Frigoken Limited v Commissioner of Customs & Border Control (Customs Tax Appeal E007 of 2024) [2025] KEHC 3364 (KLR) (Commercial and Tax) (19 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3364 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CUSTOMS TAX APPEAL E007 OF 2024

A MABEYA, J

MARCH 19, 2025

BETWEEN

FRIGOKEN LIMITED ..... APPELLANT

AND

COMMISSIONER OF CUSTOMS & BORDER CONTROL ..... RESPONDENT

RULING

1. By its Motion dated 13/6/2024, the appellant is seeking leave to file additional evidence in the nature of its applications for gazettement under EAC Duty Remission Scheme dated 4/5/2018, 4/10/2018, 28/5/2019 and 8/10/2019.

2. The Motion is brought pursuant to Rule 15 of the *Tax Appeals Tribunal Act*, Sections 1A, 1B, 3A, and 78 (d) of the *Civil Procedure Act* and Order 42 rules 27, 28 and 29 of the *Civil Procedure Rules* 2010. It is supported by an affidavit sworn on the same date by Karim Dostmohamed, the appellant's managing director.

3. The grounds for the application are that the evidence on extension of time for importation was inadvertently not produced at the Tax Appeals Tribunal. That the applications for gazettement were credible documents directly relevant to the main issue before this Court. That the documents were not voluminous and could not cause any prejudice to the respondent or cause any delay in the determination of the proceedings.

4. In opposing the application, Daniel Lemaiyan an officer appointed by the respondent and Counsel on record for the respondent swore a replying affidavit on the 18/6/2024 in which he deposed that the appellant had admitted to failing to produce the evidence of extension of time before the Tribunal.

5. That it had not proved any of the conditions provided in Order 42 rule 27 and neither had the Tax Tribunal declined to admit the evidence sought to be adduced. That further, this Court had not sought, suo moto, for such additional evidence.

6. That the documents sought to be introduced were not new to the appellant and that the respondent would be prejudiced if not granted adequate time to scrutinize the authenticity of the said documents and this would necessitate a reopening of the case. That the appellant had an opportunity to file an application for review under section 29A of the *Tax Appeals Tribunal Act* but instead opted for this appeal and that as a result, the instant application was meant to delay the determination of this matter which is against the spirit of sections 1A, 1B and 3A of the *Civil Procedure Act*.

7. In its submissions, the appellant argues that the additional evidence could not have been obtained by reasonable diligence before and during the hearing at the Tribunal. That its Tax adviser had inadvertently failed to produce them before the Tribunal as a result of the numerous documentations being handled by them at the time.

8. The appellant further submits that the additional evidence substantiates the veracity of its arguments and is substantive material to the appeal and critical in assisting the Court.

9. On its part, the respondent submits that the documents sought to be introduced by the appellant after the close of the case were not new to the appellant. That the appellant has not satisfied the conditions precedent in Order 42 rules 27, 28 and 29 of the *Civil Procedure Rules* and the principles set down by the Supreme Court in the case of *Mohammed Abdi Mohamud v Ahmed Abdulahi Mohamad & 3 Others* [2018 eKLR, the Court of Appeal in *Safe Cargo Limited v Embakasi Properties Limited & 2 Others* (2019) eKLR. The respondent further relied on this court's decision in Family Fashion Clothing Limited v *Commissioner of Investigations and Enforcement (Income Tax Appeal E050 of 2021)* [2021] KEHC 406 (KLR).

10. I have considered the rival contestations. The issue for determination is whether the appellant has made out a case for leave to be granted to adduce additional evidence on appeal.

11. The application is grounded on section 78 of the *Civil Procedure Act* Cap 21 Laws of Kenya which provides for powers of an appellate court in appeals from the subordinate court to the High Court. It mirrors Rule 29(1) (b) of the Court of Appeals Rules. The Section provides:

> "(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power: -
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> a) To determine a case finally;
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> b) To remand a case;
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> c) To frame issues and refer them for trial;
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> d) To take additional evidence or to require the evidence to be taken;
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> e) To Order a new trial.
>
> (2) Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are charged conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein."

12. In Civil Appeal (Application) 84/2012 *Attorney General Vs Torino Enterprises Limited* [2019] eKLR, the Court of Appeal stated: -

> "In Dorothy Nelima Wafula vs. Hellen Nekesa Nielsen and Paul Fredrick Nelson [2017] eKLR, it was expressed that under Rule 29(1) (a), additional evidence will be introduced on appeal in the discretion of the Court, 'for sufficient reason'. The court further stated that: -
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> "Though what constitutes "sufficient reason" is not explained in the rule, through judicial practice, the Court has developed guidelines to be satisfied before it can exercise its discretion in favour of a party seeking to present additional evidence on appeal. Before this Court can permit additional evidence under rule 29, it must be shown, one, that such evidence could not have been obtained by reasonable diligence before and during the hearing, two, the new evidence would probably have had an important influence on the result of the case if it was available at the time of the trial, and finally, that the evidence sought to be adduced is credible, though it need not incontrovertible."

13. From the above guidelines set by the Court of Appeal, the duty of this Court in the present of Motion is to determine: -

    a) Whether the additional evidence is new evidence;

    b) Whether that evidence could have been obtained by the applicant after reasonable diligence before and during the hearing before the Tribunal;

    c) If there is a probability that the new additional evidence would have had an important influence on the result of the case and

    d) based on the foregoing, whether there is sufficient reason to admit the same."

14. It is not in dispute that all the evidence that the appellant wishes to produce was available at the time of the filing and even the hearing of the appeal before the Tribunal. The Tribunal determined the appeal on 20/12/2023. That evidence was available and could have been produced at that stage.

15. The reasons advanced by the applicant for the failure to produce them was that there was an inadvertent error on the part of its tax advisor to produce the same because of the numerous documents he had at the time. The appellant has not explained at which point the said adviser discovered the alleged. It is therefore difficult to tell whether this was a genuine and/or inadvertent error or the applicant wants to patch up its case at this stage.

16. In any event, the professional tax adviser having represented the applicant before the Tribunal, knew the evidence that was needed to support his case. There is no evidence to show that he exercised due diligence and could not get or could not produce the same.

17. That being the case, it would be prejudicial to the respondent to allow the appellant to use this opportunity to patch up and/or fill up the gaps in its case at this second appeal stage. As was stated in Family Fashion Clothing Limited vs. Commissioner of Investigations and Enforcement [2021] KEHC 406 (KLR), when a party chooses a professional who represents him 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.

18. In *Mzee Wanje and 93 Others v A.K. Saikwa* (1982 – 88) 1 KAR 463, the Court of Appeal held of Rule 29 of the Court of Appeal Rule which is similar to section 78 of *Civil Procedure Act*: -

> " This Rule is not intended to enable as 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.

19. There would be no end to litigation if section 78 was used for the purposes of allowing parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the section is to be exercised very sparingly and with great caution.

20. The upshot is that the appellant's application dated 13/6/2024 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.

SIGNED AT KISUMU THIS 5TH DAY OF MARCH, 2025.

A. MABEYA, FCI ARB

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2025.

F. GIKONYO

JUDGE