



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Apli 900 of 2007

ROBERT MUHIA KARANJAAPPLICANT

V E R S U S

COMMISSIONER OF DOMESTIC TAXEDRESPONDENT

R U L I N G

This is an application (by notice of motion dated 26th November, 2007) for enlargement of time to file appeal against the decision of the Thika Income Tax Local Committee dated 27th September, 2007. By that decision the local committee rejected the Applicant's appeal against assessment of income tax by the Respondent.

The application is stated to be brought under Order 49, rule 5 of the Civil Procedure Rules; it is also brought under rule 3 of the Income Tax (Appeals to the High Court) Rules (hereinafter called the Rules). It is supported by an affidavit of the Applicant's learned counsel, MR. NJOROGE KIBATIA, and a statement of facts; both are annexed to the application.

The Respondent has opposed the application as set out in the replying affidavit sworn by one CATHERINE BWIRE filed on 14th January, 2008. She is a Senior Deputy Commissioner in the Domestic Taxes Department of the Kenya Revenue Authority. The following grounds of opposition emerge from the replying affidavit:-

1. That the reason for the delay given does not fall within the exceptions provided for under rule 3 of the Rules.
2. That in any case the reason for the delay given is not reasonable or excusable.

I have considered the submissions of the learned counsels appearing, including the cases cited. The time within which an appeal from the decision of a local committee should be filed is set, and the discretion of the court to extend that time is donated, by rule 3 of the Rules. Order 49, rule 5 of the Civil Procedure Rules may apply only to the extent that it is not inconsistent with the said rule 3. See rule 20 of the Rules.

Rule 3 of the Rules provides:-

“No appeal shall be filed unless a memorandum of appeal is presented to the Registrar during officer hours, and a copy served upon the respondent, within 30 days after the date of service upon the respondent of a notice of appeal under section 86 (2); but where the court is satisfied that, owing to absence from Kenya, sickness, or other reasonable cause, the appellant was prevented

from presenting the memorandum of appeal within that period and that there has been no unreasonable delay on his part, the court may extend that period.”

The reason given for the delay herein is that the Applicant’s learned counsel, Mr. Njoroge Kibatia, who had the Applicant’s timeous instructions to file appeal, was prevented from so filing appeal by his absence from Kenya. He had received an emergency call that required him to travel to Tanzania where his close relative had died in mysterious circumstances. Due to the urgency of the matter he inadvertently forgot to instruct one of the other advocates in his firm to file the appeal. The resulting delay was about 10 days.

It is not disputed that Mr. Njoroge Kibatia travelled to Tanzania on an urgent matter. It is also not disputed that he may have inadvertently forgotten to instruct another advocate in his firm to file the appeal in his hurry to travel to Tanzania. What I have to decide in this application are three issues:-

1. Whether the absence from Kenya of the Applicant’s advocate come within the exceptions under rule 3 of the Rules.
2. Whether the Applicant’s advocates inadvertently forgetting to instruct another counsel to file the appeal in his absence from Kenya constitutes a reasonable cause.
3. Whether there has been unreasonable delay.

1. The reference in rule 3 of the Rules to the appellant “**presenting**” the memorandum of appeal must include such presentation by his duly instructed and recognised agent. In other words, it is not necessary that the appellant himself **personally** present the memorandum. Indeed an appellant need not be a natural person; it could be a corporation. Mr. Kibatia was the duly instructed and recognised agent of the Applicant. He is the one who would have been expected to physically and personally present the memorandum of appeal to the Registrar. And even he himself need not have done that; it could have been done by his clerk. The point is this. Mr. Kibatia’s act of presenting the memorandum of appeal, had he done so, would have to be deemed to be the act of the Applicant. By the same reasoning, if he was prevented from so doing because he was absent from Kenya, this absence must be deemed to be that of the Applicant because the Applicant had dully instructed his advocate in good time to prepare, sign and present the memorandum of appeal on his behalf.

I therefore hold that the Applicant’s advocate’s absence from Kenya came within the exceptions under rule 3 of the Rules. The Court of Appeal decision relied upon by the Respondent, BARCLAYS BANK OF KENYA LIMITED –VS – THE COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY, Nairobi Civil Appeal No. 67 of 1998 (unreported) did not decide the specific point whether or not the absence from Kenya of a duly and timeously instructed agent of an appellant comes within rule 3 of the Rules. That case is therefore distinguishable.

2. It is also not unreasonable that Mr. Kibatia, in his hurry to travel to Tanzania where his close relative had died in mysterious circumstances, forgot to instruct another advocate to prepare and present the memorandum of appeal. This fact, linked as it was to Mr. Kibatia’s absence from Kenya, constitutes a reasonable cause that prevented the presentation of the memorandum of appeal within time.

3. Finally, the delay of ten (10) days in the circumstances of this case is not unreasonable. Mr. Kibatia returned to Kenya on 19th November, 2007. He filed the present application seven days later on 26th November, 2007. Contrary to what the Court of Appeal stated in the aforesaid case, the period of time for presenting the memorandum of appeal is not fixed by the statute itself (the Income Tax Act, Cap. 470) but by subsidiary legislation made thereunder (the Rules). This is thus not a case of statutory limitation. In any event, rule 3 of the Rules does excuse delay that is not unreasonable, subject of course to the other provisions of the rule.

For the above reasons, I will allow the application. The Applicant may present his memorandum of appeal within fourteen (14) days of delivery of this ruling. Costs of this application shall be in the appeal. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF APRIL, 2008

H. P. G. WAWERU

J U D G E

DELIVERED AT NAIROBI THIS 25th DAY OF APRIL, 2008