



Commissioner of Domestic Taxes v Kenya Breweries Limited (Income Tax Appeal E026 of 2023) [2024] KEHC 5348 (KLR) (Commercial and Tax) (13 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5348 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E026 OF 2023**

FG MUGAMBI, J

MAY 13, 2024

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

KENYA BREWERIES LIMITED RESPONDENT

JUDGMENT

Background

1. The Tax Appeals Tribunal (the Tribunal) *vide* a ruling dated 20th January 2023, granted leave to the respondent to adduce new documents to be considered by the Tribunal during the hearing of its appeal. The appeal was against the Commissioner's objection decision issued on 23rd August, 2021 rejecting the respondent's Notice of Objection against additional assessments raised by the appellant.
2. Dissatisfied by the said ruling, the appellant filed the Memorandum of Appeal dated 9th March 2023 premised on six (6) grounds. The respondent is opposed to the appeal on the grounds stated in its statement of facts dated 26th September 2023. The appeal was canvassed by way of written submissions filed by both parties and which form the basis of the evaluation by the Court.

Analysis

3. Having carefully considered the pleadings as well as the submissions and authorities cited by respective parties, I am of the view that two (2) issues arise for determination from the grounds raised in the Memorandum of Appeal. These are: -
 - i. Whether this Court has jurisdiction to entertain the appeal;



- ii. Whether the respondent satisfied the grounds for granting leave to adduce additional documents at the appeal stage.

Whether this Court has jurisdiction to entertain the appeal;

4. The appellant argues that this Honourable Court lacks jurisdiction to entertain this appeal as it does not qualify as an appealable decision. In response to this submission, it is common knowledge that *vide* a ruling issued on 22nd September 2023, this Court has previously considered the merits of this argument and pronounced itself. For the avoidance of doubt, this Court found that it is vested with the jurisdiction to hear and determine interlocutory appeals on the terms pronounced in the ruling. The issue is therefore *res judicata*.

Whether the respondent satisfied the grounds for granting leave to adduce additional documents at the Appeal Stage?

5. It is important to begin by noting that by dint of section 56(2) of the [Tax Procedures Act](#) (TPA), this Court's jurisdiction is confined to determining appeals from the Tribunal on questions of law only. As to what constitutes matters of law, I am of the view that this question is best answered depending on the circumstances before Court. Notably, the interpretation of law may require an analysis of the facts to which the law is applied.
6. These situations do not transform the issue into a matter of fact; rather, they are instances where the application of the law to the facts is necessary to resolve a matter of law. The court's decision on how the law applies to the facts is still considered a legal determination.
7. Thus, even when courts examine facts closely, their ultimate goal in these instances is to make a legal determination by interpreting and applying the law. I say this noting that the parties' submissions are partly as to whether the questions before the Tribunal were issues of law or fact and whether this Court has jurisdiction to make any adverse finding.
8. From my understanding it is not controverted that indeed the Tribunal does have the discretion to allow the filing of additional documents at the appeal stage. This discretionary power is donated by section 56(3) of the [TPA](#) and buttressed by section 13(6) of the [Tax Appeals Tribunal Act, 2013](#) (TATA). For the avoidance of doubt, Section 56(3) of the [TPA](#) provides as follows:

“In an appeal by a taxpayer to the Tribunal, High Court or Court of Appeal in relation to an appealable decision, the taxpayer shall rely only on the grounds stated in the objection to which the decision relates unless the Tribunal or Court allows the person to add new grounds.”
9. Section 13(6) of the [TATA](#) on the other hand provides as follows:

“The appellant shall, unless the Tribunal orders otherwise, be limited to the grounds stated in the appeal or documents to which the decision relates.”
10. The power is akin to that granted to this Court as an appellate Court under section 78(1)(d) and Order 42 rule 27 of the [Civil Procedure Rules](#), just by way of comparison. I find it appropriate to therefore borrow from the Supreme Court's decision in [Mohammed Abdi Mohamud v Ahmed Abdulabi Mohamad & 3 Others](#), [2018] eKLR where the Court established specific principles regarding the admittance of additional evidence.



11. In my opinion, these principles should, to the greatest extent feasible, also inform the Tribunal's approach, given that the Tribunal functions as an appellate body as well.
 - a. the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
 - b. it must be such that, if given, it would influence or impact upon the result of the verdict although it need not be decisive;
 - c. it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
 - d. Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
 - e. the evidence must be credible in the sense that it is capable of belief;
 - f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
 - g. whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
 - h. where the additional evidence discloses a strong prima facie case of willful deception of the Court;
 - i. The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful;
 - j. A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case;
 - k. The court will consider the proportionally and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.”
12. From my reading of its case, the appellant takes issue with the fact that the said leave ought not to have been granted on account of the fact that the impugned documents were available at the respondent's disposal and should have been obtained for use at the objection review, an assertion that the respondent denies. This Court notes that the Tribunal conducted an enquiry into this issue, looking at the facts and evidence before it and reached a conclusion, as detailed in paragraphs 8 and 9 of its decision.
13. The same is expressed in the following terms:

“The Tribunal notes that the documents sought to be produced by the appellant are such documents that are not in the ordinary possession of an exporter undertaking export of goods through another country. The documents could not be secured in the course of the appellant's ordinary trade and export transactions and were manifestly not in the appellant's possession at the time of lodging its notice of objection for consideration by the respondent. The respondent did not address the fact that in fact the appellant at some point in time sought for its help to facilitate securing such documents from the Uganda Revenue



Authority. The appellant has demonstrated the exercise of due diligence in securing documents required by the respondent for the purposes of undertaking a review of its objection.”

14. These are factual findings which the Tribunal determined and this Court finds no justification to reverse the same. The appellant further faults the Tribunal’s ruling for being contrary to Section 29(4) of the *TATA* and rule 24 of the *Tax Appeals Tribunal (Procedure) Rules*.
15. The appellant submits that the Tribunal failed to consider and make a finding on the prejudice to be suffered by the appellant from the admission of new documents (which were not considered at the objection review) during the appeal stage.
16. In rebuttal, the respondent submitted that the appellant would not suffer any prejudice regarding the appeal hearing since it was afforded the chance to file a Supplementary Statement of Facts and any desired documents upon receiving the additional evidence from the respondent. Further, the Tribunal noted that no judgment had been rendered yet on the validity of the respondent’s appeal, with the respondent tasked with proving that the appellant’s objection decision was flawed.
17. This Court notes that the Tribunal did acknowledge and address the potential prejudice to the appellant, which contradicts the appellant’s claim of the Tribunal’s oversight. At paragraph 10 of the Ruling, the Tribunal expressed as follows:

“With the appeal still pending for substantive hearing and determination thereof there is no conceivable prejudice to be suffered by the appellant with the respondent being allowed to file the additional documents. The appellant remains at liberty and has an opportunity to seek to adduce any incidental additional evidence in the appeal and it shall be available to the appellant during the hearing of the appeal to appropriately and substantively interrogate the relevancy and admissibility of the further documents.”
18. In seeking to balance between the need to ensure that the Tribunal has all the material before it to render a just determination of the issues on the one hand and the need for expeditious determination of the appeal as well as provide safeguards to ensure that no prejudice is suffered by the appellant, this Court aligns itself with the determination by the Tribunal. I am of the view that the Tribunal exercised its discretion judiciously in allowing the application by the appellant.

Disposition

19. For these reasons the appeal lacks merit and it is hereby dismissed albeit with no orders as to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 13TH DAY OF MAY 2024.

F. MUGAMBI

JUDGE

