



Commissioner of Domestic Taxes v W.E.C Lines Kenya Limited (Income Tax Appeal E156 of 2023) [2024] KEHC 10554 (KLR) (Commercial and Tax) (27 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10554 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E156 OF 2023**

**A MABEYA, J
AUGUST 27, 2024**

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

W.E.C LINES KENYA LIMITED RESPONDENT

RULING

1. This ruling determines the application dated 11/10/2023 by the appellant. It was brought under section 32 of the *Tax Appeals Tribunal Act*, Rule 10 of the *Tax Appeals Tribunal (Appeals to the High Court) rules 2015*, Order 22 rule 22, Order 42 rules 4,6 and 7, section 79G of the *Civil Procedure Act*, Order 51 rules 1 and 3 of the *Civil Procedure Rules 2010*, section 3 and 3A of the *Civil Procedure Act*.
2. The application seeks orders that the memorandum of appeal be allowed and be deemed to be properly on record. That orders for stay of execution be issued pending the hearing and determination of the application.
3. The application was supported by the grounds set out on the face thereof and the affidavit sworn by Christine Mwanja on 11/10/2023. It was contended that the time for filing an appeal against the decision of the Tax Appeals Tribunal had already expired. The delay in lodging the appeal was attributed to government bureaucracies, which resulted in the appeal being filed outside the statutory timelines.
4. The appellant argued that the appeal was filed without unreasonable delay and was justified, as it raised important legal and factual issues. Additionally, the appellant noted that the respondent would not suffer any prejudice if the extension was granted and that it would be in the interest of justice to allow the appeal to be heard and determined on merit.



5. The application was opposed vide a replying affidavit sworn by Leila Beatrice Kayoro sworn on 6/11/2023. She deponed that the appellant owed the respondent Kshs 52,673,752/- in VAT Refunds from the year 2005 to 2023 which amount continues to exacerbate.
6. It was argued that the appellant had not satisfied the conditions for a stay of execution, as it failed to demonstrate substantial loss or provide security. The appellant could not claim it would suffer loss by repaying money that rightfully belongs to the respondent. It was further stated that the funds would help the respondent replenish its cash flow and any delay in receiving the refund would be unfair to it. That it should not be prevented from enjoying the fruits of its judgment.
7. Parties filed their respective submissions which I carefully considered. The appellant submitted that the Court should exercise its discretion under section 3A and allow the appeal to be filed out of time. That the appellant should not be denied the opportunity to pursue its appeal. Counsel noted that the delay in filing the appeal was 25 days after receiving the certified copies of the proceedings and judgment. That this delay was not excessive as it had been explained.
8. Regarding the stay of execution, counsel expressed concern that it was uncertain whether the respondent would be able to refund the money if the appeal was to succeed. The respondent had not filed an affidavit of means, leaving its financial status unclear. Additionally, counsel pointed out that there had been no unreasonable delay in bringing the application to court.
9. For the respondent, it was submitted that judgment was delivered on 14/7/2023, giving the appellant 30 days to appeal, which expired on 14/8/2023. The appellant, however, filed the appeal 30 days beyond the statutory deadline without obtaining leave of Court. It was submitted that the appellant's failure to seek the court's permission before filing the memorandum of appeal violated procedural laws.
10. The respondent's Counsel submitted that the delay in filing the appeal was not adequately explained. Regarding the stay of execution, it was submitted that the appellant had not demonstrated any substantial loss it would suffer. That in any event, the appellant had not provided any security for the due performance of the decree.
11. I have carefully considered the parties' arguments in their pleadings and the submissions on record. The first issue to be determined is whether the memorandum of appeal should be considered properly filed. The appellant stated that the Tribunal delivered its judgment on 14/7/2023, prompting the appeal against that decision. However, the time allowed for filing an appeal had already expired, and the appellant attributed the delay to government bureaucracies in issuing instructions to file the appeal.
12. The timelines and procedure for filing appeals from the Tribunal are governed by section 32(1) of the [Tax Appeals Tribunal Act](#). This provision gives the court the discretion to extend the time within which an appellant may file a Notice of Appeal and a Memorandum of Appeal. It provides as follows: -

“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.”
13. Other applicable provisions are section 53 of the [Tax Procedures Act](#) and Rule 3 of the [Tax Appeal Tribunal Rules 2015 Rules](#).
14. The cumulative effect of the foregoing is that, a party has a right to appeal the decision of the Tribunal within 30 days of being notified of the decision. In [Commissioner of Domestic Taxes v Mayfair](#)



Insurance Company Ltd, ML HC ITA No 31 of 2017 [2017] eKLR, the court held that its powers and discretion to extend time are unlimited but must be exercised judiciously.

15. From the record, the decision of the Tribunal was made on 14/7/2023. The notice of appeal was served on 9.8.2023. The appeal was subsequently filed on 9/10/2023, resulting in a delay of 30 days. The Supreme Court has established additional guidelines that courts must consider when deciding on an application for an extension of time. See *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*, [2014] eKLR.
16. Some of the considerations are, the length of the delay, the reasons for the delay, public interest and the prejudice to be suffered by the other party.
17. In the present case, the delay was for only 30 days. I have reviewed the appellant's reasons for the delay and I find that the 30-day delay is not excessive. Furthermore, the respondent will not suffer any prejudice if the appeal is allowed to proceed as it is.
18. Regarding the stay of execution, I am alive to the twin requirements under Order 42 Rule 6. Rule 6(1) of substantial loss and security. The appellant contended that if the monies were released to the respondent the latter may not be able to refund the same were the appeal to succeed. I have considered that notwithstanding such a challenge, the respondent did not give any evidence to show its ability to refund the same.
19. As to security, I am alive to the fact that the applicant is the official government's revenue collector. Obviously, it is here to stay and has perpetual succession. It will be able to pay the sum any time it may be required to do so unlike many government Ministries and Departments.
20. I am alive that there is a Rapid Response initiative that has been put in place by the Principal Judge of the High Court. That if this appeal were to be filed forthwith, it can be determined before the end of October, 2024.
21. For the foregoing reasons, I find the application to be meritorious and I allow the same. Due to the time between 2005 and now that the respondent states that it is suffering for being denied the refunds it claims, I make the following orders with strict timelines: -
 - a. Time for filing the appeal is hereby extended as prayed and the Memorandum of Appeal on record deemed properly filed.
 - b. The appellant to file and serve a Record of Appeal within 7 days of this Ruling.
 - c. The respondent to file and serve its Statement of facts within 7 days of service of the Record of Appeal.
 - d. The Appellant to file and serve own submissions within 7 days of service of the Statement of facts.
 - e. The respondent to file and serve own submissions within 7 days of service of the submissions by the appellant.
 - f. Time is of the essence and any party who files any document outside the timelines set out hereinabove will result in the document being deemed struck out without the necessity of making an application for that purpose or any order for that purpose.
 - g. Matter shall be mentioned before the DR on 26/9/2024 to fix this matter in the RRI Cause List.



h. The costs of the application shall be in the Cause.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF AUGUST, 2024.

A. MABEYA, FCI Arb

JUDGE

