**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**HCCOMMITA NO. E172 OF 2024**

VISA CEMEA HOLDINGS LIMITED…….....…..APPELLANT/APPLICANT

-VERSUS-

COMMISSIONER OF LEGAL SERVICES &

BOARD COORDINATION...……...RESPONDENT

**RULING**

1. Before me is a Notice of Motion application dated 23rd September 2024 filed by the appellant/applicant pursuant to the provisions of Sections 1A, 1B, 3A & 63 (c) of the Civil Procedure Act, Order 51 Rule 1 & 3 of the Civil Procedure Rules, 2010, Rule 15 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015 and all other enabling provisions of the law. The applicant prays for an order for leave to admit the evidence identified and attached at paragraph 21, to its supporting affidavit sworn on 20th September 2024.

2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on 20th September 2024 by Ms Shelley Farrington, the Head Tax in charge of the Central Europe, Middle East and Africa (CEMEA) regions where the applicant has operations. Ms Farrington averred that the applicant, a Kenyan branch of Visa CEMEA Holdings Limited, entered into an Intercompany Services Agreement dated 1st October 2020 with Visa International Service Association (USA), under which it provides various support, training, marketing and advisory services whose consumption occurs outside Kenya, which the applicant treated as exported services under the Value Added Tax Act, 2013 (VATA) and lodged a VAT refund claim of Kshs.30,387,655.00 for the period November 2020 to June 2021.

3. She stated that upon audit, the respondent concluded that the services were consumed in Kenya and issued an assessment subjecting them to VAT at 16%. She averred that the applicant objected to the assessment, but the respondent issued an Objection Decision on 6th March 2023 rejecting the refund claim, which led the applicant to appeal to the Tax Appeals Tribunal in **Tax Appeal No. E148 of 2023** and on 17th May 2024. She stated that the Tribunal dismissed the Appeal, citing among other grounds, the applicant's failure to provide supporting invoices for the input tax claim. Ms Farrington deposed that upon review of the Tribunal record, the applicant noted that the invoices for the relevant period were inadvertently omitted from its statement of facts due to an oversight by its former Tax Advisors. She claimed that although the statement of facts referred to the invoices, only the cover letter was filed without its appendices.

4. She contended that the oversight was only discovered after delivery of the Tribunal's Judgment, but the missing invoices have now been annexed to the affidavit in support of the application herein. Ms Farrington asserted that the omission should not be visited upon the applicant, reiterating the principle that mistakes by Counsel should not prejudice a litigant. She stated that the Appeal turns on whether the services provided under the Intercompany Agreement constitute exported services, and the additional evidence is essential to demonstrate the nature of the transactions and to support the applicant's entitlement to a VAT refund. She added that the respondent will not suffer prejudice since the invoices had earlier been provided during the audit, whereas the applicant risks significant prejudice if the Appeal proceeds without the evidence.

5. In opposition to the application, the respondent filed a replying affidavit sworn on 31st October 2024 by Mr. Moses Ndirangu, who serves at the respondent's

Independent Review of Objections. Mr. Ndirangu averred that the applicant lodged a Notice of Appeal and filed a Memorandum of Appeal and Statement of Facts at the Tax Appeals Tribunal. That thereafter, the respondent filed its Statement of Facts, and the matter was heard, culminating in a Judgment delivered on 17th May 2024 in favour of the respondent. He indicated that the Tribunal found that the appellant failed to discharge its burden of proof, specifically, that it did not demonstrate the supply of exported services or present the requisite invoices and supporting documents under Rule 13(2) of the VAT Regulations.

6. Mr. Ndirangu contended that the applicant cannot introduce additional evidence before the High Court that was not presented at the objection stage or before the Tribunal. He stated that the Intercompany Service Agreement in question is dated 19th July 2021, contrary to the applicant's assertion. He asserted that allowing the application would amount to amending the pleadings after the Tribunal's decision, and it would undermine the respondent's statutory role to assess and review tax matters. He stated that the applicant was aware of the additional evidence but chose not to present it. He further stated that the Appeal before the High Court is on points of law, not factual evidence not previously considered. Mr. Ndirangu averred that if the Court is inclined to allow the evidence, then this matter should be referred to the respondent to review the documents and issue a decision.

7. In a rejoinder, the applicant filed a supplementary affidavit sworn on 27th February 2025 by Ms Shelley Farrington, the Head Tax in charge of the Central Europe, Middle East and Africa (CEMEA) regions where the applicant has operations. She emphasized that Rule 15 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015 (TAT High Court Rules), empowers this Court to admit additional evidence necessary for a fair determination of the Appeal.

She further explained that the invoices in dispute exist, were previously provided to the respondent during the audit and objection stages, but were inadvertently omitted from the record before the Tribunal due to an oversight by the applicant's former Tax Advisors, Ernst & Young. He clarified that the said invoices were referenced and relied upon in the applicant's Statement of Facts filed at the Tribunal, and that the respondent was aware of their existence.

8. Ms Farrington refuted the respondent's assertions that the invoices sought to be adduced are new evidence or that their admission would amend pleadings or usurp the respondent's powers. She stated that admitting the invoices will not prejudice the respondent, as the documents were always within its knowledge. She then went ahead to correct inaccuracies in the respondent's affidavit, including the date of the Intercompany Service Agreement, confirming it is correctly dated 1st October 2020. She clarified a typographical error regarding the letter of 17th October 2022, which was included and referenced in the Statement of Facts. She reiterated that the applicant is not seeking to amend its pleadings but only to admit additional evidence to ensure that the Court has a complete factual record for adjudication. She averred that the applicant is amenable to the Court referring the matter back to the respondent to review the invoices and issue a decision if the Court deems it necessary.

9. The application herein was canvassed by way of written submissions. The applicant's submissions were filed by the law firm of Anjarwalla & Khanna LLP on 10th March 2025, while the respondent's submissions were filed on 1st April 2025 by Marion Gitau, Advocate.

10. Ms Muna Abdullahi, learned Counsel for the applicant submitted that this Court has the discretion to admit additional evidence, specifically the invoices, under Rule 15 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015 (TAT High Court Rules). She relied on the Supreme Court of Kenya Case of

**Mahamud v Mohamad & 3 others** [2018] KESC 62 (KLR), and further submitted that the instant application is merited since the invoices sought to be adduced are directly relevant, demonstrating that the applicant supplied taxable services to a non-resident recipient, thus qualifying as exported services under the VAT Act. She contended that the said invoices are capable of influencing the Court's determination, as the recipient of the services is a contested issue, the invoices are credible and not voluminous, covering only an eight-month period. She argued that the Court's power under Rule 15 is a deliberate mechanism to ensure substantive justice, consistent with Article 159(2)(d) of the Constitution.

11. Ms Abdullahi submitted that the additional evidence sought to be admitted is directly relevant and essential for the proper determination of this Appeal. She stated that the central issue for determination is whether the services provided by the applicant qualify as exported services, which if established, would attract zero-rated VAT and entitle the applicant to claim a refund of input VAT under Section 17 of the Value Added Tax Act and Regulation 13(2) of the Value Added Tax Regulations, 2017. She argued that the invoices identify the recipients of the services as non-residents, thereby demonstrating that the supplies were exported. Counsel contended that the applicant provided these invoices to the respondent during the audit process, and the respondent was aware of their existence, notwithstanding the Tribunal's finding that the invoices were not part of the record.

12. She cited the case of **Charles Omwata Omwoyo v African Highlands & Produce Co. Ltd** [2002] KEHC 1190 (KLR) and the Court of Appeal case of **Belinda Murai & 9 others v Amos Wainaina** [1978] KECA 23 (KLR), and asserted that the omission of the invoices from the Tribunal's record was an inadvertent error by the applicant's previous representatives. Counsel urged this

Court to be guided by the principle that mistakes by legal representatives should not prejudice the client, particularly where substantive justice may otherwise be denied. She submitted that the invoices sought to be adduced are necessary for a proper determination of the Appeal, to correct the procedural oversight at the Tribunal, and to ensure that the Court reaches a just and legally sound conclusion regarding the VAT classification of the services and the applicant's entitlement to a refund. She asserted that admission of this evidence aligns with the principles of substantive justice, fairness, and the integrity of judicial processes.

13. Ms Gitau, learned Counsel for the respondent, submitted that the power to admit additional evidence under Section 78(1)(d) & (2) of the Civil Procedure Act and Order 42 Rule 27 of the Civil Procedure Rules, 2010, is circumscribed and must be exercised sparingly. She also relied on the Supreme Court of Kenya Case of **Mahamud v Mohamad & 3 others** (supra), and further submitted that the applicant has not demonstrated that the proposed invoices are new, necessary, credible, or were incapable of being obtained with reasonable diligence during the proceedings before the Tribunal. She stated that the invoices were always within the appellant's possession but and were neither produced at the objection stage nor were they produced before the Tax Appeals Tribunal, which specifically noted the absence of such evidence in its Judgment.

14. Counsel referred to the Court of Appeal cases of **Safe Cargo Limited v Embakasi Properties Limited & 2 others** [2019] KECA 982 (KLR) and **Attorney General v Torino Enterprises Limited** [2019] KECA 934 (KLR), as well as the case of **Dutch Flower Group Kenya Limited v Commissioner of Domestic Taxes** [2024] KEHC 10173 (KLR), and argued that the applicant is attempting to patch up a weak case after an adverse finding. Ms Gitau

submitted that appeals to the High Court under Section 56(2) of the Tax Procedures Act lie only on questions of law, whereas the admission and interrogation of the invoices raises factual issues outside the Court's jurisdiction. Additionally, she asserted that allowing the evidence would prejudice the respondent, as it was denied the opportunity to examine or verify the documents at the objection stage. She stated that the applicant has not provided an affidavit from its Tax Agent to support its claims of inadvertence.

**ANALYSIS AND DETERMINATION.**

15. I have considered the instant application, the grounds on the face of it and the affidavits filed in support thereof. I have also considered the replying affidavit by the respondent and the written submissions by Counsel for the parties. The issue that arises for determination is whether leave to adduce additional evidence should be granted.

16. Appeals from the Tax Appeals Tribunal to the High Court are restricted only to matters of law pursuant to the provisions of Section 56(2) of the Tax Procedures Act. Section 78 of the Civil Procedure Act, however empowers the High Court to admit additional evidence at the appellate stage. It states as follows-

> ***1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power –***
>
> ***a) to determine a case finally;***
>
> ***b) to remand a case;***
>
> ***c) to frame issues and refer them for trial;***
>
> ***d) <u>to take additional evidence or to require the evidence to be taken;</u>***
>
> e) **…….** (Emphasis added).

17. In addition, Order 42 Rule 27 of the Civil Procedure Rules, 2010, states that -

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.***

18. Further, Rule 15 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015, envisages admission of further evidence. It states that -

    ***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.***

19. In view of the above provisions of the law which allow for additional evidence to be adduced on Appeal, this Court is not persuaded that the invoices sought to be adduced by the applicant will raise matters of facts which are not for consideration by the High Court, as submitted by the respondent.

20. It is worthy of note that in as much as this Court has the discretion to admit additional evidence on Appeal, the said discretion must be exercised judiciously and not capriciously. The principles governing the admission of additional evidence were laid down by the Court of Appeal for Eastern Africa in **Tarmohamed & another v Lakhani & Company** [1958] EA 567 which adopted the decision in **Ladd v Marshall** [1954] WLR 1489, and stated as follows-

> ***"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".***

21. The Supreme Court of Kenya in the case of **Mahamud v Mohamad & 3 others** (supra), weighed in on the matter of additional evidence at appellate stage and stated as follows-

> ***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.***

22. Applying the aforementioned principles to the instant application, it is not disputed that the invoices sought to be introduced were in existence at the objection stage and during the proceedings before the Tax Appeals Tribunal. The applicant concedes that the omission to file them resulted from an oversight by its former Tax Advisors. The question therefore, is whether such an omission, attributed to the applicant's representatives, satisfies the test of evidence that could not, with reasonable diligence, have been produced earlier. While Courts have accepted that mistakes of Counsel should not invariably be visited upon a litigant, this principle must be weighed against the requirement that appellate Courts should not be turned into forums for reconstructing a party's evidential record after an adverse decision.

23. It is not in dispute that the Tribunal in considering the applicant's Appeal before it, made a clear finding that the applicant failed to present the invoices and other documentary evidence required under Rule 13(2) of the VAT Regulations, which failure formed a substantive basis for dismissal of the applicant's Appeal.

24. In the application herein, it is manifest that the applicant now seeks to introduce the very evidence whose absence the Tribunal noted. From the documents filed, it is evident that the additional evidence sought to be adduced was within the applicant's possession, was referenced but not filed, and no explanation has been offered as to why the applicant did not remedy the omission during the Tribunal's proceedings.

25. It is trite law that in determining an application for leave to adduce additional evidence at the appellate stage, Courts must guard against admitting evidence for the purpose of filling lacunae or making a fresh case. To this end, I am bound by the Court of Appeal finding in the case of **Attorney General v Torino Enterprises Limited** [2019] KECA 934 (KLR), which quoted with

authority the case of **Mzee Wanje & 93 others v A.K. Saikwa** [1982-88) 1 KAR 463, where it was held that -

> ***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 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 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 should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.***

26. In this instance, the invoices sought to be admitted by the applicant are material to the issue of whether or not the services rendered by the applicant constituted exported services under the Value Added Tax Act. Materiality alone is however insufficient, the applicant still bears the burden of satisfying the threshold of diligence and demonstrating that the evidence sought to be adduced is not being used to patch up its case after the Tribunal's adverse findings.

27. In this instance, the applicant attributes the omission to an oversight by its former Tax Advisors. While this explanation may appear plausible, it is not supported by any affidavit sworn by the said Advisors to substantiate the assertion. In the absence of such corroboration, this Court is not satisfied that the applicant has offered a sufficient explanation for its failure to place the evidence sought to be adduced at appellate stage, before the Tax Appeals

Tribunal during the hearing of the Appeal, as required under the strict standards governing the admission of additional evidence.

28. Regarding the issue of prejudice, the respondent contended that allowing the evidence sought to be introduced would deprive it of the opportunity to assess the invoices at the objection stage, thereby undermining its statutory function. This Court is inclined to agree with the respondent that admitting the documents at this stage would alter the nature of the Appeal and likely prejudice the respondent, as it would be required to confront evidence not tested before the Tribunal.

29. In the circumstances, this Court is satisfied that the applicant has not met the legal threshold for admission of additional evidence. The invoices sought to be adduced were available, were within the applicant's knowledge, and could, with reasonable diligence, have been placed before the Tribunal. Further, this Court is of the considered view that admitting the said invoices at this stage would amount to curing deficiencies in the applicant's evidentiary record and would unduly prejudice the respondent.

30. I am therefore satisfied that the application amounts to an attempt by the applicant to patch up and/or fill up the gaps in its case at this second appellant stage.

31. In the result, it is my finding that the applicant's Notice of Motion application dated 23rd September 2024 is not merited. It is hereby dismissed. Costs are awarded to the respondent

It is so ordered.

**DATED, SIGNED** and **DELIVERED** at **NAIROBI** on this **27th** day of **February 2026. Ruling delivered through Microsoft Teams Online Platform.**

**NJOKI MWANGI**

**JUDGE**

**In the presence:-**

Ms Muna Abdullahi with Mr. Onyango for the applicant

Ms Gitau for the respondent

Ms B. Wokabi – Court Assistant.