dispute Resolution Division in the KRA.
4. It was averred that the documents which the appellant sought to introduce before this court are prejudicial to the respondent as the same were not considered by the TAT nor availed to the respondent before any determination was made. That the appellant had every opportunity to produce the said documents for consideration.



5. That the documents sought to be produced have not been reviewed or scrutinized by the commissioner who is the one mandated by law to review documents relating to the tax status of the appellant before issuing an assessment.
6. That under the *Tax Procedures Act*, an appeal to the High Court or Court of Appeal shall be on a question of law only, therefore this court is limited to matters of law and not facts/review of evidence.
7. The court has carefully considered the documents on record. The issue for determination is whether leave to produce additional evidence should be granted.
8. In *Ocean Freight (EA) Limited v Commissioner of Domestic Taxes* [2018] eKLR, it was held: -

“If, however, it is a party which wishes to call additional evidence then the latitude must be more restrictive so as to avoid the process being used to re-litigate a case on altered parameters. Only recently, on September 28, 2018, the Highest court of the land, the Supreme Court, laid down the governing principles on allowing additional evidence in appellate court. In Petition No 7 of 2018, *hon Mohamed Abdi Mahamud and Ahmed Abdullahi Mohamad & 3 others*, the Supreme Court 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.”

9. Applying the above principles to the application at hand, I find that the appellant has not adequately demonstrated to this court why the documents it wishes to produce were not produced before the TAT. The mistake of its tax advisors can not be a good ground. It should seek recourse against them.
10. For the purpose of tax disputes, the High Court is a 2nd appellate court, which means it can only determine issues of law and not of fact.
11. In *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* NRB CA EPA No 5 of 2018 [2018] eKLR, the Court of appeal stated of ‘a matter of law’: -

“As far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the trial court.”
12. This court reiterates the foregoing. The appellate court’s duty is to determine whether the conclusions of the trial court were based on the evidence presented before it.
13. In view of the foregoing, I find the application dated 17/8/2021 to be without merit and dismiss the same with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF AUGUST, 2022.

A. MABEYA, FCIArb

JUDGE

