



REPUBLIC OF KENYA



Holwadag Construction Company Ltd v Commissioner Investigations & Enforcement (Income Tax Appeal E012 of 2023) [2023] KEHC 20134 (KLR) (Commercial and Tax) (30 June 2023) (Ruling)

Neutral citation: [2023] KEHC 20134 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E012 OF 2023
JWW MONG'ARE, J
JUNE 30, 2023**

BETWEEN

HOLWADAG CONSTRUCTION COMPANY LTD APPELLANT

AND

COMMISSIONER INVESTIGATIONS & ENFORCEMENT RESPONDENT

RULING

1. By a Notice of Motion filed under a Certificate of Urgency dated 23/2/2023 the Applicant has moved this court under sections 1A, 1B, and 3A of the *Civil Procedure Act* and articles 23(3), 159(2) and 165 (6) & (7) of *the Constitution* seeking the following orders:-
 - i. Spent
 - ii. that pending the hearing and determination of this Application inter-partes, this honourable court be pleased to stay the implementation of the Tribunal's decision as per the Judgment dated 10/2/2023 wherein it stated thus; "the Appellant's Notice of Objection lodged on the August 19, 2020 be and is hereby referred back to the Commissioner for consideration on its full merits and the Commissioner to issue an appropriate objection decision within 60 days of the date of delivery of this judgment and subject to any additional documents subsequently requested by the respondent and/or provided by the appellant in pursuant to the provisions of section 51(11)(b) of the *Tax Procedures Act*."
 - iii. That pending the hearing and determination of the Appeal, the honourable court be pleased to stay the implementation of the Tribunal's decision as per the judgment dated February 10, 2023 wherein it stated thus; "the appellant's notice of objection lodged on the August 19, 2020 be and is hereby referred back to the Commissioner for consideration on its full merits and the Commissioner to issue an appropriate objection decision within 60 days of the date



of delivery of this judgment and subject to any additional documents subsequently requested by the Respondent and/or provided by the appellant in pursuant to the provisions of section 51(11)(b) of the [Tax Procedures Act](#).”

- iv. That this honourable court do make any further orders in the interest of justice.
 - v. That costs of this Application be costs in the main Appeal.
2. The application is supported by the grounds set on its face and the supporting affidavit sworn by Natesh Daudi Abdi sworn on 22/2/2023. The Application is opposed and the respondent filed a statement of facts dated 5/4/2023 and a replying affidavit of Moses Ado, an officer of the Respondent sworn on 8/3/2023.
 3. The applicant submitted that being dissatisfied with the ruling of the Tribunal dated 10/2/2023, it lodged a Notice of Appeal at the Tribunal in accordance with the provisions of the [Tax Procedures Act](#). Subsequently, the applicant realised that the said notice was erroneous in that it appeared to challenge the entire decision of the tribunal while its intention was to challenge a portion of the said decision. On 24/2/2023 the applicant withdrew the said notice vide a Notice to Withdraw. According to the Appellant, the Notice to Withdraw was lodged after lodging the proper notice of Appeal on 22/2/2023. Thereafter, the applicant filed a Memorandum of Appeal based on the purported correct notice and proceeded to file this application under a Certificate of Urgency. The applicant therefore argues that this application is based on proper Notice of Appeal and the same was filed within the timelines set by the law and before the lapse of 30 days’ period.
 4. By this Application the applicant seeks to stay the execution of the decision of the Tribunal as it moves to challenge the same on appeal since, the Applicant argues, in the absence of an order for stay pending appeal, then the appeal would be rendered nugatory, superfluous and a mere academic exercise.
 5. On its part, the respondent opposed the application and argued that the same is not properly before the court. The Respondent contends that by filing the Notice to Withdraw the Notice of Appeal filed previously on withdrawal on before the Tribunal on 24/2/2023 the Applicant consequently rendered the intended appeal a nullity as the same cannot stand without a proper notice being in place. The Respondent argues that the subsequent Memorandum of Appeal and the current application are brought in a vacuum since section 32 of the [Arbitration Act](#), of the Tax Appeals Tribunal require that a party wishing to challenge a decision of the Tax Appeals Tribunal do file a Notice of Appeal at the Tribunal within 30 days from the date the decision it wishes to challenge is rendered. The Respondent argues that despite having been required by the court to serve the Respondent with the correct notice of Appeal, as it alleges, none has been served upon the Respondent and subsequently, urges the court to find that there is no proper Notice of Appeal before the Tribunal and dismiss the intended Memorandum of Appeal as being brought without a proper basis as provided for by the law. The Respondent further argues that even if there was a Notice of Appeal filed on 22/2/2023 the same would have been filed outside the time allowed by the law. The Respondent urged the court to find that it lacked the requisite jurisdiction to preside over this matter as there was no proper appeal before it and dismiss the application.
 6. On the second prayer for stay of execution pending appeal, the Respondent argues that the Applicant has not met the threshold set by the law under Order 42 Rule 6(2) of the [Civil Procedure Rules](#). Several conditions are necessary for an order of stay of execution of a decision to issue; namely:-
 - i. Prima facie case with a high chance of success must be established by the intended Appellant. The Appellant having withdrawn the Notice of Appeal, the Respondent argues that there is no proper appeal before the court in which the court can satisfy that there indeed existed



an arguable appeal with high chances of success. The Respondent further argues that the Appellant has failed to demonstrate that there exists an imminent danger or loss likely to be occasioned to the Appellant if the orders of the tribunal are to be implemented. Subsequently, the Respondent urges the court to find that no substantial loss to be suffered by the Appellant if the order of the Tribunal is complied and as such the issue of compensation does not arise. The Respondent urged the court to dismiss the application with costs to it.

Analysis and Determination: -

7. Section 32 of the [Tax Appeals Tribunal](#) provides as follows:-

- (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 side.
- (2) The High Court shall hear appeals made under this section in accordance with rules set out by the Chief Justice.”

Rule 3 of the [Tax Appeals Rules](#), 2015, provides as follows:-

- (3) The Appellant shall, within thirty days, after the date of service of a notice of appeal under section 32, file a memorandum of appeal with the Registrar and serve a copy to the Respondent.”

8. From the record before me, I note that the appellant insists that prior to its withdrawal of the Notice of Appeal filed on 17/2/2023, vide the Notice of Withdrawal dated 24/2/2023, filed a proper Notice of Appeal on 22/2/2023 and therefore the appeal before this court is properly filed. The Respondent on the other side argues that no such Notice was ever filed and if it was, none was served upon it and hence contravening the provisions of section 32 of the [Tax Appeals Act](#) and Rule 2 of the Tax Appeal Rules.

9. I further note from the submissions by the Applicant that it omitted to attach for the record to its supporting affidavit a copy of the said Notice of Appeal. I also further, note that the law requires that once a Notice of Appeal is filed then the same should be served upon the Respondent to confirm the Appellants intention and provide the Respondent with notice to defend the appeal. The High Court is a court of record and any party wishing to rely on a document as evidence of their claim before court is by law required to make the same available to the court. I note that despite having sworn a supporting affidavit in support of its application, the Applicant neglected to attach the said important document in which it intended to rely on, to confirm that indeed the matters before the court were properly filed and in accordance with the provisions of the law. This omission, in my view, is fatal to the application, as the court has no other way or means of ascertaining the assertions of the Applicant.

10. In the locus classic case of the [Owners of the Motor Vessel “Lillian S” v Caltex Oil \(Kenya\) Ltd](#) [1989] eKLR, Justice Nyarangi, (as he then was) stated as follows:-

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

11. It is therefore imperative that a court seized with a matter must first confirm that it is clothed with the requisite jurisdiction to hear and determine the same and once it determines that it is lacking



in jurisdiction, then it must stop and make no further steps. Having determined that there is no proper Notice of Appeal on record in this matter, the court finds and holds that it lacks the requisite jurisdiction to entertain the matter. In the circumstances therefore the court will not consider the second trajectory of the application by the Applicant.

12. In the premises therefore, the court finds that the application filed herein lacks merit. The same is hereby dismissed with costs to the Respondent. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF JUNE 2023

J. W. W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Juma holding brief for Mr. Onyango for the Applicant.
2. Mr. Josiah Kimuyu holding brief for Mr. Kamwara for the Respondent.
3. Sylvia- Court Assistant

