Manguzi Hardware Limited v Commissioner of Investigations and Enforcement (Income Tax Appeal E080 of 2021) [2021] KEHC 263 (KLR) (Commercial and Tax) (23 November 2021) (Ruling)

Neutral citation: [2021] KEHC 263 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E080 OF 2021

A MABEYA, J

NOVEMBER 23, 2021

BETWEEN

MANGUZI HARDWARE LIMITED ..... APPELLANT

AND

COMMISSIONER OF INVESTIGATIONS AND ENFORCEMENT ..... RESPONDENT

RULING

1. The appellant's Motion dated 17/8/2021 is brought under Rules 15, 17 and 20 of the *Tax Appeals Tribunal* (Appeals to the High Court) Rules, 2015, Rules 16 and 17 of the *High Court (Organization and Administration) General Rules, 2016*. The appellant seeks leave to produce additional evidence in the present appeal.

2. The additional evidence sought to be produced are: -

    a. The Judgment and decree delivered in Petition Number 167 of 2018 Mohamed Ali t/ a Top Model Apparels & 44 other vs Kenya Revenue Authority on 12/11/2020 during the pendency of the appeal before the TAT.

    b. Documents in support of the impugned transactions comprising VAT payment slips, Invoices, VAT monthly returns, Ledger reports and Bank statements.

3. The Motion was supported by an Affidavit and Supplementary Affidavit sworn on 17/8/2021 and 15/9/2021, respectively by the appellant's director, Mohamed Hussein. He averred that the Appeal relates to an aggregate amount of Kshs. 188,319,870.56 comprising, Corporation Tax and Value Added

Tax (VAT) as per the respondent's Objection Decision dated 26/7/2018. That the judgment in Petition Number 167 of 2018 in which the Appellant was the 13th Petitioner, was delivered during the pendency of its appeal before the Tax Appeals Tribunal.

4. Further, that the appellant's tax advisers had provided the respondent with all the original documents in support of the impugned transactions. However, they erroneously and inadvertently failed to place the documents before the Tax Appeals Tribunal in view of the many objections and appeals that were being handled by them at that time.

5. He concluded that the additional evidence sought to be adduced was necessary for the full and complete adjudication of the matters in issue in this Appeal.

6. In opposition, the respondent filed Grounds of Opposition dated 6/10/2021 and a Replying Affidavit sworn on 2/11/2021 by JOHN EKADAH, an officer in the respondent's department.

7. The gist of the response was that the documents which the appellant sought to introduce before this Court would be prejudicial to the respondent since it will not have a chance to review their authenticity and render its objection decision thereon. It is also contended that the documents would also be prejudicial as they were not considered by the Tax Appeals Tribunal before it delivered its judgment.

8. That the order sought was in gross violation of the mandatory provisions of the *Tax Procedures Act*, 2015 which required that an appeal to the High Court shall be on matters of law only. In the respondent's view, the appellant was acting in bad faith as it had every opportunity to produce the documents, which were all along in its possession, for consideration and review by the respondent and the Tax Appeals Tribunal.

9. The court has considered the submissions of both parties which are basically a reiteration of the averments in their respective pleadings. Due consideration has also been given to the authorities cited by the parties.

10. This court is alive to the fact that Section 56(2) of the *Tax Procedures Act*, 2015 mandates it to hear appeals on questions of law only. However, the court's power to admit additional evidence on appeal can be gleaned from Section 78 of the Civil Procedure Act which provides, inter alia, that: -

> "
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> "(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power –
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> ...
>
> (d) To take additional evidence or to require the evidence to be taken..."

11. The above provision is further supported by Order 42 Rule 27 of the *Civil Procedure Rules* which provides: -

> "(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 –
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> a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
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> 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".

12. In addition, Rule 15 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015 envisages the admission of further evidence and provides thus: -

> " 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".

13. What can be discerned from the above provisions of law is that the decision of whether or not to admit additional evidence on appeal is an exercise of judicial discretion but such discretion, like in every other case, must be exercised judiciously and not capriciously. The only caveat is that in admitting further evidence, the court must record the reason for allowing such adduction.

14. The principles governing the admission of additional evidence were laid down in *Tarmohamed & Another v Lakhani & Company* [1958] EA 567, where the Court of Appeal for Eastern Africa adopted the decision in *Ladd v. Marshall* [1954] WLR 1489 and stated: -

> " Except in cases where the application for additional evidence is based on fraud or surprise:
>
> 'to justify reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible".

13. *Wanjie & Others v Saikwa & Others* [1984] KLR 275, in considering the need for restricting reception of additional evidence under Rule 29 of the *Court of Appeal Rules*, Chesoni JA observed 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 authorise the admission of additional evidence for the purpose of removing lacunae and filing 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. Further, in *Oceanfreight (EA) Ltd vs. Commissioner of Domestic Taxes* [2018] eKLR, the court reiterated the principles enunciated by the Supreme Court in *Mohamed Abdi Mahamad v. Ahmed Abdullahi Mohamad & 3 Others* and emphasized the centrality of the unavailability of the evidence during trial.

17. In the present case, the dispute began in 2018. It was for the appellant to establish that the additional evidence sought to be adduced could not be produced before the Tax Appeals Tribunal even after the exercise of reasonable diligence. That is the cornerstone of the exercise of the Court's discretion.

18. To begin with, it is clear that the Judgment in Petition Number 167 of 2018 was delivered on 12/11/2020. Although that was during the pendency of the appeal before Tribunal, that was 4 months before the Tribunal sat to hear the appeal on 12/3/2021 before ultimately rendering its judgment on 28/5/2021.

19. In this regard, if the appellant felt that the judgment in the Petition was necessary for the determination of the matters in issue before the Tribunal, nothing would have been easier than to produce the same therein since there was ample opportunity to do so.

20. Further, I am in agreement with the respondent's submission that it beats logic for the appellant to have still pursued the Appeal before the Tribunal despite claiming that the respondent's objection decision had been effectively set aside by the judgment in the Petition.

21. As regards the other additional documents, I note that Mr. Stephen Okoth, one of the tax advisers who allegedly informed the appellant that they inadvertently and erroneously failed to lodge these vital additional documents before the Tribunal, has not sworn an Affidavit. He should have lodged such affidavit to confirm that this was indeed the position and explain at which point they discovered this error since the appeal before the tribunal was filed way back in 2018.

22. In this regard, it is difficult to tell whether this was a genuine and/or inadvertent error. In any event, the professional tax advisers having represented the appellant before the Tribunal, knew the evidence needed to be presented on behalf of their client and thus should have discovered this error by exercising due diligence. That being the case, it would be highly prejudicial to the respondent to allow the appellant to use this opportunity to mischievously patch up and fill the gaps in its case at this second appeal stage.

23. A close look at the proceedings will show that when the respondent's witness testified, he was questioned as to whether documents had been submitted to the respondent during investigations. His answer was an emphatic no. That was the point at which the allegation that the documents sought to be produced had been left with the respondent should have been raised and dealt with. To allege now that the same had been sent to the respondent and purport to produce letters calling for them is a little bit too late.

24. Litigation must come to an end. It does not matter that the evidence may be crucial. There must be sufficient reason why the evidence was not produced at the trial. This case is different from the one in *Commissioner of Income Tax v. Total Kenya Ltd* [2021] eKLR. In that case, both parties were aware of the document in question and they had proceeded with the appeal before the Tribunal on the understanding that the decision contained in that document had been made. The Tribunal raised the unavailability or the absence of such a decision in in its judgment and declined jurisdiction. Obviously that is not the case here.

25. The upshot is that the appellant's application dated 17/8/2021 lacks merit and is dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF NOVEMBER, 2021.

A. MABEYA, FCI Arb

JUDGE