



**Commissioner of Domestic Taxes v Odanga (Income Tax Appeal E041 of 2022)
[2024] KEHC 863 (KLR) (Commercial and Tax) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 863 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E041 OF 2022
A MABEYA, J
JANUARY 30, 2024**

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

SEBASTIAN VITALIS ODANGA RESPONDENT

RULING

1. This ruling is with respect to the appellant's application dated 20/9/2022 brought under order 8 rule 3,5& 7 of the *Civil Procedure Rules*. It sought leave to amend the memorandum of appeal. The application was predicated on the grounds on the face of it and the affidavit of Faith Onyango sworn on 20/9/2022.
2. It was the appellant's contention that it sought to amend the memorandum of appeal as he had erroneously omitted one ground of appeal and two prayers. That the application was brought without undue delay and the respondent would not be prejudiced if the amendment was allowed.
3. The respondent opposed the application via a replying affidavit sworn by himself on 18/10/2022. He deposed that the appellant sought to introduce issues that were not part of the Tribunal's ruling dated 4/3/2022. That paragraph 7 was not addressed in the ruling for review dated 12/10/2021.
4. The application was canvassed by way of written submissions which I have considered. The appellant submitted that the dispute between the parties was whether the income declared for the years 2015 and 2016 was correct. That however, the Tribunal failed to address itself on the said issue. In this regard, the appellant wished to amend the Memorandum of appeal to have the Court review and make a determination on the same.



5. It was further submitted that the respondent's appeal before the Tribunal was allowed on technicalities. That the Tribunal failed to consider the main issues laid out in the pleadings. Counsel submitted that the respondent did not state any prejudice that would be occasioned if the orders sought were not granted.
6. On the part of the respondent, it was submitted that the amendment sought to have an appeal on the judgment of the Tribunal dated 10/9/2021 instead of an appeal on the ruling of the Tribunal dated 4/3/2022. That the appellant having elected to file an appeal on the review, he could not attempt to bring a fresh amendment to include an appeal on the Tribunal's judgment. It was further submitted that the amendment sought to veer into issues which were not before the Tribunal in the application for review.
7. I have considered the pleadings by the respective parties and the submissions on record. The application before Court is for the amendment of the memorandum of appeal filed on 26/4/2022 for reasons that the appellant had omitted a ground of appeal and some prayers. The appellant's view was that the amendment was aimed at outlining all the issues that emanated from the ruling of the Tribunal dated 4/3/2022. That the amendment is with respect to the Tribunal's failure to consider the pleadings filed by the appellant and thus allowed the appeal on technicalities.
8. On his part, the respondent contended that the nature of the amendment sought was with respect of the judgment of 10/9/2021 instead of the ruling dated 4/3/2022. Further, the respondent posited that the amendment sought to introduce issues which were not before the Tribunal.
9. The amendment of pleadings is governed by section 100 of the [Civil Procedure Act](#) and order 8 rule 3 of the [Civil Procedure Rules, 2010](#). That section provides: -

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding”.

10. While order 8 rule 3 provide that: -

“(1) Subject to order 1, rules 9 and 10, order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.”

11. In [Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited](#) [2013] eKLR, the Court of Appeal held: -

“The law on amendment of pleading in terms of section 100 of the [Civil Procedure Act](#) and order via rule 3 of the repealed [Civil Procedure Rules](#) under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's Precedents of Pleading - 12th Edition, in the case of *Joseph Ochieng & 2 others v First National Bank of Chicago*, Civil Appeal No 149 of 1991 as follows:-

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal



stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”

12. In view of the foregoing, the legal parameters for the courts consideration in an application for amendment of pleadings are that; the amendment should not introduce a new cause of action, the application should be brought within reasonable time and should not affect an accrued legal right.
13. In the present case, the appellant has challenged the ruling of the Tribunal dated 4/3/2022 which dismissed the appellant’s application for review of the judgment of 10/9/2021. In its ruling on review, the Tribunal held that the appellant had not established an error apparent on the face of record.
14. I have perused the amendment sought to be introduced and the appellant seeks to have the matter referred back to the Tribunal for a fresh hearing. The appellant further stated that the Tribunal ought to have arrived at a just decision as the issue between the parties relate to sections 15 and 16.
15. As already stated, an amendment should not introduce new issues. The amendment herein relates to issues touching on the main appeal before the Tribunal and not the application for review. The court is inclined to agree with the respondent that allowing the same would be an abuse of the Court process and highly prejudicial to the respondent. Further, this Court will not permit an amendment that completely changes the nature of a party’s case.
16. The appeal should only be confined to the review ruling dated 4/3/2022 and not the judgment of 10/9/2021.
17. In view of the foregoing, the court finds no merit in the application and the same is dismissed with costs.
It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY, 2024.

A. MABEYA, FCI Arb

JUDGE

