



Commissioner of Domestic Taxes v Bosky Industries Limited (Income Tax Appeal E049 of 2022) [2023] KEHC 24558 (KLR) (Commercial and Tax) (21 July 2023) (Ruling)

Neutral citation: [2023] KEHC 24558 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E049 OF 2022**

MN MWANGI, J

JULY 21, 2023

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

BOSKY INDUSTRIES LIMITED RESPONDENT

RULING

1. Before me is a Notice of Motion application dated 3rd February, 2023 brought under the provisions of Order 51 Rule 1 & Order 42 Rule 13(4) of the *Civil Procedure Rules*, 2010, and Sections 3A & 75 of the *Civil Procedure Act*. The respondent seeks the following orders -
 - i. That the Honourable Court be pleased to strike out the appellant's Record of Appeal dated 13th June, 2022 for being incurably defective in form and substance; and
 - ii. That the costs of this application be borne by the appellant.
2. The application has been brought on the grounds on the face of the Motion and is supported by an affidavit sworn on 3rd January, 2023 by George N. Mbaye, learned Counsel for the respondent. In opposition thereto, the appellant filed a replying affidavit sworn on 17th February, 2023 by Wanjiru Njuguna, an Advocate of the High Court of Kenya working within the appellant's Legal Services Division.
3. The instant application was canvassed by way of written submissions which were highlighted on 4th May, 2023. The respondent's submissions were filed on 7th March, 2023 by the law firm of Humphrey & Company LLP Advocates, whereas the appellant's submissions were filed by Wanjiru Njuguna Advocate on 22nd March, 2023.



4. Mr. Mbaye, learned Counsel for the respondent submitted that the dispute herein arises from the tax assessments for VAT issued by the appellant to the respondent on 26th June, 2019 totaling to Kshs.46,561,921.00 for the period between 2015 and 2016. He stated that the respondent objected to the said assessment on 17th December, 2020 via the Appellant's i-Tax system and on 11th March, 2022, the Court delivered judgment in favour of the respondent and ordered the appellant to refund Kshs.8,000,000/= to the respondent.
5. The respondent's Counsel submitted that being dissatisfied with the said judgment, the appellant filed a Record of Appeal on 14th June, 2022, but the same is fatally defective for missing a batch of relevant documents to the proceedings such as a letter dated 26th June, 2019, which the respondent was referred to during cross-examination, and which was also referred to by the Tribunal at page 43 of its judgment. It was stated by Counsel that the appellant omitted paragraphs 39-46 of the judgment and adopted a landscape orientation of the Record of Appeal at page 37 of the judgment so as to ensure that the Court orders are not visible.
6. Mr. Mbaye relied on the Supreme Court holding in the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others* [2015] eKLR and stated that the appellant was obligated by law to include all the pleadings and documents relied on during the hearing at the Tax Tribunal and that failure to comply with this mandatory requirement is fatal. He further relied on the Supreme Court case of *Kenya Revenue Authority & 2 others v Mount Kenya Bottlers Limited & 4 others* (Petition 41 of 2019) [2021] KESC and prayed for the appellant's Record of Appeal to be struck out.
7. Ms. Njuguna, learned Counsel for the appellant relied Section 1A of the *Civil Procedure Act* and submitted that the overriding objective of this Court is the just and expedient resolution of disputes. Counsel stated that reliance on the letter dated 26th June, 2019 by the Tax Appeals Tribunal is an issue for determination raised by the appellant in its Memorandum of Appeal. That the said letter was attached by the respondent to its witness statement and introduced at page 39 of the proceedings. She referred to Section 79B of the *Civil Procedure Act* and submitted that the intention of lawmakers was that before a Court makes a determination on dismissal of an appeal, it must satisfy itself that the appeal lacks merit.
8. It was submitted by Counsel that Order 42 Rule 13(4) of the *Civil Procedure Rules* ought to be read together with Rule 13(3) of the said *Rules* since the law ought to be read as a whole and not in isolation. Ms. Njuguna referred to Rule 9 of the *Tax Appeals Tribunal (Appeals to The High Court) Rules, 2015* and stated that the law has provided the respondent with an avenue for presentation of the documents it deems relevant, and that the said Rule allows the appeal to proceed without deeming it as being fatally defective for the omission of the said letter. She also stated that the respondent has an avenue for redress of the said letter.
9. Ms. Njuguna relied on the case of *Kinge Simon & 2 others v Lucy Njoki Kamau* [2021] eKLR and the holding by the Court of Appeal in the case of the *County Government of Narok v British Pharmaceuticals Limited* [2021] eKLR. She stated that striking out of the appeal would leave the appellant unheard. She stated that the appellant had filed all the documents and that they did not intentionally omit any pages and in case any document was not filed, this Court may exercise its discretion in the interest of justice and issue orders for filing of the same within set timelines so as to facilitate the hearing of the appeal.



Analysis and Determination.

10. I have considered the instant application, the grounds on the face of it and the affidavit filed in support thereof, the replying affidavit by the appellant and the written submissions by Counsel for the parties. The issue that arises for determination is whether the application herein is merited.
11. In the affidavit filed by the respondent's Counsel, he deposed that on 11th March, 2022 judgment was delivered in this matter allowing the respondent's appeal, thereby vacating the additional assessment for VAT issued on 27th May, 2020. That being dissatisfied with the said judgment, the appellant filed a Notice of appeal on 8th April, 2022, a Memorandum of Appeal dated 9th May, 2022 and a Record of Appeal dated 13th June, 2022. He averred that the said Record of Appeal is incurably defective for failing to include substantial documents.
12. The appellant in its replying affidavit deposed that the respondent has merely stated that substantial documents have not been included in the Record of Appeal without specifying them. She averred that to the best of her knowledge, the Record of Appeal is complete thus validly before this Court. She further averred that the instant application is an abuse of the Court process since the respondent has not provided reasonable grounds to have the appeal struck out.

Whether the Record of Appeal is properly compiled.

13. The appellant filed a Record of Appeal on 14th June, 2022. The respondent is seeking for the said Record of Appeal to be struck out for being incurably defective in form and substance. Order 42 Rule 13(4) provides that a Record of Appeal shall contain the following documents –
 - “ a) the memorandum of appeal;
 - b) the pleadings;
 - c) the notes of the trial magistrate made at the hearing;
 - d. the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
 - e. all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
 - f. the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:Provided that—
 - i. a translation into English shall be provided of any document not in that language;
 - ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”
14. The respondent submitted that the appellant's Record of Appeal does not contain a letter dated 26th June, 2019 which was referred to the respondent during cross-examination and which was also referred to by the Tribunal at page 43 of its judgment. The respondent contended that paragraphs 39 to 46 of the judgment were omitted by the appellant in its Record of Appeal. The respondent contended that



the appellant has adopted a landscape orientation of the Record of Appeal on page 37 of the Judgment so as to ensure that the Court orders are not visible.

15. The appellant on the other hand submitted that the Tax Appeals Tribunal reliance on the letter dated 26th June, 2019 is an issue for determination raised by the appellant in its Memorandum of Appeal. This Court has looked at the appellant's Memorandum of Appeal dated 9th May, 2022 against the judgment of the Tax Appeals Tribunal dated 11th March, 2022, and it is evident that this issue has not been raised as one of the appellant's grounds of appeal. The appellant further submitted that pursuant to Rule 9 of the *Tax Appeals Tribunal (Appeals to The High Court) Rules*, 2015, the respondent has an avenue for redress of the said letter.
16. On perusal of the Record of Appeal filed on 14th June, 2022, I note that the letter dated 26th June, 2019 is found at pages 72 & 73, it is therefore not correct that it was omitted by the appellant. In addition, on perusal of the Tax Appeals Tribunal judgment which runs from pages 111 to 147 of the appellant's Record of Appeal, paragraphs 39-46 of the said judgment have not been omitted. It is also apparent that page 37 appears in portrait orientation and not in landscape orientation as submitted by the respondent.
17. Based on the foregoing, this Court finds that the appellant's Record of Appeal dated 13th June, 2022 is complete and validly before this Court hence it is not incurably defective in form and substance.
18. In the premise, I find that the application dated 3rd February, 2023 is devoid of merit. It is dismissed with costs to the appellant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF JULY, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Njuguna for the appellant

Mr. Mbaye for the respondent

Ms B. Wokabi – Court Assistant.

