



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

INCOME TAX APPEAL NO. 1 OF 2016

CENTRAL KENYA COFEE MILLS LIMITED.....APPLICANT

- VERSUS -

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGMENT

1. The appeal before me is of an interlocutory nature. It emanates from the decision of the Tax Appeals Tribunal, when it rejected the appellant's application to amend its Memorandum of Appeal.
2. The appellant, **CENTRAL KENYA COFFEE MILLS LIMITED** asserts that the Appeals Tribunal failed to properly exercise its discretionary power.
3. The Tribunal is said to have allowed its discretion to be fettered.
4. The appellant also accused the Tribunal of a failure to address itself to the pertinent issues which were raised by the Amended Memorandum of Appeal.
5. Finally, it was the appellant's contention that the Tribunal had paid undue regard to procedural technicalities, when it disallowed the application for the amendment of the Memorandum of Appeal.
6. When canvassing the appeal, Mr. Wakwaya, the learned advocate for the appellant, submitted that an amendment may be allowed at any time before a suit was determined.
7. Therefore, the appellant contends that it had a right to amend its memorandum of appeal.
8. The Respondent, The **COMMISSIONER of DOMESTIC TAXES**, does not dispute the contention that any party to a suit has a right to amend its pleadings. However, the Respondent insisted that amendments cannot be done at any time.
9. In his understanding, the respondent argued that amendments cannot be allowed if that would cause injustice or delay.
10. Secondly, the respondent pointed out that pursuant to Rule 21 of the Tax Appeals Tribunal Rules, an amendment would be allowed provided that it did not raise new issues.
11. The appellant cited the decision of the United States Court of Appeals for the Federal Circuit, **GOLDEN BRIDGE TECHNOLOGY INC. Vs. NOKIA INC. & ANOTHER No. 07-1215**, to support

the proposition that new issues can be entertained on an appeal. In particular, the appellant sought to rely on the following words;

“In Forshey, this court articulated an exemplary set of limited circumstances in which hearing arguments for the first time an appeal is appropriate; (1) when new legislation is passed while an appeal is pending, courts have an obligation to apply the new law if Congress intended retroactive application even though the issue was not decided or raised below; (2) “when there is a change in the jurisprudence of the reviewing court or the Supreme Court after consideration of the case by the lower court; (3) “appellate courts may apply the correct law even if the parties did not argue it below and the court below did not decide it, but only if an issue is properly before the court; (4) “where a party appeared pro se before the lower court, a court of appeals may appropriately be less stringent in requiring that the issue have been raised explicitly below”.

12. In my understanding of that decision, there are very limited circumstances in which new issues can be argued for the first time on an appeal. In effect, it is more of an exception, rather than the norm, to have an issue which had not been argued before the lower court, being argued at the appellate court.

13. Pursuant to the provisions of Section 12 (6) of the Tax Appeals Tribunal Act, a party may apply for an amendment at any time before the determination of the appeal.

14. In the light of that provision, the appellant submits that the Tribunal erred, when it rejected its application for an amendment.

15. In my understanding, there are two steps in the process envisaged in a case such as this one. The first step is to determine whether or not a party may be allowed to amend his appeal.

16. In general terms, the tribunal would ordinarily be ready and willing to allow an amendment to be effected, if the same was sought before the appeal was determined. But even then, the tribunal has the jurisdiction to reject the proposed amendment if it is satisfied that the application was made after an unexplained delay.

17. One of the issues which was raised in this case was that the application for the amendment was brought late. That issue emanated from the fact that the application was being made on the day when the appeal was scheduled for hearing.

18. Whilst making the application for amendment, the appellant conceded that if the amendment was effected, it would give rise to a new issue. That, to my mind, is the other aspect of this matter. In other words, even though the tribunal would normally grant leave for the amendment of an appeal if the application was made timeously, the tribunal would have to be more circumspect if the proposed amendment would introduce a new issue which had not been canvassed earlier.

19. The new issues might relate to either facts or to the law, or to both facts and the law.

20. In the case of **CONNETICUT FIRE INSURANCE COMPANY Vs KAVANAGH [1882] 61 L J P C 60**, the Privy Council had this to say;

“When a question to law is raised for the first time in a Court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below.

But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide

establishes beyond doubt that the facts, if fully investigated, would have supported the new plea?.

21. Ordinarily, therefore, the courts would be reluctant to allow issues of fact to be canvassed for the first time, at the appeal stage.

22. The respondent submitted that;

“The appellant sought to introduce the application of Section 51(11) of the Tax Procedures Act, 2015?.

According to the respondent, that statute was not in force at the material time.

22. In my considered opinion, it is an issue of law as to whether or not the statute was in force at the material time. There was no matters of fact that have to be first investigated and determined before the tribunal could make a decision on that issue.

24. In the case of **D.E.N Vs P.N.N CIVIL APPEAL No. 226 of 2012**, the Court of Appeal quoted with approval, the following words from the case of **ATTORNEY GENERAL Vs FAROE ATLANTIC Co. LTD [2005-2006] SCGLR 271;**

“The salutary and well-known general rule of law is that where a point of law is relied on an appeal, it must be one which was canvassed at the trial. But there are exceptions to this rule; the question of jurisdiction being one of them. A jurisdictional issue can therefore be taken or raised at any time, even for the first time, on appeal.

Another exception is where an act or contract is made illegal by statute.

....

Again, the well-established general rule is that where a legal question sought to be raised for the first time is substantial and can be disposed of without the need for further evidence, it should be allowed?.

25. In this case it does appear to me that the legal question sought to be raised is substantial.

26. I also find that the said issue can be disposed of without the need for further evidence being adduced.

27. Thirdly, the respondent appears to have a response to the issue.

28. By allowing the appellant to amend the appeal, the tribunal would not occasion any prejudice to the respondent. I so find because it is one thing to allow a party to amend a pleading, and it is a different matter altogether to determine whether or not the amended pleading would be successful.

29. The parties would have an equal chance when canvassing the amended pleading. Therefore, it is still possible that the tribunal may disallow the amended appeal.

30. Meanwhile, it cannot be disputed that the application was made late in the day, as it was brought on the day when the appeal was due to be heard.

31. In the circumstances, the appellant, although it should now be allowed to amend the appeal, ought to bear the costs occasioned by the delay resulting from the leave to amend.

32. In the event, I set aside the tribunal’s decision which disallowed the proposed amendment. However, the said amendment will be strictly limited to the issues of law. The appellant will not be permitted to adduce new evidence.

33. The issues of law arising from the amendment of the appeal will be determined on the basis of the facts which the parties have already place before the tribunal.

34. For the avoidance of any doubt, the appellant will pay the costs of the proceedings during which it had sought leave from the tribunal, to amend the appeal.

35. However, the respondent will meet the costs of this appeal.

DATED, SIGNED and DELIVERED at NAIROBI this 24th day of July 2017.

FRED A. OCHIENG

JUDGE

Judgement read in open court in the presence of

Bundotich for Wakwaya for the Applicant

Kirugi for Mbae for the Respondent

Mr. C. Odhiambo, Court clerk.