

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
TAX APPEAL NO. E290 OF 2024

**HASHI ENERGY (IN LIQUIDATION) APPELLANT/
APPLICANT**

-VERSUS-

**COMMISSIONER OF DOMESTIC TAXES.....
.....RESPONDENT**

RULING

Introduction and Background

1. This Ruling determines Appellant-Applicant's Notice of Motion dated 9th September 2025, seeking leave to adduce additional evidence in its appeal against the decision of the Tax Appeals Tribunal (TAT) delivered on 4th October 2024.
2. The Application is opposed by the Respondent through a Replying Affidavit sworn by Sylvester Wabwire on 18th September 2025.
3. The background of the dispute is that on **16th June 2023**, the Respondent issued a tax assessment demanding a total of **Kshs.7,178,023,154/=**. This assessment was based on several tax heads, primarily focused on alleged discrepancies in the Appellant's financial records, audited financial statements, and transactional documents.

4. Aggrieved by the assessment, the Appellant/Applicant lodged an objection, which was rejected by the Commissioner in an Objection Decision dated 7th September 2023. Consequently, Hashi Energy Limited filed an appeal at the Tax Appeals Tribunal.
5. On 4th October 2024, the TAT rendered its judgment. The Tribunal dismissed the appeal and upheld the Respondent's assessment. The Tribunal held that the Appellant had failed to discharge its burden of proof under Section 56 of the Tax Procedures Act, as it did not produce sufficient primary documents or satisfactory explanations to rebut the Commissioner's findings.
6. Dissatisfied with the Tribunal's decision, the Appellant lodged the present appeal before this Court on 28th November 2024. The appeal was duly admitted, heard, and judgment reserved for 11th September 2025.
7. Two days before the delivery of the judgment, the Appellant, on 9th September 2025, filed the present Notice of Motion seeking leave to adduce additional evidence.
8. The Application was canvassed by way of written submissions. The Appellant filed its submissions dated 1st October 2025, whilst the Respondent's submissions are dated 18th September 2025.

Applicant's Submissions

9. The Appellant, in support of the application, submitted that its application is merited and meets the threshold set out by the Supreme Court in **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others [2018] KESC 62 (KLR)**, which requires that such

evidence be directly relevant, credible, and not intended to patch up weak points in a party's case.

10. According to the Appellant, the Tax Appeals Tribunal dismissed the appeal on 4th October 2024 primarily on the ground that the Appellant failed to discharge its burden of proof, having not produced crucial documents requested by the Respondent. It is now the Appellant's case that it has since obtained and compiled additional documentary evidence which is directly relevant to the determination of its tax liability.
11. The documents sought to be introduced include: Contract for supply of fuel to the United Nations; Detailed sales ledgers and stock movement schedules; Evidence of payments from the UN and loan agreements/statements from BGF I of DRC; and Bank statements and account reconciliations to explain variances in audited financial statements, which the Appellant contends are directly relevant to the determination of its tax liability.
12. The Appellant submitted that the documents were previously unavailable because they were held in a different jurisdiction (DRC) and involved third parties whose consent was required for disclosure. The Applicant maintains that the purpose of the application is not to start a fresh appeal but to assist the Court and Tribunal in arriving at a just determination.
13. Relying on, among others, **Article 159(2)(d) of the Constitution**, the Appellant urged the Court to administer justice without undue regard and admit the additional evidence as prayed since a refusal would occasion grave prejudice to the Appellant, who would be saddled with a tax liability of Kshs. 7,178,023,154/=, which does not reflect its true obligation.

Respondent's Submissions

14. The Respondent, on its part, opposed the application and submitted that the application fails the threshold for admission of additional evidence at the appellate stage. It was maintained that the documents sought to be introduced are purely transactional and financial records, which were always within the exclusive possession and control of the Appellant.
15. According to the Respondent, the Appellant had ample opportunity to produce the documents at the objection stage and before the Tax Appeals Tribunal, but deliberately failed to do so. The Appellant's assertion that the documents were unavailable is dismissed by the Respondent as lacking merit.
16. Citing **Tarmohamed & Another v Lakhani & Co [1958] EA 567**, the Respondent asserted that to qualify for admission, additional evidence must not only be credible and material but also unavailable despite reasonable diligence at trial, which is not the case in the instant application.
17. The Appellant asserted that the instant application is an afterthought, made in bad faith, and is intended to fill gaps and patch up weak points, contrary to the principle in **Wanjie & Others v Saikwa & Others [1984] KLR 275**, where the Court of Appeal cautioned that additional evidence should not be admitted to patch up weak points, fill gaps, or enable a party to make out a fresh case on appeal.
18. It was further the Respondent's argument that allowing the application and admitting the additional documents would run afoul of

56(2) of the Tax Procedures Act, 2015, which provides that appeals to the High Court lie only on matters of law. The Respondent asserted that admission of fresh factual evidence at this stage would improperly convert the appellate court into a trial court, contrary to statute.

19. Counsel for the Respondent submitted that allowing the application would prejudice the Respondent, who would be deprived of an opportunity to interrogate the authenticity and probative value of the documents. Moreover, it would undermine the principle of finality of litigation and potentially necessitate a de novo hearing before the Tribunal.
20. In the premises, the Respondent urged this Court to dismiss the Application, with costs.

Analysis and Determination

21. Having carefully considered the application, the response thereto, and the parties' rival submissions, I find that the only issue for determination is whether the Appellant-Applicant has met the legal threshold for the admission of additional evidence at the appellate stage.
22. The principles governing admission of additional evidence at the appellate stage are well settled. The Supreme Court in **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others [2018] KESC 62 (KLR)** laid down guiding considerations as follows: -

"79. Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes

and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. 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.

80. We must stress here that this Court even with the Application of the above-stated principles will only allow additional evidence on a case-by-case basis and even then sparingly with abundant caution.”

23. In **Wanjie & Others v Saikwa & Others [1984] KLR 275**, the Court of Appeal emphasized that the rule on additional evidence is not intended to enable a party who has been unsuccessful at trial to patch up weak points or fill gaps in their case. The appellate court must find the evidence needful, and the power to admit fresh evidence should be exercised sparingly and with great caution. The Court stated as follows:

-

“As it is correctly stated in *Mulla on Code of Civil Procedure*, 13th Edn Volume 11 page 1606, in a commentary on a similar Indian

rule, 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 authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in 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 by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.”

24. In tax matters, Rule 15 of the Income Tax (Appeals to the High Court) Rules Legal Notice 105 of 1974 permits the admission of additional evidence at the appellate stage where it appears to the Court to be necessary. The Rule provides that: -

“Should it appear to the Court at the hearing of the appeal that any documentary or oral evidence other than that referred to in the statement of facts of the appellant or respondent should be admitted, the Court may admit such evidence.”

25. Applying the above legal principles to the present application, the Court notes that the Appellant seeks to introduce contracts, ledgers, reconciliations, and bank statements which, on the face of it, are material to determination of its tax liability. However, a perusal of the affidavit in support of the application reveals that apart from listing in paragraph 8 thereof the documents proposed to be admitted, no annexures or copies of the said documents have been attached. The Court is therefore unable to form any opinion as to the actual relevance

of the proposed documents as contemplated under Rule 15 of the Rules Legal Notice 105 of 1974 (as amended).

26. Further, I agree with the Respondent's submissions that the documents listed in the application are transactional and financial records ordinarily within the Appellant's control. Save for general assertions of jurisdictional challenges and third-party consent, no sufficient explanation has been given why they could not be produced earlier. The Court finds the explanation provided by the Appellant inadequate, particularly given that the documents relate to the Appellant's own operations and accounts.
27. The court observes that this application was filed on 9th September 2025, merely two days before the scheduled delivery of the judgment on the main appeal. The decision by the Tribunal was rendered on 4th October 2024, and the Appellant filed the present appeal on 9th November 2024. All along, the Appellant had not indicated its intention to file any additional documents. I find the delay inordinate.
28. As correctly observed in **Manguzi Hardware Limited v Commissioner of Investigations & Enforcement (ITA E080 of 2021)**, litigation must come to an end, and it does not matter that the evidence may be crucial if no sufficient reason is given for its late production. In this case, no sufficient reason has been provided why the evidence now sought to be admitted was not produced at trial.
29. Further, the Court is of the considered view that admitting evidence at this stage would, in my view, violate the principle of finality in litigation, as a party should not be allowed to patch up weak points in their case after realizing they may be unsuccessful.

30. In the circumstances, the Court is not satisfied that the Applicant has met the threshold for admission of additional evidence under Rule 15 of the Income Tax (Appeals to the High Court) Rules Legal Notice 105 of 1974 (as amended).

31. For the foregoing reasons, the Notice of Motion dated 9th September 2025 is hereby dismissed with costs to the Respondent.

32. It is so ordered.

SIGNED, DATED, and DELIVERED IN VIRTUAL COURT THIS

15TH JANUARY 2026

A handwritten signature in blue ink, appearing to read 'ADO MOSES', is written over a light-colored rectangular background.

ADO MOSES

JUDGE

In the presence of: -

C/A - Moses

Saka.....for the Applicant.

Nyapara..... for the Respondent.