



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Revenue Authority v Crescent Tech Limited (Income Tax Appeal E040 of 2023)
[2025] KEHC 3641 (KLR) (Commercial and Tax) (24 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3641 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E040 OF 2023**

H NAMISI, J

MARCH 24, 2025

BETWEEN

KENYA REVENUE AUTHORITY APPELLANT

AND

CRESCENT TECH LIMITED RESPONDENT

RULING

1. Before the Court is a Notice of Motion dated 13 June 2024 filed by Crescent Tech Limited seeking the following orders:
 - i. (spent)
 - ii. (spent)
 - iii. That the Honourable Court be pleased to call for the Tax Appeals Tribunal File No. 699 of 2021 together with the register for the matters filed before the said Tribunal on 28th and 29th October 2021;
 - iv. That the Honourable Court be pleased to review and set aside its judgement delivered on 8th May 2024
 - v. That the Honourable Court be pleased to re-instate and admit the Appeal for hearing on merit;
 - vi. That the costs of this Application be provided for.
2. The Application is premised on the grounds on the face of the Application and supported by the Affidavit of Ashifa Gulamalishah Saleh.



Brief Background.

3. Following a dispute between the parties herein, the Applicant lodged an appeal at the Tribunal. The issues for determination therein were: whether the Objection Decision by the Appellant/Respondent was made within the statutory timelines; whether the Applicant supplied all documents required by the Commissioner and whether the Objection Decision was proper law.
4. The Tribunal found that the Objection Decision was made within the 60-day statutory timelines as the last batch of documents was delivered to the Commissioner on 30 August 2021 and the Objection Decision was made 23 days later. The Tribunal found that the Applicant herein had discharged its burden by providing the documents that were agreed upon with the Commissioner and requested for in writing. The Tribunal further found that since the Commissioner did not provide the results of the investigations or indicate to the Applicant herein on how it was “established that there was no supply of taxable goods made by the suppliers”, the Tribunal held that the Objection Decision did not comply with section 51 (10) of the *Tax Procedures Act*. The Tribunal, therefore, allowed the appeal filed by Crescent Tech Limited and set aside the Objection Decision.
5. The Appellant then lodged this appeal, challenging the whole decision of the Tribunal on six grounds contained in the Memorandum of Appeal dated 5 April 2023. The issues for determination were:
 - i. Whether the Tribunal had jurisdiction to entertain the Respondent’s Appeal;
 - ii. Whether the Respondent discharged the burden of proof at the Tribunal;
 - iii. Whether the Tribunal erred in finding that the Commissioner inferred fraud on the part of the Respondent
6. On the issue of jurisdiction, the Appellant/Respondent submitted that the Tribunal did not have the jurisdiction to hear and determine the appeal on grounds that the appeal was filed out of time. It was argued that since the Objection Decision was issued on 29 September 2021, the Notice of Appeal ought to have been filed on or before 29 October 2021. However, the appeal was filed on 3 November 2021, outside the statutory timeline.
7. In response, the Applicant herein argued that the Appellant was trying to steal a march on it since the issue of timelines was never raised in its pleadings at the Tribunal. That the same was only raised in its submissions at the Tribunal. The Applicant herein submitted that the Appellant was barred from raising the jurisdictional issues in its submissions without according the Applicant herein the opportunity to respond.
8. In allowing the appeal, Hon. Justice D. Majanja opined that issue of jurisdiction can be raised at any stage of the proceedings in any court including at the appellate stage. Therefore, in as much as the question of the tribunal’s jurisdiction was never raised by either party or the Tribunal itself, this Court has the requisite jurisdiction to determine whether the Tribunal had jurisdiction to entertain the appeal. Consequently, the learned Judge set aside the Tribunal’s decision for want of jurisdiction.
9. It is this decision that precipitated the present application.

Notice of Motion dated 13 June 2024.

10. The Applicant argues that whereas the Court opined that the appeal before the Tribunal was filed out of time, the case had already been registered and filed by 29 October 2021. The Notice of Appeal and Memorandum of Appeal were filed at the Tribunal by email, and were assessed on 28 October



2021. The filing fees was paid on 28 October 2021, as evidenced by the annexed receipt. However, the pleadings on record erroneously indicate that the appeal was filed on 3 November 2021.

11. The Applicant avers that following the judgement, the Applicant, through their Advocates, wrote to the Tribunal on 28 May 2024 and 3 June 2024 to confirm that the appeal was, indeed, filed on 29 October 2021. Attached to the Supporting Affidavit is a copy of the response from the Tribunal confirming this position.
12. The Applicant confirms that these documents, the letter and payment receipt, were not part of the Record of Appeal and, therefore, could not have been presented for consideration by the Court. They contend that the burden of presenting a complete record was on the Appellant. Further, that even with due diligence, the Applicant could not obtain the payment receipt and the letter from the Tribunal and failure to present the same was not deliberate and is, therefore, excusable.
13. It is the Applicant's contention that there exists sufficient reason to warrant the review of the judgement, based on the letter from the Tribunal and the payment receipt.
14. The Appellant/Respondent filed a Replying Affidavit opposing the Application. The Respondent averred that the order setting aside the judgement for want of jurisdiction is not an order capable of being stayed because there is nothing that the Applicant has lost. Further, it is available for the Applicant to challenge the Appellant's decision to confirm taxes at the Tribunal, which appeal would operate as an automatic stay of any enforcement measure to recover the impugned taxes.
15. The Respondent contended that once the Court determined that the Tribunal did not have jurisdiction to entertain the Applicant's appeal, then it became functus officio and the application herein amounts to asking the Court to consider an appeal against its own decision. Further, the Respondent argued that the Applicant has not satisfied the conditions for an order for stay of execution.
16. The Application was canvassed by way of written submissions.

Analysis and Determination

17. The Application herein is brought under Order 45 rules 1 and 2 of the Civil Procedure Rules. Rule 1 provides as follows:
Any person considering himself aggrieved—
(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred;
or
(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
18. The Applicant submitted that their application falls within “discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made”, as well as “other sufficient reasons”.
19. The power of review can be exercised by the court in the event discovery of new and important matter or evidence which despite exercise of due diligence was not within the knowledge of the applicant or



could not be produced by him at the time when the order was made. As the Supreme Court of India stated in the case of *Ajit Kumar Rath v State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608.: -

“The power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”

20. In the case of *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others* [2021] eKLR, the Learned Judge opined thus:

“Ordinarily, the expression discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made would refer only to a discovery made since the order sought to be reviewed was passed. An applicant alleging discovery of new and important evidence must demonstrate that he has discovered it since the passing of the order sought to be reviewed.”

21. In the instant case, the Applicant has presented new evidence, which information was not presented at the point when the appeal was heard and determined. First, the Applicant argued that the issue of jurisdiction did not come up at the Tribunal and, therefore, the Applicant was not accorded an opportunity to respond thereto. Further, in its Supporting Affidavit, the Applicant stated that it was not until after the judgement on 8 May 2024 that he reached out to some members of the audit firm that previously represented him in a bid to get the information confirming the actual date of payment and filing of the appeal at the Tribunal. When his efforts proved futile, his Advocates on record then wrote to the Tribunal vide letters dated 28 May 2024 and 3 June 2024, seeking the said information.
22. One of the grounds of appeal was that the Tribunal erred in entertaining an appeal filed contrary to section 51(12) of the *Tax Procedures Act*, and section 13(1) of the *Tax Appeals Tribunal Act*, 2013 which grants it the jurisdiction to only hear appeals filed on time. This means that right from the lodging of the appeal, the Applicant was aware that the Appellant intended to challenge the decision of Tribunal on the issue of jurisdiction. In its Application, the Applicant argues that the obligation to provide a complete Record of Appeal lay on the Appellant. However, there is no mention anywhere in the proceedings or the Application itself that the Applicant informed the Court that the Record of Appeal was incomplete. Instead, the Applicant waited until the Court had rendered its judgement then sought to introduce this new information.
23. To satisfy the test under the Order 45 rule1, an applicant must demonstrate discovery of new evidence which he could not procure at the time the application was heard despite exercise of due care and diligence. Had the Applicant exercised due care and diligence, certainly, he could have procured the evidence and presented it at the time the appeal was heard. The Applicant has failed this crucial test.



24. In *Evan Bwire v Andrew Nginda*, Civil Appeal No. 103 of 2000, Kisumu; {2000} LLR 8340, the court held that “an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh”.
25. In *Republic v Advocates Disciplinary Tribunal ex parte Apollo Mboya, IR No. 317 2018*, the Court discerned the following principles which are relevant in applications for review: -
- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
 - ii. The expression “any other sufficient reason” appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
 - iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
 - iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
 - v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
 - vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
 - vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
 - viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
 - ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
 - x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.
26. The upshot is that the Application dated 13 June 2024 is not merited. The same is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 24 DAY OF MARCH 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:



Mola.....for the Respondent/Applicant

..Mr. Ngetich.....for Appellant/Respondent

Libertine Achieng.....court Assistant

