



REPUBLIC OF KENYA



Communication Carriers Limited v Commissioner of Domestic Taxes (Income Tax Appeal 25 of 2017) [2024] KEHC 1054 (KLR) (Commercial and Tax) (9 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1054 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL 25 OF 2017
A MABEYA, J
FEBRUARY 9, 2024**

BETWEEN

COMMUNICATION CARRIERS LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

RULING

1. This ruling determines the application dated 28/6/2021. The same was brought under section 1A, 1B, 3A and 95 of the *Civil Procedure Act*, CAP 21, Rule 20 of the Tax Appeals Tribunal (Appeals to the High Court rules 2015, Order 45 rule 1, Order 50 rule 6 and Order 51 rule 1 of the Civil Procedure rules 2010.
2. The application seeks a review of the orders dated 28/2/2020 that dismissed the appeal and for the reinstatement of the same. The applicant also sought extension of the time within which to comply with the directions given in the ruling and order of 28/2/2020 by 80 days.
3. The application was supported by the grounds on the face of it and the supporting affidavit of Suresh Hirani sworn on 28/6/2021. The applicant's case is that; on 22/5/2017, the Tax Appeals Tribunal delivered a decision in favour of the respondent.
4. Aggrieved by the said ruling, the applicant lodged an appeal to this Court on 1/9/2017. It also filed an application for stay of the judgment of the tribunal and a ruling date was given. The applicant contended that the ruling date was not communicated to it and only came to discover that the ruling had been delivered on 28/2/2020.
5. In the ruling, the appellant had been directed to set down the appeal for hearing within a period of 90days failure of which the appeal would stand dismissed. The applicant stated that it was not



served with a notice for delivery of the ruling and thus was unaware of those directions. The applicant therefore seeks that the time within which to proceed with the appeal be enlarged.

6. The respondent filed two replying affidavits in opposition to the application whose contents are the same. The first affidavit was sworn by Victor Andambi on 24/9/2021 whereas the second affidavit was sworn on 6/10/2021.
7. On the part of the respondents, it's case was that the applicant had preferred and appeal against the decision of the Tax Appeals Tribunal and simultaneously filed an application for stay of execution. That vide the ruling dated 28/2/2020, the Court granted an injunction to preserve and maintain the status quo on condition that the appeal would be set down for hearing within 90 days from the ruling date and in default the appeal would stand dismissed.
8. That the appellant had not demonstrated what steps it took to prosecute the appeal and as such, it lacked any plausible explanation. It was further contended that that a litigant ought to be vigilant and that should the Court reinstate the appeal, the appellant should pay 60 percent of the taxes due.
9. Parties filed their respective submissions which I have considered. The appellant submitted that the review was warranted since it was not served with the notice of the ruling. That as a result, the applicant was unable to comply with the Court's directions. Counsel submitted that the Court had the jurisdiction to review and enlarge time to allow the appellant prosecute the appeal.
10. It was further submitted that the time within which the applicant learnt of the ruling and the making of the application time for making the application was not inordinate. That it would be highly prejudiced if the orders sought are not granted. Counsel submitted that the substantive appeal was already on record and it was a matter of giving dates.
11. On its part, the respondent submitted that the applicant had been indolent in pursuing its matter and the delay of one and a half years was inordinate and inexcusable. That the Court became functus officio once the orders for stay were granted and did not have powers to revisit the ruling.
12. I have considered the application, the response and the rival submissions by the parties. The dispute between the parties revolves around whether the Court should grant a review of the orders of 28/2/2020 and reinstate the appeal.
13. Order 45 of the Civil Procedure Rules provides: -
 - “(1) Any person considering himself aggrieved—
 - a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay”.



14. The main reason for seeking the review is to reinstate the appeal. In the ruling dated 28/2/2020, the Court granted an injunction to preserve and maintain the status quo on condition that the appellant obtained a hearing date within 90 days. The Court further ordered that the parties be given priority in taking the hearing dates failure of which the appeal stood dismissed.
15. The applicant's argument was that it was not served with a notice for delivery of the ruling and thus was unaware of those directions. I have considered the record. The conditional order for injunction was granted because the applicant had enjoyed a status quo since 2017 without prosecuting the appeal. On this basis the Court gave timelines within with to have the appeal heard and determined.
16. In *Francis Njoroge v Stephen Maina Kamore* [2018] eKLR, it was held that: -

“It should be noted that the grounds for review are very specific as discussed herein above. The Appellant herein has not demonstrated that he discovered new evidence which was not within his knowledge, neither that there was an error apparent on the record. He just feels that depositing the ordered sum is too much for him and he wants the orders reviewed so that he can deposit the amount of money which he can conveniently raise. This is a court of justice but not court of convenience such that it has to consider the conflicting interest of the parties. And in so considering, courts have to be guided by the laid down principles of law”.
17. Apart from the applicant not particularizing its application in any of the 3 pigeon holes for review, there was in-ordinate delay in making the application. The ruling sought to be reviewed was made on 28/6/2020. The present application was lodged on 28/6/2021, that is, one year and four months later. That in my view was inordinately long. It is for litigants to be vigilant in the prosecution of their matters. Indeed it is the Court itself that had to notify the applicant of the matter for it to spring to action It had gone to slumber and comfortably left the matter lie.
18. Even if it were that the ruling was issued without notice, there was nothing to show that the applicant ever made any inquiry about the pending ruling. Had it been interested with the matter, it would have made inquiries after the lapse of, say, 6 months. Any such evidence lacking, I think the applicant had lost interest in the appeal and it would be proper to leave the loss lie where it has fallen.
19. For the foregoing reasons, the Court finds no merit in the application and the same is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

A. MABEYA, FCI Arb

JUDGE

