



BAC/GKA JV Company Limited v Commissioner of Domestic Taxes (Commercial Case E128 of 2024) [2025] KEHC 3687 (KLR) (Commercial and Tax) (25 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3687 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E128 OF 2024
RC RUTTO, J
MARCH 25, 2025**

BETWEEN

BAC/GKA JV COMPANY LIMITED APPLICANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

RULING

1. The Appellant/Applicant filed an application dated 18th November 2024 under Section 78(1)(d) of the *Civil Procedure Act* and Order 42, Rule 27 of the Civil Procedure Rules, seeking leave to introduce additional evidence in the form of a Record of Discussion with Japan, which forms part of the Exchange Notes between the Government of Kenya and Japan, and to have it included in the record of appeal.
2. The application is supported by the supporting affidavit of Micheal Okumu and is based on the grounds that the evidence sought to be introduced was not available to the Appellant at the time of the original hearing, as it required approval from the Cabinet Secretary for Treasury and the Japanese Ambassador to Kenya, which caused delays. Furthermore, the new evidence is credible and material to the determination of the issues on appeal, particularly regarding the tax-exempt status of local entities and companies involved in the Mombasa Port Development Project Phase II.
3. In response to and in opposition to the application, the Respondent contends that a new document cannot be introduced at the third stage of appeal, where the appeal is limited to issues of law. Furthermore, the Applicant's attempt to introduce a new document at this stage is not only an afterthought but also unprocedural, as it effectively places the court in a position of reviewing the Applicant's objection on behalf of the Respondent, contrary to statutory provisions. Additionally, the Respondent argues that the introduction of the new evidence is untimely, as it comes after the Respondent had already issued its Objection Decision.



4. Further, that the Appellant had been given an opportunity to provide any evidentiary material in support of its claim for exemption at the time of filing the objection, yet no mention of such a document was made either at the objection stage or during the appeal before the Tax Appeal Tribunal. Lastly, the Respondent asserts that the validity and authenticity of the document are questionable, as it lacks a letterhead or any authentication from the National Treasury to confirm its origin.
5. The Application was canvassed by written submissions.

Applicant's/Appellant's Submissions

6. The Applicant's submissions are dated 9th December 2024. The Applicant set out the facts of the case and submitted on only one issue, that is, whether leave to admit additional evidence should be granted in this matter. Relying on the Supreme Court case of Patrick Thoithi Kanyura v. Kenya Airports Authority, Petition (Application) No. 7 of 2017, the Applicant argued that the additional evidence is directly related to the matter and would significantly influence the outcome of the appeal.
7. The Applicant further relied on the case of Dorothy Nelima Wafula v. Hellen Nekesa Nielsen & Paul Fredrick Nelson [2017] eKLR, which held that under Rule 29(1)(a), additional evidence may be introduced on appeal at the court's discretion for sufficient reason. It was submitted that the additional evidence is necessary to enable the court to determine the appeal with finality, as it was not included and could not have been included in the Record of Appeal.
8. The Applicant also contended that the evidence was not available at the time of the original hearing, as it required approval from the Cabinet Secretary for Treasury and the Japanese Ambassador to Kenya, which caused delays. Referring to the court's discretion under Section 78(1)(d) of the [Civil Procedure Act](#) and Order 42 Rule 27 of the Civil Procedure Rules, the Applicant maintained that it is not attempting to build a new case on appeal but rather to introduce documents that would shed light on critical aspects of the dispute.
9. The Applicant prayed that the Application be allowed as prayed.

Respondent's Submissions

10. In opposing the application, the Respondent relied upon its Replying Affidavit sworn by Eric Mwangi on 27th November 2024 as well as submissions dated 27th December 2024. The Respondent set out one issue for determination that is, whether the Applicant has met the threshold for being granted leave to introduce new documents at the High Court Appeal stage.
11. The Respondent submitted that Order 42, Rule 27 of the Civil Procedure Rules restricts parties to an appeal from introducing additional evidence, whether oral or documentary, in the court where the appeal is preferred. The Respondent further argued that tax appeals to the High Court are limited to issues of law, as provided under Section 56(2) of the [Tax Procedures Act](#), and that the Applicant's attempt to introduce new documents at the appellate stage is unjustified. In support of this position, the Respondent relied on the cases of Safe Cargo Limited v. Embakasi Properties Limited & 2 others [2019] eKLR, Attorney General & Inspector General of Government v. Afric Cooperative Society Limited, Miscellaneous Application No. 06 of 2012 (SC), and the Supreme Court case of Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamud & 3 others [2018] eKLR, which set out the principles for allowing additional evidence. The Respondent contended that the evidence the Applicant seeks to introduce is not fresh and will not have a substantial impact on the determination of the appeal.
12. The Respondent noted that the additional evidence was signed on 16th January 2015, more than seven years before the issuance of the objection decision. Therefore, they argued that the document was



known to the Appellant at the inception of the project and was not a newly discovered fact arising after the Tribunal rendered its judgment.

13. Furthermore, the Respondent submitted that if the Applicant's justification for introducing the document at this late stage were valid, the document should have been accompanied by a letter from the Treasury confirming that, although it is dated 16th January 2015, it was actually signed after the Tribunal's judgment. The Respondent also pointed out that the Applicant had not specified when it received the document to support its argument. Based on the foregoing, the Respondent relied on *Safe Cargo Limited v. Embakasi Properties Limited & 2 others (Supra)* to argue that the additional evidence does not constitute new evidence.
14. The Respondent submitted that the additional evidence raises concerns regarding its authenticity, as it is an extract from an unknown document, lacks an official letterhead or any authentication marks from the National Treasury, and does not meet the established threshold for an official document.
15. As to whether the additional evidence would have a significant impact on the outcome of the case, the Respondent submitted that the main dispute was whether the services offered by the Applicant were exempt from taxes. The Respondent argued that since the Appellant claims exemption, it ought to have provided the necessary evidentiary material, such as an exemption certificate from the National Treasury, rather than the Record of Discussion. Additionally, the Respondent submitted that the exchange notes signed on 16th January 2015 and [*Legal Notice No. 15 of 2021*](#) only exempted Japanese companies, consultants, and employees involved in the project under the Financial Agreement, and not Kenyan companies or consultancies such as the Appellant.
16. The Respondent submitted that if the court was to allow the production of the document, it must also address the question of tax exemption, as there is no evidence to demonstrate that the lead partner in the Applicant's joint venture was a Japanese supplier, consultant, or contractor. Furthermore, the Respondent argued that allowing the document would introduce factual issues, which are not within the jurisdiction of the High Court, as appeals to this court are strictly limited to questions of law. The Respondent also contended that it would suffer significant prejudice, as it had no opportunity to review the document at the time of issuing the assessment and objection decision. Consequently, admitting the document would undermine the authenticity of the Commissioner's decision.
17. In conclusion, the Respondent submitted that if the additional evidence is admitted, the court should remit the matter to the Respondent for review and the issuance of a fresh decision.
18. The Respondent cited the cases of *Attorney General v Torino Enterprises Limited* [2019] eKLR and *Dutch Flower Group Kenya Limited v Commissioner of Domestic Taxes (Income Tax Appeal E025 of 2022)* [2024] KEHC 10173 (KLR) (Commercial and Tax), to urge that the 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. The Respondent further contended that the Appellant is guilty of laches, having unreasonably delayed in filing the present application without providing a justifiable explanation. Therefore, the application lacks merit and should be dismissed with costs.

Analysis and Determination

19. Having carefully considered the present Application, submissions made and all documentation provided, this court is of the view that the only issue for determination is: whether the Applicant has met the threshold for leave to introduce additional evidence at the appellate stage.



20. Section 78 of the *Civil Procedure Act* gives this Court the jurisdiction to admit additional evidence. It provides, inter alia, that:

- “(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) To take additional evidence or to require the evidence to be taken;”

21. This is further supported by 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”.

22. In addition, Rule 15 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015 envisages admission of further evidence. It provides: -

“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.”

23. From the foregoing, it is evident that admitting additional evidence on appeal does not derogate from the provisions of Section 56(2) of the *Tax Procedures Act*, 2015, as argued by the Respondent. Based on the cited legal provisions, the decision to admit additional evidence on appeal is an exercise of judicial discretion. Like all other forms of discretion, it must be exercised judiciously and not arbitrarily.

24. In addressing the question whether to allow additional evidence on appeal or not, the Supreme Court gave the general principles in the case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 Others* [2018] eKLR where it is held 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 wilful 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."

25. In the present case, it is undisputed that when the Applicant filed its notice of objection letter dated 27th June 2022, it solely relied upon Legal Notice No. 15 (Special Issue: Kenya Gazette Supplement No. 17 - Legislative Supplement No. 10) issued on 26th February 2021 as its supporting document. The additional document now sought to be introduced was not part of the original filings. However, upon reviewing the judgment of the Tax Appeals Tribunal, which is annexed to the Respondent's affidavit, I note that in Paragraph 72 of the Tribunal's judgment, summarizing the Respondent's case, the Appellant referenced the tax exemption status in relation to the Loan Agreement between the Kenya Ports Authority and the Japan International Cooperation Agency, as well as the exchange notes between the Governments of Kenya and Japan.
26. Based on the foregoing, it is evident that the Applicant was aware of the existence of the Record of Discussion with Japan, which forms part of the Exchange of Notes between the Government of Kenya and Japan, and which it now seeks to introduce as additional evidence. If this record was essential, the



Applicant could have easily produced it when it was filing an objection to the assessment or, at the very least, indicated any challenges encountered in accessing the document before the Tribunal. However, no such effort was made.

27. Notably, even in the present application, no explanation has been provided, nor has any evidence been presented, to demonstrate any follow-ups taken to ensure that the said record was signed by the relevant parties for use as evidence either at the first appellate stage or in support of the notice of objection. In this regard, I concur with the Respondent that the Record of Discussion is dated 16th January 2015, which is more than seven years before the Respondent issued its objection decision, and was known to the Appellant at the inception of the project and was not a newly discovered fact arising after the Tribunal rendered its judgment.
28. If there were indeed challenges in obtaining the signed document, these challenges have not been demonstrated or explained. Further, had any follow ups been conducted, the Applicant would be expected to clearly outline the steps taken and, provide supporting evidence to that effect.
29. The High Court in the case of *Family Fashion Clothing Limited v Commissioner of Investigations and Enforcement (Income Tax Appeal E050 of 2021)* [2021] KEHC 406 (KLR) (Commercial and Tax) (29 December 2021) (Ruling) when faced with a similar application stated as follows:
22. That being the case, it would be prejudicial to the respondent to allow the applicant to use this opportunity to patch up and/or fill up the gaps in its case at this second appeal stage. When a party chooses a professional who represents him/it in a negligent manner, sometimes it is fair to let the loss lie where it falls as in this case. The client should seek recourse there other than vex the other litigant and/or the court unnecessarily.
30. Litigation must come to an end. It does not matter that the evidence is crucial. There must be sufficient reason why the evidence was not produced at the trial. This case is completely different from the one in *Commissioner of Income Tax v. Total Kenya Ltd* [2021] eKLR. In that case, both parties were aware of the existence of the document in question and they had proceeded with the appeal before the Tribunal on the understanding that the decision contained in that document had been made. The problem arose when the Tribunal raised the unavailability or the absence of such a decision in its judgment suo motto. It did so because it was unaware of the same and it wrongly declined jurisdiction. Both parties were of a different view. Obviously, that is not the case here.
31. The upshot is that the applicant’s application dated 14/10/2021 is without merit and is hereby dismissed with costs to the respondent. The parties should take steps to prosecute the appeal expeditiously.”
32. I concur with the above holding of the court, as allowing the additional evidence would effectively permit the Applicant to patch up or fill gaps in its case, despite having had two prior opportunities to do so. I find that the reasons advanced by the Applicant are insufficient. Furthermore, the additional evidence does not, in itself, provide clarity on the issue of the Respondent’s exemption status. The Applicant has failed to demonstrate this in the present application.
33. I am also guided by the Court of Appeal’s decision in the case of *Gachuki & another v Njenga & 2 others* (Civil Appeal (Application) 413 of 2019) [2025] KECA 451 (KLR) (7 March 2025) (Ruling) where the appellate Court stated;

“ 22. From the averments of the 1st applicant, she did not depose/demonstrate the difficulties that she encountered and the due diligence that she undertook to access and produce the documents she now wants to produce. We find that the



proposed additional evidence could have been discovered with due diligence. Further, the applicants have not demonstrated to our satisfaction that the proposed additional evidence removes any vagueness or doubt on the issues in the appeal pending before this Court.”

34. I am therefore not convinced that the threshold to adduce additional evidence has not been reached and i decline to allow the Applicant to adduce the proposed additional evidence.
35. Consequently, the Notice of Motion dated 18th November 2024 lacks merit and is hereby dismissed. Costs shall abide by the outcome of the appeal.
36. Mention before the Deputy Registrar on 8th April, 2025 for onward transmission to the Presiding Judge of the Commercial and Tax Division for reallocation/or hearing of the appeal.
37. Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF MARCH, 2025.

RHODA RUTTO

JUDGE

Delivered on the virtual platform, Teams this 25th day of March, 2025.

In the presence of;

.....Applicant

.....Respondent

Wanyoike Court Assistant

