REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

TAX APPEAL NO. 24 OF 2017

BETWEEN

GUACA STATIONERS LIMITED.....APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

RULING

Introduction

1. The Appellant's Notice of Motion dated 18th May 2020 is made, inter alia, under **section 80** of the ***Civil Procedure Act (Chapter 21 of the Laws of Kenya)*** and ***Order 45 rule 1*** of the ***Civil Procedure Rules*** seeking the following orders:

> *[1] THAT this Honourable Court be pleased to stay its Judgment, Decree and any consequential orders, delivered and issued on the 20th of February 2020, pending hearing and determination of this application.*
>
> *[2] THAT this Honourable Court be pleased to Review its Judgment and Decree delivered and issued on the 20th of February 2020 by the Honourable Justice D.S. Majanja.*
>
> *[3] THAT this Honourable Court be pleased to discharge and/or vary and/or correct and/or amend and/or set aside its Judgment and Decree delivered and issued on the 20th of February 2020 by the Honourable Justice D.S. Majanja.*
>
> *[4] THAT this Honourable Court be pleased to Order, that the Appeal having been allowed the suit be marked as settled.*
>
> *[5] THAT this Honourable Court be pleased to give directions as to the discharge of Bank Guarantee issue by Diamond Trust Bank to the Commissioner of Domestic Taxes on account of the Appellant herein.*
>
> *[6] THAT in the alternative and totally without prejudice to the foregoing:*
>
> > *(a) This Honourable Court be pleased to Order that the Appellant's Kenya Revenue Authority VAT assessment for the year 2008 be amended and or revised to reflect the add back of Kenya Shillings 10,511,139.00.*
> >
> > *(b) This Honourable Court be pleased to Order that the VAT to be paid as per the amended return for the year 2008.*
>
> *[7] THAT the costs of this application be provided for.*

2. The application is supported by the affidavit of the Appellant's director, Chitan Devji Shah, the grounds set out on the face of the application and written submissions. The application is opposed by the Respondent through Grounds of Opposition dated 28th May 2020 and written submissions. Before I deal with the substance of the application, a brief background of the matter will suffice.

Background

3. The Respondent carried out an in-depth audit of the Appellant for the years 2007 and 2008 and raised assessments on various heads being Income Tax, PAYE, VAT and Withholding Tax amounting to Kshs. 38,409,067/-, Kshs. 4,929,453/-, Kshs. 115,822,812/- and Kshs. 126,706/- respectively. The assessments were communicated to the appellant by a letter dated 30th July 2012.

4. The appellant objected to the assessment by its letter dated 24th August 2012 and lodged an objection notice with the respondent. The respondent dismissed the objections and confirmed the assessment by the letter dated 17th October 2013. The appellant, being aggrieved by the decision to confirm the assessment, lodged an appeal with the Tax Appeals Tribunal ("the Tribunal").

5. At the hearing of the appeal before the Tribunal, the parties settled several issues by consent except the following issue framed for determination, "*Whether the Respondent was within the law in confirming the assessment of VAT amounting to Kshs. 10,511,139/- due to failure of the appellant to produce the necessary documents."*

6. In its decision dated 22nd May 2017, the Tribunal dismissed the appeal thus precipitating this appeal. I heard the appeal and by the Judgment dated 20th February 2020 ("the Judgment") allowed the appeal on the following terms:

> *(a) The respondent's statement of facts shall be deemed to be properly filed and served on the appellant.*
>
> (b) *The submissions and evidence duly filed by the parties shall form part of the record of the Tribunal.*

Appellant's Case

7. The Appellant seeks review of the Judgment on the ground that it has established a mistake and sufficient reasons for review. The Appellant complains that the order that, *"The respondent's statement of facts shall be deemed to be properly filed and served on the appellant"* as a reason for allowing the appeal was neither appealed against by the Respondent or sought in the appeal by the Appellant. The Appellant submits that in expunging the Respondent's Statement of Facts, the Tribunal relied on **section 15** of the ***Tax Appeals Tribunal Act*** and exercised its unfettered discretion which neither party challenged nor argued was clearly wrong.

8. The Appellant contends that the order for rehearing of the appeal is erroneous as there exists no new evidence to be placed before the Tribunal. It submits that the Tribunal in reaching its decision, considered all evidence including the evidence and documents produced by the Respondent from the bar which it had purported to expunge. The Appellant therefore argues that the Tribunal, having heard the appeal without any evidence placed before it, cannot come to a different conclusion than it did in its judgment.

9. The Appellant complains that the court failed to consider the substance of its appeal. It submits that the parties reached a consent before the Tribunal that the disputed sum was KES 10,511,139.00 which the Tribunal ordered payment hence this court was to determine whether the amount is either taxes or an addback amount which would be subjected to VAT.

10. The Appellant complains that this Court failed to determine whether the Appellant was liable for an add back or not for reasons that the Respondent having sought to have the sum of KES 10,511,139.00 disallowed from the Appellant's account on grounds that the Respondent was unable to produce or avail the entities that supplied goods worth Kenya Shillings 10,511,139.00 yet the Respondent went ahead to recognise VAT payments issued on the same goods after the Appellant resold the same goods to a third party. Further and despite the Appellant having already resold the goods to a third party and availing proof of delivery, ETR payment receipts, proof of receiving the above sum after the sale, proof of payment to the entity who initially supplied the goods, the Respondent chose to only accept all documents relating to the third party and declined to recognise payments made to the initial supplier. The Appellant pointed out that despite the Respondent claiming that the initial suppliers could not be traced, the supplier's KRA PIN tax details on the itax portal were live and there was no evidence that they were non-existent. The Appellant before making payments used the itax pin checker to confirm that its suppliers were existent entities.

11. Based on the aforesaid grounds, the Appellant argues that there exists sufficient reasons to warrant a grant of the orders sought in the application. The Appellant cited the case of ***Nguruman Limited v Shompole Group Ranch and Another*** **NRB CA Civil Appl. No. NAI 90 of 2013 [2014] eKLR** and ***Otieno, Ragot and Company Advocates v National Bank of Kenya Limited*** **CA Civil Appeal Nos. 60 and 67 of 2017 [2020] eKLR** to also argue that the court did not have jurisdiction to issue the orders which were not prayed for by either party.

Respondent's Case

12. The Respondent opposes the application on the ground that the Appellant has not established or demonstrated the grounds upon which the court may review its judgment. It submits that the grounds proffered by the Appellant do not constitute an error or mistake apparent on the face of the record or provide any sufficient cause for the court to exercise discretion in its favour.

13. The Respondent submits that the court gave reasons for referring the matter back to the Tribunal and whether this court was right or wrong, is the subject of appeal and not review.

Determination

14. The application before the court is one for review of the Judgment. Order **45** Rule**1** of the ***Civil Procedure Rules***, which the Appellant has invoked, provides as follows:

*45**(1)** Any person considering himself aggrieved-*

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.

15. The principles governing the exercise of discretion to review a decree or order are now commonplace and the parties have cited several decisions to support their respective positions. An applicant is required to show either that there was an error apparent on the face of record or that there has been discovery of new and important matter or for any other sufficient reason for the court to review. The Court of Appeal in ***National Bank of Kenya Limited v Ndungu Njau*** **[1996] KLR 469** explained what constitutes an error of law apparent on the face of the record and the scope of review:

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review.

16. In ***Nyamogo & Nyamogo Advocates v Kogo*** **[2001] EA 170,** the Court of Appeal further explained that:

Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view as adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for appeal.

17. The Appellant complains that in its Judgment, the Court dealt with the Tribunal decision expunging the Respondent's Statement of Facts yet neither party had challenged the decision. This argument lacks merit. I would do no better than quote the Appellant's Memorandum of Appeal dated 21st June 2017 which raised the issue regarding the expunged Statement of Facts as follows;

[4] Having expunged the Respondent's Statement of Fact from the record, the Honourable Tribunal had no factual basis upon which it could ground its decision but still went ahead to deal with the matter as a defended cause in violation of the law.

[5] The Honourable Tribunal erred in law and in fact by allowing an advocate rather than a party to the litigation to present factual issues from the bar when in the contrary, in clear violation of the law.

18. How the Tribunal dealt with the evidence was the subject of extensive submissions by both sides and therefore central to the determination of the appeal and that is why I concluded in the Judgment as follows;

*[32] At the hearing of the appeal, the Tribunal invoked the provisions of **section 17** of the **Act** which empowers it to call for additional evidence. It directed that parties attach documents to their respective submissions. By taking this course, the Tribunal denied each party the opportunity to interrogate the evidence produced by the other side. Further, this court did not have the benefit of consideration of the facts and substance of the VAT dispute set out in the assessment and canvassed in the appeal before the Tribunal. It is for this reason that an evaluation of the evidence afresh, as required by the first appellate court, to determine whether the appellant has established its case is not feasible.*

19. After coming to the aforesaid conclusion, the court exercised its powers on appeal provided under **section 78** of the ***Civil Procedure Rules*** including the power to refer the appeal for rehearing and making incidental orders thereto. I therefore reject the argument that the conclusions and result of the appeal amounted to a mistake. As the Respondent submits, the Judgment was a result of consideration of the record and submissions and can only be the subject of an appeal.

20. I also reject the Appellant's submission that a rehearing will not serve any purpose. The Tribunal will consider all the submissions and evidence and make a determination as directed by this court. The issues now raised by the Appellant on the substance of the appeal will be re-considered and dealt with by the Tribunal.

Disposition

21. The Appellant's Notice of Motion dated 18th May 2020 is now dismissed with costs to the Respondent.

DATED and DELIVERED at NAIROBI this 22nd day of JANUARY 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Odipo instructed by RBZ Advocates LLP for the Appellant.

Mr Lemiso instructed by the Commissioner of Domestic Taxes.