



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

INCOME TAX APPEAL NO. 13 OF 2017

OCEANFREIGHT (E.A) LIMITED APPELLANT

VERSUS

THE COMMISSONER OF DOMESTIC TAXES RESPONDENT

(Being an Appeal from the Judgment of the Tax Appeals Tribunal at Nairobi delivered on the 8th day of December 2016 in the Tax Appeals Tribunal Tax Appeal No. TAT/101 of 2015).

RULING

1. This is a call to discuss the latitude of The High Court in receiving additional evidence when hearing a Tax Appeal under the Provisions of The Tax Procedure Act and The Tax Appeals Tribunal Act.
2. In a Motion dated 21st June 2008, this Court is asked to allow Oceanfreight (E.A) Limited (the Appellant) to adduce and rely on additional evidence of one Mr. Martin Kisuu. The Motion is said to be anchored on the Provisions of Rules 15,20 of The Tax Appeals Tribunal Rules, Order 42 Rule 27, and Order 51 Rule of The Civil Procedure Rules.
3. This Appeal is triggered by the Decision of the Tax Appeals Tribunal (the Tribunal) dated 8th December 2016 which upheld the additional assessment of Khs.142,308,538 by the Commissioner of Domestic Taxes against the Oceanfreight as Withholding Tax and Demurrage Charges. The Appellant asserts that the Appeal involves complex and technical issues on the Customs, Practices and Tax processes in the Shipping Industry and the Court will benefit from the additional evidence of Mr. Kisuu. This matter, the Court is told, has a significant impact on the entire Shipping Industry.
4. So who is Mr. Martin Kisuu? Mr. Kisuu is a Fellow of the Institute of Certified Public Accountants of Kenya. He has attended various Training Courses organized and facilitated by The World Trade Organization (WTO), World Customs Organization (WCO) and the International Bureau of Fiscal Documentation (IBFD). For the latter, he is a Contributing Author and Reviewer. He has also served as a Member of The Kenya Customs Valuation Appeals Tribunal for the period 2002 to 2005. I have not heard the Respondent doubt these credentials.
5. Mr. Kimani for Oceanfreight pitches for the additional evidence on the ground of what his Client sees is the unique nature of the Dispute. That so unclear was the issue giving rise to this Dispute that it has been found necessary to clarify it in the Finance Bill of 2018 in which the Legislature has accepted the position taken by the Appellant.
6. The Court is reminded that this is an Appeal from a Tribunal which exercises a specialized Jurisdiction and so there ought to be some scope for the Court to receive whatever additional evidence is necessary to help it discharge its mandate. While appreciating Section 56 of The Tax Procedures Act limits Appeals of this nature to questions of Law only, it is fairly clear to the Appellant that a Judge can consider additional facts. This, it is argued, is the spirit of Rules 9 and 15 of The Tax Appeals Tribunal Rules. These Provisions read:-

“9. (1) The statement of facts filed under rule 8 shall—

(a) be signed by the respondent;

(b) giving an address for service of the respondent;

(c) set out precisely the respondent's response to the memorandum of appeal and refer specifically to documentary evidence or other evidence which the respondent proposes to adduce at the hearing of the appeal.

(2) The documentary evidence referred to in paragraph (1)(c) shall be annexed to the response.

(3) The Court may extend the period specified in rule 8 if it is satisfied that, owing to any reasonable cause, the respondent was unable to file the statement of facts and documentary evidence within that period and there was unreasonable delay on the respondent's part.

15. The Court may, at the time of hearing of an appeal, admit other documentary or oral evidence not contained in the statement of facts of the appellant or respondent should it consider it necessary for determination of the appeal.”

7. It is pressed that Rule 9 which allows the Respondent to file a Statement of Facts allows the Respondent to expand the scope of Facts beyond what was before the Tribunal. As for Rule 15, this Court is asked to construe it as being permissive of additional evidence. That unlike say Rule 29 of the Court of Appeal Rules or Order 42 Rule 27 of The Civil Procedure Rules which are prohibitory, the words of Rule 15 are deliberately permissive to allow for additional evidence in a specialized area.

8. Mr. Bahati associated himself with these arguments adding that Mr. Kisuu would analyze the Judgement *vis a vis* International Best Practices and will help the Court to appreciate that the Tribunal failed to determine the controversy before it. That he shall give evidence that the Judgement is bad in Law because it cannot be applied and that the Shipping Companies are in no better position than they found themselves before the Appeal was filed.

9. The Plea for additional evidence was opposed. Ms. Lavuna for the Respondent takes the position that whether or not the Decision emanates from a Specialist Tribunal, an Appeal does not invite the admission of new evidence. This is because an Appeal must be viewed as a continuation of the main matter.

10. It is argued that if the Tribunal understood the matters that involve the Dispute then, this Court will understand them.

11. The Respondent submit that the Expert is providing an opinion based on his interpretation of the Tribunals Decision and is merely a unique of that Judgement. That in any case Mr. Kisuu represented the Appellant before the Tribunal in 6 of 7 matters arising. It is therefore not only an abuse of process but also mischievous for him to now purport to give evidence.

12. Counsel argued that the discretion to allow evidence at an Appeal stage is one to be used sparingly. The discretion is circumscribed.

13. The Jurisdiction of this Court to hear and determine an Appeal from the Decision of a Tribunal is in Section 56 of Tax Procedure Act which reads:-

“(1) In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.

(2) An appeal to the High Court or to the Court of Appeal shall be on a question of law only.

(3) 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”.

14. Whilst the Jurisdiction of this Court in this Appeal is to hear and determine questions of Law only, issues of facts may turn out to give raise to a question of Law. In Mercy Kirito Mutegi vs. Beatrice Nkatha Nyaga & 2 others [2013] eKLR, the Court of Appeal said as follows:-

“What are the points of law raised in this appeal? An appellate court will not ordinarily differ with the findings on a question of fact, by the trial Judge who had the advantage of hearing and seeing the witnesses. Our role is to review the evidence and determine whether the conclusions reached are in accordance with the evidence and the law. A conclusion although based on primary factual evidence that is erroneous becomes a point of law”.

This is a demonstration that there will be occasion when facts or evidence matter in determining a question of Law.

15. However, I agree with Counsel for the Respondent that an Appeal is the Judicial Examination of the Decision of an inferior Court and is not a forum to argue a matter on the basis of different or additional parameters. If that was not so then there would be no end to litigation because parties would be arguing and presenting their cases in piece-meal.

16. That said, Statute often permits the calling of additional evidence at the Appeal stage, see for instance Order 42 Rule 27 of the Civil Procedure Rule which reads,

“(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.”

17. Indeed Rule 15 of The Tax Appeals Tribunal Rules expressly contemplates the admission of additional evidence as follows:-

“The Court may, at the time of hearing of an appeal, admit other documentary or oral evidence not contained in the statement of facts of the appellant or respondent should it consider it necessary for determination of the appeal”.

It true as argued by the Appellant that the nature of this Appeal is specialized in nature and there will be instances when the Court will consider it necessary to receive additional evidence for purposes of having a clear view of the real issues in controversy.

18. Rule 15 is not explicit as to whether the Power is one to be invoked on the Courts Motion or at the instance of parties before it. It seems to me to cover both. So, is the Court to be unbounded in receiving additional evidence?

19. I take a view that different sets of Rules must apply when the Court itself is calling for additional evidence and when the parties to the Appeal are seeking to call the evidence. Where the Court finds it necessary to admit further evidence necessary for determination of the Appeal and on its own Motion calls for that evidence, then the only fetter to that Power is that it should not call and receive the evidence in a manner that prejudices the parties or recasts or changes the scope of the Dispute. This is because the matters arising in a Tax Appeal may be technical and additional evidence may assist in unpacking the controversy.

20. If, however, it is a party which wishes to call additional evidence then the latitude must be more restrictive so as to avoid the process being used to re-litigate a case on altered parameters. Only recently, on 28th September 2018, the Highest Court of the Land, the Supreme Court, lay down the governing Principles on allowing additional evidence in Appellate Court. In Petition No. 7 of 2018, Hon. Mohamed Abdi Mahamud and Ahmed Abdullahi Mohamad & 3 others, the Supreme Court held:-

“We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

(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 proportionality 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”.

21. If I were to apply these Principles then it's quite clear that the Application is without merit. It has not been explained why the evidence sought to be introduced was not marshalled during the hearing of the matter before the Tribunal. Mr. Kusuu who wants to adduce additional evidence represented the party herein before the Tribunal and it must be presumed that he was well aware of what evidence needed to be presented on behalf of his Client. If he left out some evidence then he cannot use the Appeal stage to now call in evidence to patch up, revamp or fill the gaps in the Appellants case. That would be abuse of process of Court.

22. The Application of 21st June, 2018 is without merit. It fails and is hereby dismissed with costs.

23. But this needs to be said! The outcome of this Decision does not bar this Court from calling for additional Evidence in the Course of hearing if it considers it necessary for the effectual disposal of this Appeal.

Dated, Signed and Delivered in Court at Nairobi this 5th day of October, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Owiti for Kimani for Appellant

Ochieng for Respondent

Nixon - Court Assistant