THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL AT KAMPALA

MISC APPLLICATION NO. 67 OF 2021

ARISING OUT OF APPLICATION 60 OF 2020

ERICSSON AB……..…….APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY…….RESPONDENT

BEFORE: DR. ASA MUGENYI, MR. GEORGE MUGERWA MS. CHRISTINE KATWE

RULING

This ruling is in respect of an application to re-open the applicant's case.

The applicant brought this application under S. 22(3) of The Tax Appeals Tribunal Act, Rule 30 Tax Appeals (Procedure) Rules and Order 52 Rule 1 of the Civil Procedure Rules for orders that the applicant be granted leave to re-open its case; that leave be granted to add documents and witnesses to the list of documents and witnesses respectively.

The grounds of the application are:

(a) That the documents in question are vital for the applicant's case.
(b) That the issue in dispute is one of reconciliation which the applicant strongly believes will be resolved by review of the additional documents
(c) That this evidence will not prejudice the respondent.
(d) That it is reasonable and in the interest of justice that this application is allowed.

The applicant was represented by Mr. Edwin Eciba, Mr. Augustine Kiggundu and Ms. Vanessa Mbekeka while the respondent by Mr. Alex Sali Aliddeki.

The applicant's application was supported by the affidavit of Ms. Joyce Namuyanja, its employee. She deponed that the respondent objected to some documents that were not signed. The applicant undertook a rigorous process to extract information from 2013 to

2017 which would be vital for its case. The information provided will give a detailed explanation of the nature of the applicant's business. It will give a detailed reconciliation of the applicant's sales during the audit period. They also showed that VAT was fully accounted for. The witness deponed that the additional evidence will not prejudice the respondent.

In reply, Charlotte Katuutu, an officer in the respondent's legal department replied in opposition to the application. She deponed that there was a scheduling conference where the parties laid down their cases. The applicant's new evidence is not part of the joint trial bundle. The applicant called a number of witnesses. The applicant closed its cases. The applicant has failed to prove that the additional evidence was unavailable at the time of the hearing. The additional evidence has not been discovered as new and important which after exercise of due diligence was not within the knowledge of the applicant. The respondent submitted that the evidence in annexture B was rejected by the Tribunal. The witness contended that granting the application will prejudice the respondent's case.

The applicant submitted that courts have a constitutional mandate to dispense justice without due regard to technicalities under Article 126(2)(e) of the Constitution which is enshrined in S. 22 (2) of the Tax Appeals Tribunal Act. The applicant cited Samba *Telecom v Karuhanga & Anor* Misc App 2014/451 [2014] UGHC 98 (20 August 2014) where the high court relied on *Smith v New South Wales* [1992] HCA36 and observed that it is necessary to distinguish between the considerations which may bear on a decision to reopen a case and the process involved in reconsideration once a case has been reopened. The court noted that the primary consideration is whether there would be embarrassment or prejudice to the other side.

The applicant submitted that it intends to adduce three pieces of evidence, that is;

(a) Detailed explanation of the nature of the services provided by the applicant to its customers.
(b) A detailed reconciliation of the applicants sales during the audit period as declared in its Value Added Tax returns to its audited financial statements.
(c) Copies of the applicants VAT returns for the period 2013-2017.

The applicant submitted that the first two pieces of the evidence were objected to by the respondent on grounds that they were not by it

The applicant contended that it is in the interest of justice to reopen its case as the exclusion of the additional evidence may lead to a miscarriage of justice and double taxation. The applicant contended that the VAT returns will not prejudice the respondent as they were filed with the latter through its online self-assessment system, and they formed the basis of the respondents VAT assessments. The applicant submitted that as the respondent has not yet opened their case, they will have ample opportunity to clarify on any issue or to cross examine the witnesses that will tender in the documents as evidence.

In reply, the respondent contended that Article 126(2)(e) of the Constitution is not a scape goat for filling in gaps in evidence by a litigant in courts of law. The respondent cited *Kasirye Byaruhanga & Co. Advocates v Uganda development bank,* SC Civil Application No. 2/97 where it was held that;

> "…a litigant who relies on the provisions of Article 126(2)(e) of the Constitution must satisfy the court that in the circumstances of a particular case before the court it was not desirable to pay undue regard to the relevant technicality. This article is not a magic wand in the hands of defaulting litigants".

The respondent submitted that Article 126(2)(e) has not done away with the requirement that litigants must comply with the rules of procedure in litigation. In *Utex Industries Ltd v Attorney General* SCCA.53 of 1997 the court said;

> "…we are not persuaded that the constituent assembly delegates intended to wipe out the rules of procedure of courts by enacting Articles 126(2)(e). Paragraph (e) contains a caution against undue regard to technicalities. We think that the article appears to be a reflection of the saying that rules of procedure are handmaidens to justice-meaning that they should be applied with due regard to the circumstances of each case."

The respondent submitted that the applicant willingly closed its case. It cannot turn around now and file an application aimed at filling gaps in the evidence. The respondent submitted that courts have the discretion to allow re-opening cases. The respondent cited *Odoyo Osodo v Real Obara Ojouk* & 4 Others [2017] Eklr where it was stated that

"i. The applicant must demonstrate that the evidence sought to be adduced is one that the applicant has come upon or discovered as some new and important evidence which after exercise of due diligence was not within the knowledge of the applicant at the time of the hearing their case.

ii. The grant of the application shall not prejudice the opposite party's defense.

iii That it was not due diligence of Counsel and as such was a genuine mistake or error on the part of the lawyer the court may over look in the interest of justice.

iii. The evidence is not intended to fill any gaps in evidence of the applicant."

The respondent submitted that the applicant has failed to prove the above tenets.

The respondent submitted that the information sought to be admitted in evidence is contained in pages 328-335 of the joint trial bundle. The nature of services rendered by the applicant are contained in the different contracts the applicant signed and is contained in the joint trial bundle in exhibit 16 pages 205-261, details filed in the VAT returns of the applicant are contained in the invoices in Exhibit 17 at pages 262-281 of the joint trial bundle. Exhibits 12, 13, 14 and 15 contain the applicants audited books of accounts. The said evidence is on record and reopening of the case is unfair and against the principles of natural justice.

The respondent submitted that information in the detailed reconciliation was available to the applicant at the time of the hearing which the latter neglected and / or failed to prepare and does not warrant the grant of this application. The respondent cited *Odoyo Osodo v Real Obara Ojouk & 4 others* [2017] eKlr, Justice J. M. Mutungi stated;

> "It defeats logic how the defendants who all along were represented by counsel could overlook evidence that was necessary for their case. There is no case of genuine mistake or error on the part of counsel which perhaps could invite sympathy of the court. The defendants and their counsel appear to have treated the matter with a lot of casualness such that they only realized the lacuna in their case…"

The respondent submitted that the applicant has failed to prove any genuine mistake or error on the part of counsel which perhaps could invite sympathy. The applicant intends to use the application as a gate to fill gaps in its case.

The respondent argued that the applicant filed this application to circumvent the ruling of the tribunal rejecting its document instead of appealing. The tribunal ruled as follows;

> "The witness statement is allowed in as evidence in chief of the witness. Annexure B is allowed in as exhibit 29 annexure "A" is not signed. It is not addressed to or copies to witness. The schedules bear neither heading nor description. It is not allowed in as an exhibit. Counsel for the respondent may proceed with cross examination".

After cross examination of the Mikateko Mawila, the applicant closed its case. The respondent prayed that this application is dismissed with costs to the respondent.

In rejoinder, the applicant submitted that in *Airtel (U) Ltd v URA* App No. 10 of 2019, the tribunal exercised its discretionary powers judiciously to allow an applicant to add an additional ground for determination as it was not prejudicial to the respondent to do so and would avoid a multiplicity of suits and unnecessary appeals. The applicant also cited *Shah v Mbogo and another* [1967]1EA 116 where it was stated that the purpose of exercising discretion includes avoiding injustice or hardship resulting from accident, inadvertence, or excusable mistake.

The applicant also reiterated that S. 22 (2) of the Tax Appeals Tribunal Act states that the proceeding before a tribunal shall be conducted with as little formality and technicality as possible and tribunal shall not be bound by the rules of evidence. The applicant stated that the documents sought to be introduced are vital to the applicant's case and their exclusion on the basis of technicalities may lead to a miscarriage of justice and double taxation of the applicant in respect of the transactions in dispute.

Having read the submissions of both parties, this is the ruling of the tribunal

When this matter came for hearing, the applicant closed its case. However the respondent has not called any witness. The applicant applied to reopen its case, file documents and call witnesses. It submitted that reopening its case will enable it file vital information that will enable the Tribunal determine the case. The respondent objected on the ground that the applicant should not be able to use the opportunity of re-opening to fill in gaps in evidence.

The applicant relied on Article 126(2)(e) of the Constitution which provides substantive justice shall be administered without undue regard to technicalities. The respondent opposed and cited *Kasirye Byaruhanga & Co. Advocates v Uganda Development Bank,* SC Civil Application No. 2/97 where it was held that;

> "…a litigant who relies on the provisions of Article 126(2)(e) of the constitution must satisfy the court that in the circumstances of a particular case before the court it was not desirable to pay undue regard to the relevant technicality. This article is not a magic wand in the hands of defaulting litigants".

The Tribunal is aware that matters should be heard on merit without due regard to technicalities. It is also aware that parties should not abuse court procedures.

In *Micheal Fethun v The State* Case No 458/96 it was held that courts have the discretion to allow a case to be re-opened at any time before a judgment is issued taking into account such factors such as the finality of the case, the stage of the proceedings, reasons why the evidence was not led on time among others. The respondent cited *Odoyo Osodo v Real Obara Ojouk & 4 Others* [2017] Eklr where it was stated that

i. The applicant must demonstrate that the evidence sought to be adduced is one that the applicant has come upon or discovered as new and important evidence which after exercise of due diligence was not within the knowledge of the applicant at the time of the hearing their case.
ii. The grant of the application shall not prejudice the opposite party's defense.
iii. That it was not due diligence of counsel and as such was a genuine mistake or error on the part of the lawyer the court may over look in the interest of justice.
iv. The evidence is not intended to fill any gaps in evidence of the applicant.

In exercising its discretion, the Tribunal will take into consideration that S. 22(2) of the Tax Appeals Tribunal Act provides that a proceeding before a Tribunal shall be conducted with as little formality and technicality as possible. In determining the yardstick of formality the Tribunal will also take into consideration that S. 23 of the Act allows an applicant to appear in person or be represented. An applicant may be represented by an advocate or any other person. The Tribunal has to ask itself: if a person appears in person or is not represented by an advocate would it apply the strict rules on re-opening of cases. If so, would it not be denying illiterate litigants who do not know the law especially on reopening

of case justice? Should the Tribunal use a different yardstick between parties who are represented by advocates and those who appear in person or are represented by non-advocates? If this was so, wouldn't the Tribunal not be accused of promoting inequalities in protection of persons before the law? The application of the rule on re-opening cases should apply across the board. It should be flexible to allow litigants who are not represented to open their cases as well as those who are represented.

The Tribunal notes that the respondent has not called any witnesses. It will not suffer any prejudice. The tribunal is mindful that on the 1st September 2021, this tribunal disallowed the applicants documents on grounds that they were not addressed to or copied to the witness, had no heading nor description. The applicant is under obligation to produce proper documents to prove her case. The Tribunal notes that S18 of the Tax Appeals Tribunal Act places the burden of proof on the applicant to prove that an objection decision is excessive or a taxation decision should have been made differently. A taxpayer cannot discharge the burden if it is denied a chance to adduce documents that help its case. In the interest of justice we shall allow the applicant to re-open its cases and tender in relevant documents subject to the rules on admissibility of evidence.

If there is any prejudice to the respondent, it can be catered for in costs. The Tribunal notes that the applicant ought to have exercised due diligence when representing its case. Because it failed to exercise diligence it had to apply to reopen its case. The Tribunal will award the costs of this application to the respondent.

Dated at Kampala this 31st day of December 2021.

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ASA MUGENYI	**GEORGE MUGERWA**	**CHRISTINE KATWE**
CHAIRMAN	**MEMBER**	**MEMBER**