



Acorn Limited v Commissioner of Domestic Taxes (Miscellaneous Civil Application E940 of 2023) [2024] KEHC 9948 (KLR) (Commercial and Tax) (31 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9948 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E940 OF 2023**

A MABEYA, J

JULY 31, 2024

BETWEEN

ACORN LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

RULING

1. Before Court is an application dated 30/10/2024 brought under sections 1A, 1B, 3A, 79G and 95 of the *Civil Procedure Act*, Order 51 rule 1 of the *civil procedure rules*, section 32 of the *Tax Appeals Tribunal Act*.
2. In it, the applicant sought leave to appeal out of time against the judgment of the Tax Appeals Tribunal (the Tribunal) delivered on 14/07/2023. It also sought for stay of execution pending appeal and that the agency notice dated 26/9/2023 be lifted.
3. In support of the application, the applicant relied on the grounds on the face of it and the supporting affidavit of Judy Wangari Gitau sworn on even date.
4. The applicant contended that at the time the Tribunal delivered its judgment, the director was indisposed and which affected the applicant's normal operations. That the delay to institute the intended appeal was not inordinate and the applicant would stand to be greatly prejudiced if the orders sought are not granted. It was contended that the intended appeal was arguable and meritorious.
5. On its part, the respondent opposed the application vide a replying affidavit of Christopher Njoroge sworn on 8/11/2023. He averred that the appellant had not provided valid explanations for the delay and the respondent stood to suffer great prejudice if the application was allowed. That the failure by



the applicant to adhere to the statutory timelines and procedures in filing an appeal to this Court was not sufficient to grant the orders sought.

6. This application was canvassed by way of written submissions which I have considered. The issue for determination is whether the Court should extend the time for filing an appeal against the impugned decision of the Tribunal. Appeals to this Court from the Tribunal are governed by section 32 of the [Tax Appeals Tribunal Act](#) which provides that: -

“ 32.

- (1) A party to proceedings before the Tribunal may, within thirty days after being notified of the decision or within such further period as the High Court may allow, appeal to the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party.

...

- (3) The appellant shall, within thirty days, after the date of service of a notice of appeal under Section 32(1), file a memorandum of appeal with the Registrar and serve a copy on the respondent.
- (4) The Court may extend the time specified in rule 3 if the Court is satisfied that, owing to absence from Kenya, sickness, or other reasonable cause, the appellant was unable to file the memorandum of appeal within that period and that there has been no unreasonable delay on the part of the appellant.”

7. From the foregoing, it is clear that an appeal challenging a decision of the Tribunal should be lodged within 30 days by way of a Notice of Appeal. The same is to be followed by lodging a memorandum of appeal within 30 days. In the present case, the decision sought to be challenged was made on 14/7/2023. The Notice of Appeal should have been lodged by 14/8/2023. The present application was lodged on 30/10/2023 making the delay to be over two and a half months.

8. In an application for extension of time, the Supreme Court of Kenya set out the factors to be considered in the case of [Nicholas Kiptoo Arap Salat v IEBC and 7 Others](#) SCK App. No. 16 of 2014 [2014] eKLR as follows: -

“A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

1. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
2. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
3. Whether there will be any prejudice suffered by the respondents if the extension is granted;
4. Whether the application has been brought without undue delay; and;
5. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”



9. The reasons availed by the applicant for failure to file the appeal in time was that the applicant's director was unwell and therefore unable to run the affairs of the applicant during that period. I have considered the application and I note that the delay is not inordinate and the court finds the reason plausible. The respondent would not be highly prejudiced if the order for extension is granted. I find that this is a proper case to exercise my discretion and grant the extension sought.
10. On whether the stay of execution pending appeal should issue, the applications for stay of execution pending appeal are governed by Order 42 Rule 6 (2) which provides;
- “No order of stay shall be made under sub rule (1) unless-
- a) The court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay; and
 - b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
11. In *Kenya Shell v Benjamin Karuga Kibiru & another* [1986] eKLR, the Court of Appeal stated that: -
- “If there is no evidence of substantial loss to an applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”
12. In the present case, the respondent was the successful party. The respondent is a statutory body that collects revenue for the government of Kenya. It will be able to refund the monies if the appeal were to succeed. However, if a stay is not granted and the agency notice lifted, the applicant may suffer substantial loss.
13. Accordingly, I find the application to be meritorious and give the following orders: -
- a. Leave to appeal is hereby granted to appeal against the judgment of the Tribunal made on 14/7/2023.
 - b. The Notice of Appeal be filed and served within 14 days of the date hereof and the Memorandum of Appeal be filed and served within 14 days of service of the Notice of Appeal.
 - c. The interim stay is hereby confirmed on the security that was ordered on 3/11/2023 until the appeal is heard and determined.
 - d. The costs shall abide the outcome of the appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY, 2024.

A. MABEYA, FCI Arb

JUDGE

