



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI COMMERCIAL AND TAX DIVISION

MISC. APPLN. NO. E1042 OF 2020

THE COMMISSIONER OF INCOME TAXES.....APPLICANT

VERSUS

LOCAL PRODUCTIONS (K) LIMITED.....RESPONDENT

RULING

1. By a Motion on Notice dated 9/9/2020, the applicant applied under ***Order 51 Rule 4 of the Civil Procedure Rules 2010, Rule 4 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015, Article 159 of the Constitution of Kenya and sections 1A, 1B & 3A of the Civil Procedure Act*** for extension of time for the filing of the Memorandum of Appeal and that the Memorandum annexed to the application to be deemed to have been duly filed and served.
2. The application was grounded upon the grounds set out in the body of the Motion and in the supporting affidavit of **Twahir Alwi Mohamed** sworn on 9/9/2020. The grounds were that; the judgment sought to be appealed from was delivered on 17/12/2019. Whilst the deponent was on leave, his colleague filed a Notice of Appeal on 18/12/2019 without notice to him.
3. When the deponent resumed, he filed yet another Notice of Appeal on 14/1/2020 and subsequently filed an appeal predicated thereon. That appeal was struck out as it was filed out of time.
4. The deponent swore that had he known that his colleague had already filed the Notice of Appeal of 18/12/2019, he would have filed a Memorandum of Appeal instead of filing another Notice of Appeal. That it is for that reason that the applicant sought to have the time for filing an appeal to be extended.
5. The application was opposed vide the Grounds of Opposition dated 29/10/2020 and the Replying Affidavit of **Timothy Okwaro** sworn on 30/10/2020. It was contended that this Court has no jurisdiction to make the order sought as there was no valid Notice of Appeal under ***section 32(1) of the Tax Appeals Tribunal, 2013***. That mistake of counsel does not constitute 'other reasonable cause' under ***Rule 4 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015***.
6. It was further contended that the reasons being advanced were similar to those put forward in opposition to strike out the appeal. That there was delay in bringing the application and that there was no evidence to support the application. That the respondent continued to be prejudiced as there was delayed refund of the decreed sum as had been ordered by the Tribunal.
7. It was submitted for the applicant that the ruling of **Majanja J** that struck out the applicant's appeal recognized that the applicant had lodged its Notice of Appeal on 20/12/2019. That on the authority of **Pithon Waweru Maina v. Thuka Mugiria [1983] eKLR** a mistake of counsel should not be visited on a litigant. That as per **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Another [2018] eKLR**, the applicant had advanced plausible reasons for the grant of the orders sought. The Court was urged to disregard technicalities and determine the matter on substantive justice.
8. For the respondent, it was submitted that; the applicant was out to waste judicial time having filed its submissions out of time. That the applicant had not correctly re-started the appeal as its appeal was struck out together with the notices of appeal. The cases of **Trimborn Agricultural Engineering Ltd v. David N. Kabaiku & 2 Others [2002] Eklr**, **Mechanical Engineering Plant & 2 Others v. Standard Chartered Bank Kenya Ltd [2009] Eklr**, **Vantage Road Transporters Ltd & Another v. Valji Naran Mulji & 5 Others [2008] Eklr** were relied on in support of that submission.
9. It was further submitted that since there was no Notice of Appeal and considering the nature of the orders sought in the Motion, this Court did not have jurisdiction to grant the same. That the Court had no power to grant a relief not sought. The case of **Malindi Air Services & John M. Cleave v. Halima Abdinoor Hassan CA No 69 of 2000 (UR)** was relied on in support of that submission.

10. The respondent further submitted that the applicant had not met the requirements under **Rule 4 of the Tax Appeals Tribunal (Appeals to the High Court) Rules** (hereinafter “the Rules”) for granting an extension of time. That the reason given for failure to file the appeal on time was the mistake of counsel which does not fall within the scope of ‘*other reasonable cause*’ under **Rule 4** of the Rules. The cases of **Northern Province Labour Utilization Board v. The Commissioner of Income Tax [1960] HCT** and **Barclays Bank of Kenya Ltd v. Commissioner General & Another [1998] Eklr** were relied on for that proposition.
11. Finally, it was submitted that due to the dilatory conduct of the applicant, it was not deserving of the Court’s assistance. That the applicant was aware of the defect of its appeal way back in March, 2020 but did not seek to rectify the mistake. Further that the applicant had failed to give reasons for its objection decision and failing to consider the additional information supplied by the respondent.
12. That there would be prejudice to be suffered by the respondent if the orders sought were granted. The Court was urged to dismiss the application.
13. This is an application for leave to lodge a Memorandum of Appeal out of time. In my view, the principles applicable would be, the length of the delay, the reason for the delay and the prejudice, if any, to be suffered by the opposite party.
14. On the length of the delay, the decision sought to be appealed against was made on 17/12/2019. The appeal that was filed in respect thereof, **HC ITA No. 007 of 2020**, was found to be fatally defective and was struck out on 1/9/2020. The present Motion was lodged on 9/9/2020. Between the striking out of the appeal and the preferring of the present application, there was a delay of 9 days. In my view, the present application was brought timeously.
15. As to the reason for the delay, the applicant contended that its advocate who had the conduct of the matter, **Mr. Twahir Alwi Mohamed**, was on leave when the decision appealed against was delivered. A Notice of Appeal dated 18/12/2019 was filed on the same day by a colleague of **Mr. Twahir**. When **Mr. Twahir** resumed, oblivious of the earlier Notice of Appeal, he filed yet another Notice of Appeal on 14/1/2020 which was still within time. An appeal that was filed based on the second Notice of Appeal was held to be out of time.
16. Accordingly, it was the mistake of **Mr. Twahir Advocate** of failing to ascertain that a Notice of Appeal had been lodged on 18/12/2019 and to file an appeal on that basis that caused the delay. It was clearly a mistake of Counsel. The question which the Court will determine later on is, whether mistake of Counsel is a reasonable cause under **Rule 4 of the Rules**.
17. It was the respondent’s contention that the appeal having been struck out, both Notices of Appeal dated 18/12/2019 and 14/1/2020 went with the said appeal. That there was no Notice of Appeal upon which an extension of time for filing a Memorandum of Appeal can be predicated on. That in the premises, the process of appeal had not been correctly re-started and the application had no legs to stand on.
18. I have considered the record. The Motion that led to the striking out of the appeal was predicated on the basis that, the Notice of Appeal against the decision of 17/12/2019 was filed on 18/12/2019. That the second Notice of Appeal was invalid. **Majanja J** who heard the application found that the appeal should have been filed by 20/1/2020. He struck out the appeal.
19. I agree with the submission of the respondent that, once an incompetent appeal has been struck out, out goes with it all the documents filed in support of it including the Notice of Appeal that commenced the appeal. In this regard, both the Notices of Appeal dated 18/12/2019 and 14/1/2020 were struck out vide the ruling of 1/9/2019.
20. That being the case, there is no Notice of Appeal on record upon which a Memorandum of Appeal sought to be filed or already filed can be predicated upon. The practice obtaining in the Court of Appeal is applicable here. This is that once an appeal has been struck out, the appellant should re-start the process by way of a Notice of Appeal. In this regard, the applicant should have prayed for not only the extension of time to file the memorandum of appeal but also the Notice of Appeal. See **Trimborn Agricultural Engineering Ltd v. Dvid N Kabaiku (supra)** and **Murata Sacco Society Ltd v. Banking, Insurance Finance Union (Kenya) [2019] eKLR**.
21. The second objection was that since there was no prayer for extension of time within which to file a Notice of Appeal, the Court has no jurisdiction to grant the orders sought. I have already found that both the Notices of Appeal filed by the applicant went with the striking out of the appeal. There is therefore no Notice of Appeal on record on which the proposed appeal may be predicated upon.
22. My reading of **Rule 4 of the Rules** is that, that Rule is to be invoked once the process of appealing has been set into motion. The process of appeal is set in motion by the filing of a Notice of Appeal under **section 32 of the Act**. Since there was no prayer for leave to file a Notice of Appeal out of time, none can be granted.
23. In **Malindi Air Services Ltd & Another v. Halima Abdinoor Hassan (supra)**, the Court of Appeal was categorical that: -
- “These THREE orders did not form part of the prayers sought by the plaintiff on the Chamber Summons. The law is very clear that a court has no power to grant a relief which a party has not expressly prayed for unless, of course, it is ancillary”.**
24. The view I take is that, the filing of the Notice of Appeal is not ancillary to an application under **Rule 4 of the Rules**. Its filing out of time should be prayed for specifically where an appeal has been struck such as in this case. It is only then that one can have locus standi to seek to invoke the remedy under Rule 4.
25. Accordingly, without there being a valid or any Notice of Appeal in force in this matter, this Court has no jurisdiction to entertain an application for extension of time under **Rule 4 of the Rules**.
26. The other objection was that mistake of Counsel does not fall within the scope of ‘*other reasonable cause*’ under **Rule 4**. That the

grounds set out under that rule are for physical impediment to the filing of the appeal within the timelines given.

27. **Rule 4 of the Rules** provides: -

“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 the period and that there has been no unreasonable delay on the part of the appellant”.

28. I have considered the submissions of the respondent on this issue. I have also carefully considered the two authorities of **Nothern Province Labour Utilization Board v Commissioner of Income Tax (supra)** and **Barclays Bank of Kenya Limited v. Commissioner General & Another.** These two decisions held that the grounds under the precursor to **Rule 4** aforesaid were only those that amounted to physical impediment. That the words ***‘other reasonable cause’*** should be read ejusdem generis with the words absence from Kenya and sickness.

29. My view is that the said decisions are distinguishable. The use of the disjunctive term ***‘or’*** immediately after the words; ***absence from Kenya and sickness*** was meant to differentiate those words from the following ***other reasonable cause***. If it was the intention of the Legislature that the words ***other reasonable cause*** was to be ejusdem generis the earlier words, the legislature would have used the conjunctive term ***‘and’*** and not ***“or”***.

30. In any event, the said decisions were made in 1960 and 1998, respectively. This was way before 2010. After 2010, there was introduced the notion of overriding objective and the interpretation of the law in a wide manner with a view to extending rights rather than stifle them.

31. The interpretation of the law in pre 2010 was restrictive in nature which stifled rights rather than embrace substantive justice. In my view, the words ***‘other reasonable cause’*** under **Rule 4 of the Rules** refers and connotes all and any reason which the Court will find reasonable, and not necessarily physical impediment as contended by the respondent. In this regard, I reject the invitation that mistake of counsel is not a ground for extension of time under Rule 4 as contended by the Respondent.

32. As regards prejudice, the respondent contended, and it was not denied that the continued withholding of the refunds ordered had adversely affected its cash flow.

33. For the foregoing reasons, I find that the application has no merit and the same is hereby dismissed with costs to the respondent.

DATED and **DELIVERED** at Nairobi this 21st day of **January, 2021**.

A. MABEYA, FCI Arb

JUDGE