



Kimani v Commissioner of Domestic Taxes KRA (Miscellaneous Application E586 of 2021) [2022] KEHC 10192 (KLR) (Commercial and Tax) (24 June 2022) (Ruling)

Neutral citation: [2022] KEHC 10192 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E586 OF 2021**

A MSHILA, J

JUNE 24, 2022

BETWEEN

FRANCIS NDERU KIMANI APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES KRA RESPONDENT

RULING

1. The Notice of Motion dated 28th July 2021 was brought under Section 32 of the [Tax Appeals Tribunal Act](#) No.40 of 2013; it was supported by the grounds on the face of it and by the sworn Affidavit of Francis Nderu Kimani who sought for orders that;
 - a. The execution of the decree /Judgment extracted from the Tribunal be stayed pending the hearing and determination of this Application.
 - b. The Appellant be granted leave to appeal out of time.
 - c. The execution of the decree /Judgment extracted from the Tribunal be stayed pending the hearing and determination of this Appeal.
 - d. The Applicant be granted leave to provide additional evidence and the Respondent a chance to cross examine and respond to the same.
 - e. Cost of this Application be provided for.
2. The Applicant stated that if the Respondent is allowed to proceed with implementing the judgment then the Applicant who cannot even afford the said assessment will result in closing of his business, and may even face dire consequences due to the misrepresentation of the facts before the tribunal.



3. The Appellant stands to suffer irreparable damage as the assessment done was not correct and has a good case for appeal as his evidence was not considered by the tribunal.
4. There will be no prejudice that will be suffered by the Respondent herein.
5. The Respondent responded to the Application vide the Replying Affidavit dated 14th September 2021.

Applicant's Case

6. It was the Applicant's submission that the judgment was delivered on the 28th May 2021 dismissing the Applicant's Appeal and upheld the Respondent's objection decision dated 3rd July 2018 for Kshs.10, 674,320.60. The Applicant learned of the same on June 2021 through the accountant who was representing him. The Applicant immediately sought for stay orders in the tribunal on the 2nd July 2021 and when the matter came up for hearing the tribunal stated that it became functus officio on the 6th August 2021. That on the same day the Applicant filed this matter before this court. That the Appellant is yet to receive the proceedings but has annexed the Memorandum of Appeal. The length of the delay was approximately 35 days.
7. While relying on Order 42 Rule 6(2) of the Civil Procedure Rules, the Applicant submitted that he has sought stay of execution since he stands to suffer irreparable damage and his intended appeal will be rendered nugatory should the Respondent be allowed to execute the said judgment.
8. Further, the Applicant argued that the Respondent has not opposed the Application. The Memorandum of Appeal has been annexed and the letter requesting for written proceedings as well.
9. The Applicant submitted that he did not adduce any evidence in an affidavit at the tribunal and only relied on submissions and annexed documents which were not considered by the tribunal for the sole reason that the Respondent did not get the chance to respond to the said document even though it originated from them.
10. The Applicant submitted that the application had merit and prayed that it be allowed.

Respondent's Case

11. In response it was the Respondent's submission that the Court has the power to extend time within which to file an Appeal as laid out under Rule 4 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015.
12. The grounds under which such an Application for extension of time to file an Appeal can be granted are set out under Section 13(4) of the TAT Act which provides: "An extension under subsection (3) may be granted owing to absence from Kenya, or sickness, or other reasonable cause that may have prevented the Applicant from filing the Notice of Appeal or submitting the documents within the specified period."The Applicant has failed to set out any reasonable cause that can prompt the Court to grant orders for extension of time to file an appeal.
13. The Respondent relied on the case of; Manuchar Kenya Limited v Commissioner of Domestic Taxes [2020] eKLR where the Court stated that a party, who seeks to revive its right of appeal must explain the delay, the reason for that delay which must be reasonable in the circumstances.
14. The Respondent averred that the Objection Decision was issued on the on 3rd July 2018 confirming the demand of taxes, being Income Tax of Kshs.11, 512,820.86 and VAT of Kshs.838, 500.26. The Applicant appealed against the Objection Decision at the Tax Appeals Tribunal on the 2nd August, 2018 and judgment was delivered on the 28th May, 2021 in favour of the Respondent.



15. Thereafter, the Respondent demanded for the payment of the Kshs.18, 858,843.43 tax arrears vide a demand letter dated 16th June, 2021. The Applicant sought for review of the judgment at the Tax Appeals Tribunal vide an application dated 30th June, 2021 but later withdrew and filed the Application herein.
16. The taxes in issue accrued on 3rd July, 2018 and if at all the Court is inclined to grant the stay of execution orders then the Applicant should be ordered to pay half the taxes to the Respondent and issue a bank guarantee for the remaining half.
17. The Respondent submitted that the Applicant cannot seek to rely on a document which was not availed to the Respondent during the objection stage as the same will amount to introduction of new grounds which the Respondent did not have a chance to respond to before the Appeal.
18. In addition, the Applicant was given adequate opportunity to prosecute it's Appeal at the Tax Appeals Tribunal but failed to put in the evidence in support of the Appeal and cannot now start clutching at straws after judgement; and urged the court to disallow the application.

Issues for Determination

19. The Court has considered the pleadings and the written submissions herein and has framed the following issues for determination;
 - a. Whether the Appellant should be granted leave to file an appeal out of time;
 - b. Whether an order of stay of execution pending appeal should issue;
 - c. Whether the Applicant should be granted leave to provide additional evidence and the Respondent given a chance to respond to the same?

Analysis

Whether the Appellant be granted leave to file an appeal out of time;

20. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR set out the considerations to guide the court in exercising its discretion in cases seeking extension of time. It stated:
 - i. 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;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. Whether the application has been brought without undue delay; and



- vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
21. The Application was brought under Section 32 of the [Tax Appeals Tribunal Act](#) which provides;
- “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.
- (2) The High Court shall hear appeals made under this section in accordance with rules set out by the Chief Justice.”
22. Rules 3 & 4 of the Tax Appeals Tribunal (Appeals to The High Court) Rules, 2015 provide;
- “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.”
23. Further, Section 53 of the [Tax Procedures Act](#), 2015 (“the TPA”) which is an Act that consolidated the procedural rules for administration of tax laws in Kenya provides for a right of appeal to the High Court as follows:
- “53. A party to proceedings before the Tribunal who is dissatisfied with the decision of the Tribunal in relation to an appealable decision may, within thirty days of being notified of the decision or within such further period as the High Court may allow, appeal the decision to the High Court in accordance with the provisions of the [Tax Appeals Tribunal Act](#), 2013 (No. 40 of 2013).”
24. The Applicant herein did not state that he was absent from Kenya or that he was sick. The one ground left to be relied on can only be ‘other reasonable cause’. Did the Applicant have other reasonable cause to warrant the extension of time?
25. The reasons availed by the Applicant for failure to file the Appeal in the specified time was that the judgment was delivered on 28th May 2021 dismissing the Applicant’s Appeal. The Applicant learned of the same in June 2021 through the accountant who was representing him. The Applicant immediately sought for stay of execution orders from the tribunal on the 2nd July 2021 and when the matter came for hearing the tribunal stated that it was now functus officio n 6th August 2021. That on the same day the Applicant applied to have this matter filed before this court.
26. The Applicant filed the matter before this Court on 6th August 2021 that the length of the delay of thirty-five (35) days was not inordinate. Considering the circumstances of the case and the reasons given by the Applicant for the delay occasioned at the Tribunal, this court finds that there is a reasonable and satisfactory explanation given for the delay.



Whether an order of stay pending appeal should issue?

27. 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.

28. 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.”

29. The court agrees that substantial loss takes various forms and in this case the Applicant was apprehensive that if the Respondent is allowed to proceed with implementing the judgment then the Applicant will close his business. The closure of the business will evidently occasion substantial loss to the Applicant.

30. The Respondent urged the Court to order the Applicant to pay half the taxes to the Respondent and issue a bank guarantee on the remaining half. On the other hand, the Applicant was silent on the issue of security.

31. It is paramount for the Court to balance the interests of the parties, a successful party who wants to enjoy the fruits of the litigation and the dissatisfied litigant who prefers an appeal against that judgment. The court therefore concurs with the Respondent’s submission that the Applicant should provide security as a condition for the grant of the stay of execution order.

Whether the Applicant should be granted leave to provide additional evidence and the Respondent given a chance to respond to the same?

32. At this juncture, the Court will not address nor make a substantive determination on this issue as it is found to be premature. This is an issue that the Court will deal with after the substantive appeal has been filed or at the time of hearing the Appeal.

Findings and Determination

33. In light of the above, the court makes the following findings and determinations;

- i. The application is found to be partially meritorious;
- ii. The Appellant is hereby granted leave to appeal out of time; the Record of Appeal be filed and served within thirty (30) days from the date hereof;
- iii. The execution of the decree /Judgment extracted from the Tribunal is hereby stayed pending the hearing and determination of this Appeal; on condition that the Applicant pays the sum



of Kenya Shillings One Million (Kshs.1,000,000/-) as taxes to the Respondent within thirty (30) days from the date hereof;

- iv. The Application to be granted leave to provide additional evidence is found to be premature at this stage and is hereby disallowed; the applicant at liberty to re-visit the issue once the Appeal has been filed.
- v. The costs of this Application be borne by the applicant.

Orders Accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

HON. A. MSHILA

JUDGE

In the presence of;

Nyabuto holding brief for Gatheca for the Applicant

Miss Githu for the Respondent

Lucy-----Court Assistant

