REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

HC ITA. NO. E023 OF 2020

COMMISSIONER OF INCOME TAX.....APPELLANT

VERSUS

TOTAL KENYA LIMITED.....RESPONDENT

R U L I N G

1. Vide his Motion on Notice dated 8/9/2020, the applicant has sought leave to produce additional evidence in aid of his appeal. He has also sought that the additional documents be deemed as duly filed and do form part of the record of appeal. The application is brought under ***sections 1A, 1B, 3A, 6 & 7 of the Civil Procedure Act*** and ***Order 42 Rule 27 of the Civil Procedure Rules.***

2. The Motion is supported by the affidavit of **Chelang'at Mutai** sworn on 8/9/2020. She averred that; the applicant had appealed against the judgment of the Tribunal made on 26/2/2020 ("the impugned judgment").

3. That the Tribunal had held that the Appeal before it was premature as there had been no compliance with **Article 24 of the Double Taxation Agreement** between Kenya and France. That that issue was not before the Tribunal for determination as the Mutual Agreement Process under that Article had collapsed between the applicant and the relevant French body.

4. It is further contended that it is for the reason of the said collapse that the parties were before the Tribunal. That it was therefore important to produce that document for the Court to discern the futility of the Tribunal's holding.

5. The Motion was opposed by the respondent vide the replying affidavit of **Joseph Wechuli** sworn on 18/11/2020. He swore that he had learnt from the respondent's advocate that immediately the witnesses had testified, the Tribunal had inquired whether the parties had tried to settle the matter considering the matter was between two governments.

6. That it was at that point that the applicant should have produced the Mutual Agreement Process ("MAP") the applicant is now seeking to introduce before this Court. That in any event, the respondent was not copied the subject document as it was a matter within the governments of Kenya and France. It was therefore urged that the application be dismissed.

7. The Court has carefully considered the depositions on record and the submissions of Learned Counsel. This is an application for leave to produce additional evidence on appeal.

8. The powers of this Court on appeal is set out in ***section 78 of the Civil Procedure Act*** which provides, *inter alia,* that: -

> ***"(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power –***
>
> **…**
>
> ***(d) to take additional evidence or to require the evidence to be taken;***
>
> **…"**.

9. The issue of additional evidence pursuant to the aforesaid section is prescribed in ***Order 42 Rule 27 of the Civil Procedure Rules*** which provides: -

"(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if –

a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted;

or

b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.

2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission".

10. From the foregoing, it is clear that the power to admit additional evidence exist and is in the discretion of the Court. However, like all other discretions the same must be exercised judiciously. The only caveat put is that in admitting further evidence, the court must record the reason for allowing such adduction.

11. I have considered the cases relied on by the applicant of **Dorothy Nelima Wafula vs. Hellen Nekesa Nielsen & Another [2017] Eklr, Raila Odinga & 5 Others vs. Independent Electoral and Boundaries Commission & 3 Others [2013] Eklr** and **Mohamed Abdi Mohamud vs. Ahmed Abdullahi Mohamad & 3 Others [2018] Eklr.**

12. In **Tarmohamed & Another v. Lakhani & Company [1958] EA 567,** the Court of Appeal for Eastern Africa adopted the decision in **Ladd v. Marshall [1954] WLR 1489** and stated: -

"Except in cases where the application for additional evidence is based on fraud or surprise:

'to justify reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible".

13. In **Wanjie & Others v. Sakwa & Others [1984] KLR 275,** in considering the need for restricting reception of additional evidence under ***Rule 29 of the Court of Appeal Rules,*** Chesoni JA observed at pg 280 thus: -

"This rule is not intended to enable a 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. The Rule does not authorise the admission of additional evidence for the purpose of removing lacunae and filing in gaps in evidence. The appellate court must find it needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh casein appeal. There would be no end to litigation if the rule were used for the purpose of allowing the parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given should be exercised very sparingly and great caution should be exercised in admitting fresh evidence".

14. From the foregoing, it is clear that the power to admit additional evidence is discretionally. However, it should be exercised restrictively. The evidence sought to be adduced must not have been in the possession of the applicant or could have been obtained with due diligence. That the evidence should be needful and not meant to patch up an applicant's case on appeal. Finally, the power should be exercised sparingly but for the ends of justice.

15. In the present case, the evidence was in the possession of the applicant during the trial before the tribunal. However, it was contended, and not controverted, that it was not produced at the trial because the parties knew or conducted themselves in a manner suggesting that it was not necessary. This is so because, the parties with knowledge that the mutual agreement process had collapsed, resorted to the appeal before the Tribunal before and without considering the Alternative Dispute Resolution required under ***Article 24*** of the ***Double Taxation Agreement.*** This is the Article the Tribunal relied on to determine the matter against the applicant.

16. The Court has considered that the evidence sought to be relied on is needful. This is so because, there was no contention that the respondent had raised the issue of jurisdiction before the Tribunal. It was submitted that that was the case because the parties knew of the position of the MAP that there was no requirement for ADR before approaching the Tribunal.

17. The Court is persuaded that, if it be true that the Tribunal's decision was based on the unavailability of the intended evidence and reliance thereon was *suo motto*, that piece of evidence would have been crucial to the applicant's case. There would be no prejudice to be suffered if the said evidence is adduced at this stage.

18. In view of the foregoing, and guided by the authorities cited above, the Court is of the considered view that the applicant has satisfied the criteria for the grant of the orders sought. The applicant is not seeking to patch up his case or fill any lacunae. He must have been caught by surprise by the Tribunal.

19. Accordingly, the application is well founded. I allow the same as prayed. Costs will abide the appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF APRIL, 2021.

A. MABEYA, FCI Arb

JUDGE