



Choda Fabricators Limited v Commissioner of Domestic Taxes (Income Tax Appeal E167 of 2021) [2023] KEHC 21187 (KLR) (Commercial and Tax) (28 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21187 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E167 OF 2021**

A MABEYA, J

JULY 28, 2023

BETWEEN

CHODA FABRICATORS LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

(Appeal from the Ruling of the Tax Appeals Tribunal dated 20/8/2021 in the Tax Appeal Misc. Applications No. 20 of 2021)

JUDGMENT

1. The appellant is a private company incorporated under the [Companies Act](#) and imports and sells motor vehicle spare parts and related accessories. The respondent is a principal officer of the Kenya Revenue Authority which is established under the [KRA Act](#) to assess, collect and account for tax revenue.
2. The respondent issued the appellant with demand notices for Kshs 37,925,110/- dated September 20, 2018, October 30, 2018 and January 18, 2019 giving the appellant 14 days to settle the amount.
3. The same were un-responded to and on 31/1/2019, the respondent issued agency notices to various banks and warrant of distress on the applicant's goods on 15/4/2019.
4. On 20/6/2019 the respondent wrote to the appellant conceding that it had made part payment and committed to pay the balance within 6 months. On that basis, the respondent lifted the agency notices vide his letter dated 21/6/2019.
5. On 8/10/2019, the appellant wrote a notice of objection to the tax demand. On 20/2/2020, the respondent issued fresh agency notices to recover Kshs 40,436,563/- from the appellant's bankers. On 5/3/2020, the appellant filed Misc Appln No 12 of 2020 before the Tax Appeals Tribunal ("the



- Tribunal”) seeking stay of enforcement of the agency notices and the same was granted on 25/3/2020 pending the hearing inter parties.
6. On 11/3/2020, the appellant wrote to the respondent seeking an out of court settlement and proposed to first pay Kshs 2 million and pay the balance in monthly installments of Kshs 1.5 million. That in the meantime, the matter before the tribunal be withdrawn.
 7. On 28/1/2021 the respondent issued fresh agency notices for Kshs 40,436,563/- to the applicant’s bankers. The applicant filed an application dated 24/2/2021 seeking inter alia stay of those notices and for enlargement of time within which to file an appeal. The respondent opposed the same and by a ruling dated 20/8/2021, the tribunal dismissed the same.
 8. Aggrieved by that decision, the appellant filed the instant appeal vide memorandum of appeal dated 15/9/2021 seeking to set aside that ruling and allow the extension of time as prayed for.
 9. The appeal was based on 5 grounds including that the tribunal erred by failing to take into account the issues raised in the application, that the tribunal failed to appreciate that there were substantial issues warranting extension, the tribunal failed to consider the documents filed by the appellant and relied on technicality rather than substantive justice, the tribunal failed to exercise its discretion in view of the facts before it, and that the tribunal failed to consider that the appellant was under duress due to the multiple enforcement measures by the respondent.
 10. The respondent opposed the appeal vide his statement of facts dated 8/12/2021. He contended that the tribunal correctly found that as per the annexures produced by the appellant, the appellant had admitted twice the entire amount of the tax liability and submitted a payment plan including that dated 11/3/2020 offering to pay Kshs 2 million first and Kshs 1.5 million per month.
 11. That the tribunal also correctly found that the application was inordinate and should have come before the admissions were made. That the tribunal correctly found that the admissions implied that the objection was spent and having been no objection, there was no objection decision and therefore no appeal. That the tribunal also correctly found that the admission mooted the stay orders granted in Misc App No 12 of 2020.
 12. That the tribunal was correct in finding that the respondent was justified in issuing fresh agency notices after the appellant failed to honor its commitments to pay the admitted taxes as assessed. That there being no grounds to stay the agency notices of 28/1/2021, the tribunal found that the demanded taxes of Kshs 40,436,563/- were due and payable.
 13. He therefore contended that the tribunal’s decision was in tandem with section 52(2) of the [Tax Procedures Act](#) (TPA) and urged that the appeal be dismissed.
 14. The appeal was canvassed by way of written submissions which the court has considered.
 15. In [Commissioner Of Income Tax –Vs- Mabati Rolling Mills Ltd](#) [2012]eKLR, it was held: -

“An appeal to this court is by way of a retrial and that implies that the appellate court has jurisdiction to consider whether the decision of the local committee was arrived at appropriately or not. The appellate court can confirm, reduce, increase or annul the assessment concerned or make any other order as it deems fit.”
 16. The court notes that in its submissions, the appellant submitted that it had not been accorded a fair hearing by the tribunal. This issue was never raised as a ground of appeal in the memorandum. Any



- attempt to introduce new issues or grounds of appeal vide submissions would be prejudicial to the respondent. That won't do. It is to be disregarded.
17. What was before the tribunal was an application dated 15/9/2021 for enlargement of time within which to file an appeal before the tribunal. The grounds for the application included that; the applicant had been represented by the tax agent Bon and Drew Associates and had been under the impression that the said agent had filed the appeal within the timelines as instructed by the appellant. That the tax agent had failed to communicate to the appellant and was not traceable. That failure to file the appeal on time was occasioned by the said agent and the mistake ought not have been visited upon the appellant.
 18. Though the tribunal found that the appellant had raised grounds for the appeal suggesting that the appeal was arguable, the tribunal found that from the annexures produced by the appellant, the taxes had been admitted twice and a payment plan proposed by the appellant. Therefore, the tribunal found that there was inordinate delay in bringing the application that the same ought to have been brought before such admissions were made.
 19. The tribunal also found that the admissions implied that the appellant's objection was spent and if there was no objection, there was no objection decision to appeal against. There was also a finding that though the appellant had obtained stay orders in Misc No 12 of 2020, the appellant had later on admitted the tax demand rendering the orders therein moot. The fresh agency notices were also found to have been justified.
 20. Those are the findings that are being challenged in this appeal.
 21. Section 13(1)(b) of the *Tax Appeals Tribunal Act* 2013 (TATA) provides: -

“A notice of appeal to the tribunal shall be submitted within 30 days upon receipt of the decision of the Commissioner.”
 22. Section 13(2) of the *TATA* provides that within 14 days of filing a notice of appeal, the appellant shall submit copies of the memorandum of appeal, statements of facts and tax decision.
 23. Section 13(3) of the *TATA* grants the tribunal the power to extend for the filing of an appeal. Section 13(4) thereof provides the grounds upon which such extension may be granted. These are that; if it is found that the applicant was unable to submit the documents because of either sickness, absence from Kenya or any other reasonable cause.
 24. These conditions are similarly provided for under rule 10(3) of the *Tax Appeals Tribunal (Procedural) Rules 2015*.
 25. In *Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 Others* (2014) eKLR, it was held that: -
 - a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
 - b. A party who seeks for extension of time has the burden of laying the basis to the satisfaction of the court.
 - c. Whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis.
 - d. Whether there is a reasonable reason for delay, the delay should be made to the satisfaction of the court.



- e. Whether there will be prejudice suffered by the Respondent if the extension is granted.
 - f. Whether the application for extension has been brought without undue delay.
26. In *Hellen Muthoni Njiru v Commissioner of Domestic Taxes* [2021] eKLR, it was held that: -
- “In granting leave, the court has to balance the competing interests of the applicant with those of the respondent, a position well stated in the following paragraph extracted from *M/S Portreitz Maternity v James Karanga Kabia*:-[3]
- “That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”
27. In the present case, the appellant’s explanation for failing to file the appeal on time was that its agent was instructed to file the appeal but failed to do so and was not traceable. There was however no evidence tendered to allegation. There was no documentation produced before the Tribunal to indicate that the said agent had been instructed to file the appeal but failed to. Neither was there any communication on follow ups or at all to satisfy the Tribunal that there was reasonable cause to justify the extension of time.
28. The application was brought on 24/2/2021 after the respondent had issued fresh agency notices dated 28/1/2021. There was no valid explanation why the appellant failed to file an appeal in time. This Court is not convinced that the application was merited and the Tribunal was right in its decision.
29. The other issue is that, the appellant did not refute nor deny that it had admitted the demanded taxes. It had given a repayment plan with the respondent after raising its objection albeit late on 3/10/2019. The Tribunal cannot be faulted by equating the admission to the demand to the vacation of the objection by the appellant.
30. This court thus finds that the appellant did not meet any of the grounds to justify the granting of leave by the Tribunal as sought.
31. Though the appellant attempted to argued that its objection was deemed to be accepted, that cannot hold since the appellant had itself admitted the taxes and proceeded to enter into an out of court settlement with the respondent. This was after it had raised its objection and filed an application wherein it committed to pay the demanded taxes in a payment plan including the proposal dated 11/3/2020 offering to pay Kshs 2 million first and Kshs 1.5 million per month.
32. The appellant proceeded to pay the Kshs 2 million but failed to honor its commitment to pay a monthly amount of Kshs 1.5 million per month. The conduct of the appellant implied that the objection and application for stay had been vacated and the debt admitted.
33. Having negated its commitment, the respondent was justified in issuing fresh notices. This court agrees with the tribunal’s finding that there was no justifiable basis to stay or set aside the agency notices of 28/1/2021.
34. There is nothing to show that the tribunal misdirected itself in its finding that the application was unmerited. The Tribunal’s finding was sound and the appellant has not established any grounds for the setting aside of the Tribunal’s ruling.
35. The upshot is that the appeal is without merit and is hereby dismissed with costs to the respondent. It is so decreed.



DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2023.

A. MABEYA, FCIArb

JUDGE

