



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

TAX APPEAL NO. E004 OF 2020

BETWEEN

COMMISSIONER OF DOMESTIC TAXESAPPELLANT

AND

LIFECARE INTERNATIONAL BROKERS LIMITED..... RESPONDENT

RULING

1. This matter concerns an appeal from the decision of the Tax Appeals Tribunal (“the Tribunal”) in **Nairobi Tax Appeals Tribunal Appeal No. 60 of 2017 Lifecare International Insurance Brokers v Commissioner of Domestic Taxes** which was delivered on 18th December 2019.
2. The Respondent raised a preliminary objection that the appeal is incompetent and ought to be struck out on the ground that the Appellant failed to file the Notice of Appeal within the prescribed 30-day period prescribed by **section 32(1)** of the **Tax Appeals Tribunal Act, 2013 (“TATA”)** from the date of notification of the decision by the Tribunal.
3. The Respondent argued that the Tribunal notified the parties of the Judgment when it was delivered on 18th December 2019 in presence of counsel for the parties. Thereafter, and in terms of **section 32(1)** of **TATA**, the appellant was required to file and serve the Notice of Appeal within 30 days of the date of the decision. In this case, the Respondent submitted that the Notice of Appeal, having been filed on 28th January 2020 and served on 29th January 2020, was filed out of time and therefore the memorandum of appeal filed thereafter was incompetent.
4. Counsel for the Respondent further submitted that the time for filing the appeal out of time had not been extended and since the time for filing the appeal is a matter of jurisdiction, the appeal ought to be struck out. Counsel cited, **Patrick Kirunja Kithinji v Victor Mugira Marete MRU CA Civil Appeal (App) No. 48 of 2014 [2015] eKLR** to support the proposition that the time for filing the appeal is a matter of jurisdiction.
5. The Appellant submitted that whether the appeal was valid turned on the meaning of the phrase, “*the date of being notified of the decision.*” Counsel for the Appellant submitted that although the word “*Notification*” has not been defined in **TATA**, its ordinary and dictionary meaning implies that a party must be formally or officially informed about something. In his view, the Appellant was notified when the hard and certified copy of the Judgment was served on it on 14th January 2020.
6. The Appellant therefore submitted that for purposes of computing time under **section 32(1)** of **TATA**, it had 30 days to serve the Notice of Appeal from 14th January 2020 hence the Notice of Appeal having been served on 29th January 2020 was within time and the Memorandum of Appeal filed within time.
7. A preliminary objection is based on undisputed facts or law that may determine an issue (see **Mukisa Biscuits Manufacturing Co., Ltd v West End Distributors [1969] EA 696**). The following facts relevant to this determination, gleaned from the court record, are common ground:
 - a. The Tribunal delivered its judgment on 18th December 2019 in the presence of the Advocates for the Appellant and Respondent;

b. The Notice of Appeal was served on the Respondent on 29th January 2020.

8. Section 32 of *TATA* provides for the right of appeal from decisions of the Tribunal to the High Court as follows:

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.

(2) The High Court shall hear an appeal made under this section in accordance with the rules set out by the Chief Justice.

9. The manner in which the appeal is to be heard is provided for under **Rule 3** of the *Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015* (“the *Rules*”) promulgated by the Chief Justice which provides as follows:

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 service a copy on the respondent.

10. Resolution of the preliminary objection turns on the meaning of notification under **section 32(1)** of *TATA*. The ordinary meaning of the word notify is to bring to the attention. The record shows that after hearing the matter, the Tribunal informed the parties that the judgment would be delivered on notice. It is apparent on the face of the judgment that the advocates for both parties; Ms Chelangat for the appellant and Mr Mwamuye for the Respondent, were present when the judgment was read. They were thus duly notified of the judgment. I agree with counsel for the Respondent that the parties were notified of the judgment when the decision was delivered in their presence. No further notification was required and delivery of the certified copy of the judgment was but a mere administrative act as the parties had the liberty to collect a copy of the judgment once the decision was delivered in their presence.

11. My decision is fortified by the fact that it is not necessary to have a copy of the decision appealed from in order to evince the intention to appeal. This has been the position in several cases. In *Eliud Buku Thuku v Beatrice Wambui Mwangi* NYR CA Civil Appl. No. 267 of 2011 [2013] eKLR, the Court of Appeal stated thus:

The applicant was represented by Counsel at the High Court when judgment was delivered on 23rd September, 2011. As was stated by Tunoi, JA. (as he then was) in *Njoka Muriu & Another vs Evan Githinji Muriu & Another, Civil App. No. NAI 356 of 2003*, a notice of appeal is a simply one page formal piece of paper whose lodgment is a matter of course. A careful advocate would lodge a notice of appeal to safeguard his client’s interest.

12. Likewise, the Court of Appeal in *Bi-Mach Engineers Limited v James Kahoro Mwangi* CA Civil Appl. No. NAI 5 of 2011 [2011] eKLR held that filing a Notice of Appeal is a simple and mechanical task which could have been done soon after the delivery of the judgment. These cases also confirm the position that parties have due notice of the judgment at the time of delivery to enable them lodge the Notice of Appeal.

13. It is trite law that a right of appeal is a creation of statute and its exercise is governed by statutory strictures governing the exercise of that right (see *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) SCK Pet. No. 12 of 2016 [2019] eKLR*). Whether a party has complied with statutory provisions governing exercise of that right is a jurisdictional issue as was held by the Court of Appeal *Patrick Kiruja Kithinji v Victor Mugira Marete* MRU CA Civil Appeal No. 48 of 2014 [2015] eKLR that:

It is our view, whether or not an appeal is filed on time goes to the jurisdiction of this Court. It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. Consequently, we find that an appeal filed out of time is not curable under Article 159.

14. Failure to file 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. Counsel for the Appellant valiantly addressed the court on why the court should validate the appeal. The issues raised are factual issues that call for the court to exercise its discretion and can only be addressed in an appropriate application which is not before the court.

15. This appeal is incompetent. It is struck out with costs to the Respondent.

DATED and DELIVERED at NAIROBI this 18th day of SEPTEMBER 2020.

D. S. MAJANJA

JUDGE

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

Mr Mwamuye instructed by Bahati Mwamuye and Associated Advocates for the Respondent.