



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

TAX APPEAL NO. E096 OF 2020

BETWEEN

COMMISSIONER OF DOMESTIC TAXES.....APPELLANT

AND

SAMRAT SUPERMARKETS LIMITED.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Tax Appeal Tribunal at Nairobi delivered on 21st August 2020 in Tax Appeal No. 190 of 2018)

RULING

Introduction and Background

1. On 21st August 2020, the Tax Appeals Tribunal (“the Tribunal”) allowed the Respondent’s appeal against the Commissioner’s (“the Commissioner”) decision disallowing the Respondent’s objection.
2. The Commissioner has appealed against the Judgment by the Memorandum of Appeal dated 24th September 2020. The Respondent has now moved the court by the Notice of Motion dated 2nd March 2021 under **Rule 3** of the ***Tax Appeal Tribunal (Appeals to the High Court) Rules, 2015*** (“the **Rules**”) seeking to strike out the Memorandum of Appeal.
3. The application is grounded on the supporting affidavits of the Respondent’s counsel, Charles Gitonga, sworn on 2nd February 2021 and that of Alex Mwangi Thuku, an accountant of the Respondent, sworn on even date respectively. In opposition to the application, the Commissioner has filed a replying affidavit of its supervisor in its Legal Services Division, Richard Ngari, sworn on 17th March 2021.

The Application

4. The Respondent’s application seeks to strike out the Commissioner’s Memorandum of Appeal dated 24th September 2020 on the ground that it was served on 26th January 2021 and that this service was outside the time period of 30 days stipulated by **Rule 3** of the **Rules** and without leave of the court. It contends that the service upon it 146 days after service the Notice of Appeal amounts to unreasonable delay within the meaning of **Rule 4** of the **Rules**.
5. The Respondent contends that the failure to serve an appeal within time and without complying with statutory conditions is not a mere technicality that can be overlooked, it goes to the competence of the appeal hence the Memorandum of Appeal dated 24th September 2020 is incompetent, improperly on record and ought to be struck out.

The Commissioner’s Reply

6. Mr Ngari, on behalf of the Commissioner, depones that he prepared the Record of Appeal and had the same scanned into electronic *PDF* format for purposes of filing at the High Court on 24th September 2020 and that on the same day emailed the first bundle of pages 1-500 to its internal process server Mr Charles Kamonji and also copied the same to the Respondent’s email address on the KRA *iTax* System. The

Commissioner adds that on the same day, he emailed the remaining pages in a series of four consecutive emails with a copy to the Respondent's former counsel on record and the Respondent's official email on the iTax system.

7. The Commissioner states that on the following day, after official court assessment, a receipt for payment was issued and later when the matter was mentioned before the Court, in the absence of the Respondent, it sought and obtained leave to serve the Record of Appeal, which order, the Commissioner maintains has not been varied, set aside or stayed. The Commissioner avers that upon obtaining the said order it arranged to have the appeal served physically on the Respondent at its office in Nyeri on 26th January 2021.

8. The Commissioner contends that justice ought to be served without regard to technicalities and it therefore opposes the Respondent's application and prays that the same be dismissed with costs

Analysis and Determination

9. Before I proceed further, it is appropriate to reproduce the relevant provisions applicable to resolving this matter.

Section 32(1) of the *Tax Appeals Tribunal Act, 2013* ("the *TATA*") provides:

32(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 party.

Rule 3 and **4** of the *Rules* provides:

3. Time for filing of memorandum of appeal

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. Extension of time for filing memorandum of appeal

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. [Emphasis mine]

10. In light of the foregoing provisions, the Commissioner had thirty days from the date of the Tribunal's judgment, being 21st August 2020, to file and serve the Notice of Appeal, the latest date being 21st September 2020. The Commissioner then had thirty days from the date of service of the Notice of Appeal to file and serve the Memorandum of Appeal upon the Respondent.

11. The Respondent confirms that it received the Notice of Appeal on 2nd September 2020 meaning that the Commissioner was in compliance with **section 32(1)** of the *TATA*. It is also not in dispute that the Memorandum of Appeal was filed within the time stipulated by **Rule 3** of the *Rules*.

12. The question for resolution then is whether service of the Memorandum of Appeal on 26th January 2021, which is 146 days after the date of service of the Notice of Appeal is fatal to this appeal.

13. A reading of **Rules 3 and 4** of the *Rules* show that it is the Memorandum of Appeal which must be filed within 30 days from the date of service of the Notice of Appeal and when it is not filed then **Rule 4** specifically makes provision for extension of time for filing. Conversely, while **Rule 3** requires the Memorandum of Appeal to be served on the Respondent upon filing, there is no corresponding provision for extension of time for service. In my view, this implies that the service outside the prescribed time is not fatal otherwise extension time for service would have been included in **Rule 4** of the *Rules*.

14. Having come to the conclusion that failure to serve the Memorandum of Appeal within the time prescribed is not fatal to this appeal, I am inclined to condone the Commissioner's failure to serve the Memorandum of Appeal within 30 days for two reasons. First, the Commissioner made an effort to serve the Respondent with the Record of Appeal, a day prior to filing the record. Second, the Record of Appeal was eventually served after several mentions for directions before the court. I therefore do not see any prejudice befalling the Respondent in the circumstances.

Disposition

15. The Respondent's Notice of Motion dated 2nd March 2021 is now dismissed with no order as to costs.

16. The parties are now invited to take directions for filing submissions on the appeal.

DATED and DELIVERED at NAIROBI this 30th day of APRIL 2021.

D. S. MAJANJA

JUDGE

Mr Ngari, Advocate instructed by the Commissioner of Domestic Taxes, Kenya Revenue Authority.

Mr Gitonga instructed by Mwamba and Gitonga Advocates for the Respondent.