REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

INCOME TAX APPEAL 19 OF 2013

COCA-COLA CENTRAL EAST AND

WEST AFRICA LIMITED.....APPLICANT

-VERSUS-

THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

RULING

1. This matter was awaiting judgment when the Appellants moved this Court to arrest delivery thereof to allow counsel make submissions with respect to judgments of the Tax Appeals Tribunal in Coca-Cola Central, East and West Africa –vs- The Commissioner of Domestic Taxes (TAT Appeal No. 5 of 2018 and LG Electronics Africa Logistics Kenya Branch -vs- The Commissioner of Domestic Taxes (TAT Appeal No. 359 of 2018). The request is in a Motion of 30th April 2020.

2. The two decisions were delivered on 31st March 2020, a date after this Court had reserved its matter for judgment. I am told that TAT Appeal No. 5 of 2018 is on all fours with the current Appeal, as the parties are the same, facts are the same and issues to be decided are the same.

3. As to TAT Appeal No. 359 of 2018, it is argued by the Appellant that the issues are directly relevant to the issues to be decided in the matter currently before me.

4. The Respondent opposes the application and asserts that the current application seeks to delay the resolution of an old matter. It points out that parties were given a fair hearing to present their respective cases and to make clarifications sought by the Court and that the delivery of Judgment should not be delayed any further. It is further argued that litigation cannot go on in perpetuity.

5. The Court is further told that the application is an abuse of the Court process and it offends the doctrine of *sub judice* as it seeks to have this Court discuss matters which are subject of litigation in other matters including HCC No. TA No. 083 of 2020, an appeal to the High Court from TAT No 5 of 2018 .

6. Connected to what is stated above, it is argued that considering the decisions which are the subject of Appeal will be prejudicial to the Appeals filed by the Respondent in the matters.

7. This Court is reminded that the Tribunal is inferior to it and its decisions can never bind this Court.

8. Lastly, that what the Applicant really seeks to do is to re-litigate the issues already canvassed before Court.

9. This Court has given regard to submissions made by the parties and returns this view.

10. As stated by Justice Kasango in Samuel Kiti Lewa –vs- Housing Finance Co. of Kenya Ltd & Another [2015] eKLR (a case cited by the Respondent):-

> "20. The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening of the case will be

defeated by in ordinate and unexplained delay."

Although this matter seeks the re-opening of the Appeal for further argument and not for admission of new facts, the manner in which the discretion is to be exercised is by and large as set out in that decision.

11. The Rulings which the Appellant intends to bring to the attention of this Court were received by the Appellant on 31st March 2020. This admittedly was a date after the highlighting of written submissions in this matter.

12. It is not contested that soon thereafter, the Appellant brought the existence of the two Rulings to the attention of the Court for directions as to whether parties could address the Court on them. As the Respondent's counsel was opposed to the re-opening of arguments, the Court directed the Appellant file a formal application, hence this Application. In compliance, this Application was expeditiously filed.

13. The Appellant has submitted that the two decisions are relevant to the issues that arise in the Appeal before this Court. The Respondent does not respond to this pointed argument. I therefore take it that it is not in contention that the issues raised in the two decisions touch on matters similar to those that arise for determination here.

14. Now, it sometimes happens that after the close of submissions, but before rendering itself, the Court on its own comes across an authority or legal material which could have a bearing on the outcome of a matter. When this happens then the fair thing to do is to invite parties to make comments on the new authority material before making use of it in a decision.

15. If however it is the parties who come across authority or legal material (not on evidence) which may assist the Court arrive at its decision, then it is the duty of the parties, and where represented a greater duty on counsel, to bring such authority or material to the attention of the Court. The business of the Court is to render itself on the law, and facts before it. An authority that may assist a Court arrive at a correct decision should therefore not be shut out unless to do so jeopardizes a party's right to fair hearing.

16. The Tax Appeals Tribunal is a Subordinate Court under our systems of Courts (Article 169 of the Constitution). Appeals from that Tribunal are heard and determined by the High Court. Are decisions of the Tribunal, which are relevant to a matter before Court, to be ignored merely because the High Court is not bound to follow such a decision?

17. The respect to be accorded to a decision of a Court will depend on the quality and correctness of the decision. The level from which the decision emanates should not matter. Is it not true that there are repeated occasions when decisions of the High Court have been acknowledged by the Court of Appeal and Supreme Court as correctly stating the law? On as many occasions decisions of the High Court have been held to be persuasive by Courts above it. This Court will be the last to look down at a decision merely because it is of the subordinate Court.

18. It is common ground that the decisions sought to be relied upon by the Appellant are now the subject of Appeal and are pending before the High Court. Does a discussion of those decisions before this Court offend the rule of *res judicata* (Section 6 of the Civil Procedure Act) or the *sub judice* rule as suggested by the Appellant?

19. Section 6 of the Civil Procedure Act reads:-

> "Stay of suit
>
> No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.
>
> *Explanation.* — The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court."

The argument that this would make this matter *res judicata* the two appeals is misplaced. The outcome of this Appeal cannot in any way determine the other two Appeals. This Court has no such power.

20. In GNK –vs- USA-Africa Management Co Ltd & Another [2016] eKLR the Court restates *sub judice* Rule :-

> "6. The sub judice rule is a common law principle that generally prohibited public discussion on matters pending before the court. At common law, the principle was particularly appropriate in cases of trial by jury where there was genuine fear that lay jury members would be swayed by public opinion. The retired Constitution of Kenya appeared to secure the common law position on sub judice (see Section 79(2))."

21. The matters before the Tribunal are done and dusted. There is no way, whatever this Court makes of the decisions, the Judgment here can reopen the matters. Whilst this Court's comment on the two decisions could persuade the Courts hearing the Appeal, the Courts being of concurrent jurisdiction to this Court are not bound by the decision here. A judicial discussion of the decisions which are the subject of Appeal does not offend the *sub judice* Rule.

22. I think that in the end, the outcome of this application has to come down to whether allowing the Application will prejudice the Respondent.

23. This matter has taken 7 years to get to this point. This, no doubt, has been a long journey. The Respondents forceful argue that to reopen the matter for arguments will cause further delay on the matter. That I agree. Should the Court allow the reopening then some further delay is inevitable. Yet I have not heard the Respondent apportion blame for the delay this far. It is not said that the delay is solely or partly attributable to the Appellant. To that extent I have no reason to frown upon the Appellant's conduct in the matter.

24. The answer to the Respondent's anxiety is for this Court to impose strict timelines on further submissions so that the reopening does not drag on.

25. This Court is also told that to allow the application is to permit the Appellant to re-litigate this matter and to subject the Court and Respondent to unending arguments. This Court has held that, in so far as there is no contention as to the relevance of the two decisions, it may serve the ends of justice better if the Court was to consider them in the context of what is before it. Secondly, that the decisions came after parties had closed their arguments but their existence promptly brought to the attention of the Court. I do not see how to giving parties an opportunity to submit on these two decisions is to permit endless litigation. This is the first application for reopening that the Appellant has made.

26. But so that the reopening of arguments is not abused, this Court will ring fence the leave it shall shortly be granting.

27. The Motion of 30th April 2020 is allowed. The reopening of arguments is limited to Counsel pointing out the relevance or distinction of the two decisions to this Appeal. The Court will at the delivery of this Ruling appoint a close date for those arguments. In the meantime, each party to bear its own costs.

Dated, Signed and Delivered in Court at Nairobi this 5th Day of August 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Miss Malik for the Applicant.

Mr Ochieng for the Respondent.