



Commissioner of Domestic Taxes v Gulf Badr Group (K) Limited (Income Tax Appeal E141 of 2023) [2023] KEHC 26391 (KLR) (Commercial and Tax) (30 November 2023) (Ruling)

Neutral citation: [2023] KEHC 26391 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E141 OF 2023**

A MABEYA, J

NOVEMBER 30, 2023

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

GULF BADR GROUP (K) LIMITED RESPONDENT

RULING

1. This is a ruling on two (2) Motions by the appellant and the respondent, respectively. The 1st Motion is dated 9/10/2023 by the respondent. It seeks to strike out the Memorandum of Appeal dated 8/9/2023 while the appellant's Motion dated 2/11/2023, seeks the enlargement of time within which to file the Memorandum of Appeal against the ruling of the Tax Appeals Tribunal delivered on 14/7/2023 and consequently deem the memorandum of appeal dated 8/9/2023 as duly filed and served.
2. The two applications being two sides of the same coin, were argued together. The application for striking out the Memorandum was brought under Rules 3 and 5 of the Tax Appeals Tribunal (Appeals to the High Court) Rules 2015 ("the Rules") while the one for extension of time was predicted Rule 4 of the Rules and Section 32 of the *Tax Appeals Tribunal Act* (TAT).
3. For the striking out application, it was contended that the judgment of the Tax Appeals Tribunal ("the Tribunal") was delivered on 14/7/2023, a Notice of Appeal and Memorandum against the same were filed on 11/8/2023 and 12/9/2023, respectively. That the Memorandum of Appeal together with the requisite documents were supposed to be filed by 10/9/2023. That the Memorandum that was filed was defective as it was not accompanied by the requisite documents as required by Rule 5 of the Rules.
4. That due to the defectiveness of the said Memorandum, the respondent was unable to file its statement of facts. In the premises, the same should be struck out.



5. The application was opposed vide an undated replying affidavit of Victor Andambi Chabala and the Motion for the extension of time dated 2/11/2023. It was contended for the applicant that the unsigned copy of the judgment was availed to the parties on 14/7/2023. On 7/9/2023, the appellant sought for the certified copies of the proceedings and judgment from the Tribunal but none had been supplied. That Mr. Chabala, Advocate inadvertently failed to serve the holding Memorandum of Appeal upon the respondent after he had filed the same. That he understood that he should have lodged the Memorandum together with a signed and certified copy of the judgment in terms of Rule 5 of the Rules and Order 20 (3) (1) of the Civil Procedure Rules. That none of the parties was in possession of the signed copy of the judgment as at the time of the application. That the Court has the discretion to allow the filing of and/or admit an unsigned judgment.
6. The applications were argued orally by Mr. Ruto and Mr. Chabala. I have considered the said able submissions as well as the authorities relied on by Learned Counsels. The authorities included; Kisii Petroleum Vs Kobil (2006) eKLR, Bwana Mohamed Bwana Vs. Silvanus Buko Bonaye (2014) eKLR, Andrew Kiplagat Chamaringo Vs Paul Kipkorir Kibet (2018) eKLR and Orarao & Rachier Vs Cooperative Bank (2001) eKLR.
7. Before delving into the merits of the applications, I think it is imperative to comment on an issue of concern. Our Constitution 2010 sought to rein in on the uncaring attitude that hitherto existed in public service. It called upon each institute, Public and States Officers to be guided by the principles set out in Article 10 thereof. These includes accountability, transparency, patriotism, integrity amongst others.
8. It is absolutely unacceptable at this time and age for a Judicial Body or Officer, for that matter, to make a decision (read judgment or ruling) that determines and affects the rights of citizens and sits on the same. There is no property in a judgment or ruling once delivered. It is absolutely unacceptable that the Tribunal will make a determination, deliver a judgment and fail to have it signed and supplied to the parties. There are timelines in tax matters and the same have drastic consequences both to the tax payers and the national economy. Lately, this Court has observed with consternation that appeals from that Tribunal are either delayed or not filed at all because of delay in releasing to the parties signed judgments and/or proceedings in time or at all.
9. The culture of holding a delivered judgment or ruling MUST stop. The earlier the Judiciary Administration reins on this unlawful unconstitutional and undesirable tendency the better. We cannot achieve the desired social transformation when we cannot enable litigants access justice in time or at all. When a decision is withheld for over 60 days, access to justice is defeated.
10. I make these observation because of the many appeals that have come before this Division but cannot be prosecuted because “signed judgments” or proceedings have not been supplied by the Tribunal. Justice must be delivered without delay (Art 159 (2) (b). The Tribunal is obviously in persistent in breach of this.
11. So much about the Tribunal. In the applications before me, it is not in dispute that because of the special nature of tax matters, strict timelines are set by the statutes (the TAT and the [Tax Procedures Act](#) “TPA”) and the Rules. Since tax liability is periodic, on a 12-month cycle, actions required to be undertaken in respect of tax processes as well as disputes are time bound.
12. Decisions from the Tribunal should be appealed against within 30 days of delivery by lodging a Notice of Appeal (Section 32 of the TAT). This is followed by the lodgment and service of the Memorandum of Appeal within 30 days after service of the Notice of Appeal (Rule 3 of the Rules). Rule 5 requires



- that that Memorandum be accompanied by a copy of the decision appealed against, the Notice of Appeal and all the documents supporting the appeal.
13. The application for striking out the appeal is based on two grounds; that the appeal was filed and served out of time and that the Memorandum that was served was not accompanied by the relevant documents required under Rule 5.
 14. On the time and service, the respondent contended that the Memorandum of Appeal was filed within time, 8/9/2023, but served late on 12/9/2023. The appellant contended otherwise. It contended that the Memorandum of Appeal was filed and served on 12/9/2023, which was outside the statutory time.
 15. I have looked at the Court Tracking System for the Division. I have confirmed that the Memorandum of Appeal was filed and paid for on the 8/9/2023. Accordingly, that was within time as the last day for filing was 10/9/2023.
 16. However, there was admission that the same was served late, 12/9/2023. The respondent urged through its application dated 4/11/2023 that that breach be excused because its advocate was still pursuing the certified copies of the proceedings and signed copy of the judgment from the Tribunal.
 17. In an application for extension of time, the Court looks at the length of the delay, the reason for delay, the period taken to apply for extension of time and the prejudice if any to be suffered by the opposite party.
 18. In the present case, the delay in service was for 2 days, between the 10th and 12th September, 2023. The delay was not inordinate.
 19. As for the reason, it was contended that the advocate for the respondent misapprehended the law. That he thought that he required to have the certified copies of the proceedings and the signed copy of judgment. I think that was a mistake in understanding the Rules. The practice and procedures of the Court of Appeal is not applicable to appeals to this Court. Under the Rules, there is no requirement for a certified copy of proceedings. All that is required are the documents set out in Rule 5 of the Rules, copy of the decision, a Notice of Appeal and documents supporting the appeal.
 20. I will excuse the respondent for the reason that it did not have a copy of a signed judgment. A copy of the decision appealed against is crucial document to sustenance of an appeal. It would be a monumental breach of the rules for the Memorandum of Appeal to fail to be accompanied by the decision appealed against.
 21. In the present case, it was averred and not denied that, up to the time of arguing the applications, the signed copy of the judgment had not been availed by the Tribunal. The Court saw the letters bespeaking these documents from the Tribunal.
 22. As regards the prejudice to be suffered by the applicant, this is delayed enjoyment of the fruits of its judgment. Since the period from the date of delivery of judgment and the application for extension is not long that delay is not inordinate and the prejudice is therefore minimal. I will therefore excuse the delay for service.
 23. The other issue is the filing and service of the Memorandum of Appeal without the requisite documents set out in Rule 5. I agree with the applicant that a mere Memorandum of Appeal without the documents set out in Rule 5 is susceptible to striking out. All that is needed is a copy of the judgment/decision of the Tribunal and the documents to be relied on. These documents having been exchanged before the Tribunal are expected to be in the possession of the parties.



24. Accordingly, I hold that where a signed copy of the judgment or decision is available, an applicant should lodge the appeal with all the documents in his/its possession within the time stipulated by the Rules. Copies of proceedings can be introduced later by way of a Supplementary Record. That way, the timelines set out for hearing of the appeals before this Court both by the Statutes, Rules and Performance Management and Measurement Unit would be achieved and/or realized.
25. In the present case, as already stated, even a signed copy of the judgment had not been obtained from the Tribunal as at the time the application were being argued before me. That being a crucial document under Rule 5(e) of the Rules, I will excuse the delayed service of the Memorandum.
26. Accordingly, I find the application dated 9/10/2023 to be without merit and dismiss the same. The application dated 4/11/2023 is meritorious and is allowed. However, in the circumstances of this case, the costs of the applications are awarded to the tax payer capped at Kshs. 20,000/=.
27. In order to avoid any further delay, I direct that a compliant Memorandum of Appeal be filed and served within 14 days. The statement of facts be filed and served within 14 days of service. Parties to file and exchange submissions within 30 days of service of the Statement of Facts on a 15 days' basis.
28. In the meantime, the Deputy Registrar to ensure that this Ruling is served upon the Tribunal and is brought to the attention of the CRJ for necessary action.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2023.

A. MABEYA, FCIArb

JUDGE

