Darwine Wholesalers Limited v Commissioner of Investigations and Enforcement (Income Tax Appeal E051 of 2021) [2021] KEHC 405 (KLR) (Commercial and Tax) (29 December 2021) (Ruling)

Neutral citation: [2021] KEHC 405 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E051 OF 2021

A MABEYA, J

DECEMBER 29, 2021

BETWEEN

DARWINE WHOLESALERS LIMITED ..... APPELLANT

AND

COMMISSIONER OF INVESTIGATIONS AND ENFORCEMENT ..... RESPONDENT

RULING

1. The application before Court is the appellant's Motion on Notice dated 14/10/2021 seeking leave to adduce additional evidence in support of its appeal. The additional evidence is the judgment and decree delivered on 12/11/2020 in Petition Number 167 of 2018: Mohamed Ali t/a Top Model Apparels & 44 other v Kenya Revenue Authority ("the said judgment"); a letter dated 13/3/2020 forwarding a certified copy of the said judgment and decree to the respondent and; documents in support of impugned transactions comprising of VAT payment slips, Invoices with corresponding ETRs VAT monthly returns bank statements e-acknowledgment VAT return receipts among other documents.

2. The application is brought under sections 1A, 1B, & 6 of the *Civil Procedure Act*, Order 42 Rule 27 of the *Civil Procedure Rules 2010*, 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)*.

3. It is supported by an Affidavit sworn on even date by the appellant's director, MOHAMED HUSSEIN. He avers that the appeal relates to an aggregate amount of Kshs. 105,340,298/= comprising of Value Added Tax (VAT) and Corporate Tax confirmed in the respondent's Objection Decision dated 10/8/2018. He states that the judgment in Petition Number 167 of 2018 in which the appellant was

the 10th Petitioner, was delivered during the pendency of its appeal before the Tax Appeals Tribunal ("the Tribunal").

4. That the appellant's tax advisers provided the respondent with all the original documents in support of the impugned transactions. However, they erroneously and inadvertently failed to place the said documents before the Tribunal in view of the many objections and appeals that were being handled by them at that time. Lastly, he contends that the additional evidence sought to be adduced is necessary for the full and complete adjudication of the matters in issue in this appeal.

    1. In opposition, the respondent filed a replying affidavit sworn on 9/12/2021 by JOHN EKADAH, an officer in its Investigations & Enforcement Department. The respondent contends that the appellant claimed local purchases from traders during the period 2015 to 2017 but investigations revealed that the said traders only existed on paper and were neither involved in buying or selling goods nor do they have any known physical addresses. That the investigations further revealed that the mysterious businesses printed and sold invoices with ETR receipts to the appellant at a commission to reduce its tax liabilities.

    2. The respondent further contends that the appellant failed to justify its claim for input VAT and costs within the stipulated timelines. That the respondent therefore stands to suffer great prejudice and injustice if the application is allowed for reasons that; the appellant is merely forum shopping; it is nearly three (3) years since it appealed against the respondent's Objection Decision to the Tribunal and failed to produce any documents in support of its appeal therein. Further, that the respondent will not have a chance to review the authenticity of the documents which the appellant now seeks to introduce and render its objection decision thereon as by law required.

    3. It is also contends that the order sought is in gross violation of the mandatory provisions of the *Tax Procedures Act*, 2015 that an appeal to the High Court shall be on matters of law only. Lastly, that issues raised in the application are now res judicata having been dealt with conclusively by this Court in Nairobi ITA No. E083 of 2021: Jarinta (K) Limited v Commissioner of Investigation and Enforcement and Nairobi ITA No. E080 of 2021: Manguzi Hardware Limited v Commissioner of Investigation and Enforcement.

    4. The Court has considered the opposing contentions and the submissions of the respective parties. Due consideration has been given to the same as well as the authorities cited by the parties.

    5. The Court proposes to first deal will the two objections; that the matter is res judicata and that it offends the provisions of section 56(2) of the *Tax Procedures Act*. To begin with, it is important to note that the issues raised herein cannot be said to be res judicata since Nairobi ITA No. E083 of 2021: Jarinta (K) Limited v Commissioner of Investigation and Enforcement and Nairobi ITA No. E080 of 2021: Manguzi Hardware Limited v Commissioner of Investigation and Enforcement were between different parties. The applicants therein are separate legal entities from the applicant herein.

    6. On the second issue, 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 is not restricted or impeded by the said provision. Its jurisdiction is derived from section 78 of the *Civil Procedure Act* which provides, inter alia, that: -

        "

"(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power –

...

(d) To take additional evidence or to require the evidence to be taken..."

7. This 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 –

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".

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

"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".

9. From the foregoing, it is clear that admitting additional evidence on appeal does no derogate the provisions of section 56(2) of the *Tax Procedures Act*, 2015 as contended by the respondent. The Court rejects that contention.

10. From the cited provisions of the law, the decision as to whether or not to admit additional evidence on appeal is an exercise of judicial discretion. Like all other discretions, the same 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.

11. The principles governing the admission of additional evidence were laid down in *Tarmohamed & Another v Lakhani & Company* [1958] EA 567. In that case, 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".

12. In *Wanjie & Others v Saikwa & Others* [1984] KLR 275, Chesoni JA observed on admitting additional evidence on appeal 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 authorize 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"

13. From the foregoing, the question is whether the applicant made a case for grant of leave to file additional evidence? It is not in dispute that all the evidence that the applicant wishes to produce was available during the filing and even the hearing of the appeal before the Tribunal. The judgment in Petition Number 167 of 2018 was delivered on 12/11/2020, long before the appeal before the Tribunal was heard on 12/3/2021. The appeal was determined on 28/5/2021.

14. In this regard, if the applicant felt or knew that that judgment was necessary for the determination of the matters in issue before the Tribunal, nothing would have been easier than to produce the same at the hearing. The fact that the applicant forwarded a certified copy of the same to the respondent amounts to nothing since the appeal in the Tribunal was filed by the applicant and it was the Tribunal to make a determination on the issues before it and not the respondent. Having decided not to produce and rely on it before the Tribunal, it is a choice that the applicant made willingly and has to live with it.

15. Additionally, it beats logic for the applicant to have still pursued the appeal before the Tribunal despite claiming that the respondent's objection decision had been effectively set aside by that judgment. To this Court's view, that is an afterthought. That judgment does not qualify to be produced at this stage.

16. As regards the other additional documents, the Court notes that Mr. Stephen Okoth, one of the tax advisers who allegedly informed the applicant that they inadvertently and erroneously failed to lodge these vital documents before the Tribunal, has not sworn an Affidavit to confirm this fact. He has not explained at which point the said advisers discovered the alleged error considering that the appeal before the Tribunal was filed way back in 2018. It is therefore difficult to tell whether this was a genuine and/or inadvertent error.

17. In any event, the professional tax advisers having represented the applicant before the Tribunal, knew the evidence needed to be produced on behalf of their client. They should have discovered the alleged error by exercising due diligence. Needless to say, these are documents that every tax payer is by law required to keep records of in a manner that is easily accessible as

and when needed. (See Section 23 of Tax Procedure Act 2015, Section 43 of the *Value Added Tax Act 2013* and Section 54A of the *Income Tax Act 2015)* .

18. That being the case, it would be prejudicial to the respondent to allow the applicant to use this opportunity to patch up and/or fill up the gaps in its case at this second appeal stage. When a party chooses a professional who represents him/it in a negligent manner, sometimes it is fair to let the loss lie where it falls as in this case. The client should seek recourse there other than vex the other litigant and/or the court unnecessarily.

19. Litigation must come to an end. It does not matter that the evidence is crucial. There must be sufficient reason why the evidence was not produced at the trial. This case is completely different from the one in *Commissioner of Income Tax v. Total Kenya Ltd [2021]* eKLR. In that case, both parties were aware of the existence 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 problem arose when the Tribunal raised the unavailability or the absence of such a decision in its judgment suo motto. It did so because it was unaware of the same and it wrongly declined jurisdiction. Both parties were of a different view. Obviously that is not the case here.

20. The upshot is that the applicant's application dated 14/10/2021 is without merit and is hereby dismissed with costs to the respondent. The parties should take steps to prosecute the appeal expeditiously.

It is so ordered.

DATED AND DELIVERED VIRTUALLY THIS 29TH DAY OF DECEMBER, 2021.

A. MABEYA, FCI Arb

JUDGE