



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

TAX APPEAL NO. E067 OF 2020

BETWEEN

MANUCHAR KENYA LIMITED..... APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

RULING

1. Although this matter was registered as a Tax Appeal, what is before the court is the Notice of Motion dated 11th June 2020 made under **section 32(1)** of the *Tax Appeals Tribunal Act, Rules 3 and 4* of the *Tax Appeal Tribunal (Appeals to the High Court) Rules, 2015* and **sections 78(2) and 79G** of the *Civil Procedure Act*. The main prayer it seeks is an order for extension to file an appeal out of time from the judgment delivered by the Tax Appeal Tribunal (“the Tribunal”) in Appeal No. 43 of 2016 on 27th March 2016.

2. The applicant seeks other orders including an order restraining the respondent from enforcing assessments that were the subject of the appeal before the Tribunal. The jurisdiction to issue such orders would depend on whether the court has granted the order for leave to appeal out of time.

3. The application is supported by the supporting and supplementary affidavit of AyubMwahuki, the applicant’s finance manager, sworn on 11th June 2020 and 5th August 2020 respectively. It is opposed through the replying affidavit of Victor AndambiChabala, the advocate instructed in the matter by the respondent, sworn on 23rd July 2020.

4. It is common ground that the respondent commenced an audit into the applicant’s affairs which resulted in assessment for Kshs. 18,902,123.00 for Corporation Tax and Kshs. 6,529,054.00 for VAT on 17th March 2016. While the applicant lodged a Notice of Appeal on 25th April 2018, it did not lodge an appeal within the time prescribed by the law despite the fact that the Tribunal supplied the parties with certified copies of the proceedings and judgment by letters dated 17th May 2018 and 8th November 2018.

5. Mr Mwahuki explained that the applicant did not file the appeal in time as it was given improper and erroneous advice and it was only when, in the course of a routine audit, that external counsel advised it that it had a very good appeal with overwhelming chances of success. It is upon this advice that it instructed counsel to file the present application. Counsel for the appellant submitted that the appeal had overwhelming chances of success as evidenced by the fact that the respondent has not taken any steps to enforce the judgment or collect taxes under the said decision.

6. The respondent on the other hand opposed the application on the basis that the judgment is now over two years old and the applicant has not given good reasons as to why it failed to file an appeal. The respondent pointed out that at all times the applicant was aware of its right of appeal as demonstrated by the fact that it filed a notice of appeal. Counsel for the respondent submitted that the explanation for the delay was insufficient to warrant extension of time to lodge the appeal out of time.

7. The parties agreed that the court has jurisdiction to allow the appellant to file its appeal out of time. They also agree that whether or not to extend time, is a discretion of the court. The factors the court may consider were condensed by the Supreme Court in *Nicholas KiptooArapSalat v IEBC and 7 Others* SCK App. No. 16 of 2014 [2014] eKLR as follows:

1. *A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*

2. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
3. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
4. Whether there will be any prejudice suffered by the respondents if the extension is granted;
5. Whether the application has been brought without undue delay; and
6. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

8. The first hurdle the applicant must surmount is to explain the delay in lodging the appeal from the period it filed the Notice of Appeal on 25th April 2018 evincing its intention to appeal against the Tribunal judgment and the date of filing the present application that is 11th June 2020. Timelines are an integral part of litigation and are necessary to ensure that parties rights are determined fairly and expeditiously. While a party has a right to appeal against a judgment, the right is not open ended. It must be exercised timeously as a judgment settles the legal rights of the parties and marks the end of the dispute. That is why 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. Ouko, P explained this principle in ***NaphtalyMuyonga v Public Service Commission and Another*** NRB CA Civil Application No. 278 of 2019 [2020] eKLR as follows:

By observing the timelines set by the rules, the rights of the parties and other litigants to have their cases progress according to the periods of time prescribed by the rules are guaranteed. When the period prescribed for filing an appeal has expired the decree-holder obtains a benefit under the law to treat the decree final and beyond challenge, and a legal right accrues to him by lapse of time. He has a legitimate expectation that the decree will not be challenged. Conversely, if satisfactory and acceptable explanation for delay is shown, the Court, in exercise of its absolute discretion may excuse the delay and admit the appeal out of time.

9. The reason given by the applicant for the delay is that it only received positive legal advice this year from its new advocates on record. For two years the applicant did not pursue its appeal yet it was aware that it was entitled to appeal. Given the amount it had to pay, about Kshs. 24,000,000.00, following dismissal of its appeal, it would have sought a second legal opinion since it knew it had a substantial tax liability. That tax liability remained on its books for the entire period and must have stuck out like a sore thumb. It now seeks to revive its right of appeal after two years because it has received fresh legal advice. The fact that it received wrong advice in the first place does not assist the applicant. In ***Mary WarugaWokabi and 3 Others v Jacob MwantoWangora*** NRB CA Civil Application No. NAI 352 of 2018 [2019] eKLR, Makhandia JA., stated that, “*giving wrong advice cannot be a ground for extension of time.*” That it took two years to seek relief for liability that was always known is not, in the circumstances, a good ground for the court to grant the order sought.

10. Having failed to surmount the first hurdle of explaining the two-year inordinate delay in filing the appeal, I am not inclined to exercise the court’s discretion in the applicant’s favour.

11. The Notice of Motion dated 11th June 2020 is dismissed with costs to the respondent.

DATED and DELIVERED at NAIROBI this 10th day of AUGUST 2020.

D. S. MAJANJA

JUDGE

Mr Mwamuye instructed by Bahati Mwamuye and Associates Advocates for the appellant.

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