



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**INCOME TAX APPEAL NO. 6 OF 2015**

**ENASOIT RANCH LIMITED.....PLAINTIFF**

**VERSUS**

**KENYA REVENUE AUTHORITY.....DEFENDANT**

**RULING**

1. There is in this matter pending the appeal filed by **Enasoit Ranch Limited** (hereinafter the Ranch). The Respondent in this appeal is the **Kenya Revenue Authority** (KRA).

2. In this Ruling I am considering an oral application by the Ranch to be permitted to produce documents in this appeal.

**BACKGROUND**

3. An audit was conducted by KRA on the Ranch for the tax years of 2007, 2008, 2010 and 2011. In the said audit KRA deemed interest on loans advanced to Mr. Halvor Astrup. The Ranch appealed the KRA decision on deemed interest to the Local Committee Nyeri. The said Local Committee, by its Ruling dated 5<sup>th</sup> June 2015, identified the one single issue it was to determine in the appeal. This is how the Local Committee phrased the issue for determination:

*“The issue for determination by the committee is whether Mr. Halvor in Kenya. A determination of the said issue will resolve the contentious issue of withholding tax on deemed interest.”*

4. The Local Committee went further to discuss that issue, in its Ruling, and stated:

*“However, an element of permanence must accompany the home in defining as a permanent home. In the case of Mr. Halvor, no evidence of a permanent home was submitted. There is no evidence of permanent structure, nor was there evidence of a temporary structure or a room which could be stated have belonged to Mr. Halvor permanently, and which he lived in on his visits to Kenya.”*

**SUBMISSIONS ON BEHALF OF THE RANCH**

5. The submission on behalf of the Ranch were that when the appeal was before the Local Committee photographs were shown or produced to it of the home of Mr. Halvor but that the said Local Committee disregarded that evidence in determining whether Mr. Halvor had permanent residence in Kenya. Mr. Halvor was a Norwegian national with an alien status in Kenya.

6. It was further submitted that the law does not preclude this Court from looking at the photographic evidence in determining whether the Local Committee properly considered the evidence before it. The Learned Counsel relied on the decision in the case **MERCY KIRITO MUTEGI V BEATRICE NKATHA NYAGA & 2 OTHERS [2013] eKLR**, as follows:

*“We are nonetheless conscious that our jurisdiction is only limited to determination of points of law and thus, our concern regarding the issues that dealt on facts will be limited to our duty of re-evaluation of the Judge’s conclusions; and if the conclusions are erroneous; that is, not supported by evidence and the law; the matter becomes a point of law. As it was held in the case of Mwangi v Wambugu, [1984] KLR 453:*

*“A Court of Appeal will not normally interfere with a finding of fact by the trial Court unless such finding is based on no*

*evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate Court is not bound to accept the trial Judges finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”*

#### **SUBMISSIONS ON BEHALF OF KRA**

7. On behalf of KRA it was submitted that appeal to the High Court was restricted to consideration of points of law. The Tribunal, or in this case the Local Committee, was the one that had original jurisdiction to receive evidence, but not this Court. It is on that basis that KRA opposed the introduction of photographic evidence by Ranch.

#### **ANALYSIS AND DETERMINATION**

8. As I understood the submissions before me is that what the Ranch wishes to do is to have the photographs considered at the hearing of this appeal. It was not denied by KRA, as was submitted on behalf of the Ranch, that those photographs were before the Local Committee but the Local Committee failed to consider them in its Ruling being appealed against.

9. Under Section 56 of the Tax Procedures Act it is provided that on appeal to the High Court or to the Court of Appeal shall be only on a question of Law. It is on the basis of that provision that KRA opposed the application for photographs to be produced before this Court. The Court of appeal has severally given guidance on the hearing of second appeal which are only on points of law. The Court of Appeal in the case **BODOLE ABALA KONE V REPUBLIC [2019] eKLR** had this to say:

*In **Boniface Kamande & 2 Others vs. R [2010] eKLR**, this Court pronounced itself as follows:-*

*“On a second appeal to the Court, ... we are under legal duty to pay proper homage to the concurrent findings of facts by the two Courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision upon it.”*

10. At this point in time this Court is not called upon to decide the appeal. When it does decide this appeal it will be required to abide with the provision of Section 56 of the Tax Procedure Act. What this Court is ask to do, by the Ranch, is determine whether the photographs, which the Ranch submitted, and it was not denied, were before the Local Committee can be produced in this appeal.

11. Under the Tax Appeals Tribunal (Appeal to the High Court) Rules it is provided, under Rule 20, that the Civil Procedure Rules are applicable to appeal such as this one. That Rule 20 provides:

*“The Rules determining procedure in civil suits before the Court, to the extent to which those Rules are not inconsistent with the Act or these Rules, shall apply to the tax appeal as if it were a civil suit.”*

12. Under Order 42 Rule 27 of the Civil Procedure Rules it is provided that the Court to which it is appealed to, such as this Court, it can require any document to be produced to enable it to pronounced judgment.

13. As stated before KRA did not deny that the photographs showing Mr. Halvor’s residence were before the Local Committee. In my perusal of the Ruling of the Local Committee I could not find any finding relating to those photographs. In order for this Court to pronounce itself in the judgment of this appeal it is necessary that this Court does have before it the same evidential material the Local Committee had when it ruled. The production therefore of the photographs, as sought by the Ranch is permissible under Rule 27 of Order 42 of the Civil Procedure Rules.

14. My above finding is further supported by Rule 15 of the Tax Appeals Tribunal (Appeals to the High Court) Rules. That Rule 15 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.”*

15. That Rule 15 in my view is clear and it does provide for this Court to consider/admit documentary evidence, which is necessary for determination of the appeal.

**16. In the end I find and I hold that the Appellant, Enasoit Ranch Ltd., is entitled to file and rely on photographs that were produced at the hearing before the Local Committee. The costs of the application shall be in the cause.**

**DATED, SIGNED and DELIVERED at NAIROBI this 24<sup>TH</sup> day of JULY, 2019.**

**MARY KASANGO**

**JUDGE**

***Ruling Read and Delivered in Open Court in the presence of:***

**Sophie.....COURT ASSISTANT**

**.....FOR THE PLAINTIFF**

**.....FOR THE DEFENDANT**