



REPUBLIC OF KENYA



Commissioner of Customs and Border Control v Welrods Limited (Customs Tax Appeal E037 of 2023) [2024] KEHC 8709 (KLR) (Commercial and Tax) (11 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8709 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CUSTOMS TAX APPEAL E037 OF 2023**

MN MWANGI, J

JULY 11, 2024

BETWEEN

COMMISSIONER OF CUSTOMS AND BORDER ONTROL APPELLANT

AND

WELRODS LIMITED RESPONDENT

RULING

1. The respondent/applicant filed a Notice of Motion dated 27th September, 2023 under the provisions of Order 2 Rules 13 and 15 of the [Civil Procedure Rules, 2010](#) and all other enabling provisions of the law. The applicant seeks the following orders-
 - i. Spent;
 - ii. That the Honourable Court be pleased to strike out the Memorandum of Appeal filed on 12th September, 2023;
 - iii. That the costs of the suit (sic) and application be provided for; and
 - iv. That there be such further or other orders as the Honourable Court deems fair and expedient to grant in the circumstances.
2. The application is anchored on the grounds on the face of it and the supporting affidavit of Kelvin Mogeni, the learned Counsel for the applicant sworn on 27th September, 2023. In the said affidavit, he deposed that the judgment of the Tax Appeals Tribunal was delivered on 14th July, 2023 by Robert M. Mutuma (Chairperson), Rodney O. Oluoch (Member), Elisha N. Njeri (Member) and Delilah K. Ngala (Member).



3. He further deposed that the appellant/respondent herein, filed a Notice of Appeal at the Tribunal against the said judgment on 13th August, 2023 and served it upon his office on 17th August, 2023. That a Memorandum of Appeal was filed on 12th September, 2023 against the said judgment and served on his office on 13th September, 2023. Counsel stated that the respondent applied for proceedings vide its letter copied to his office on 17th August, 2023.
4. The applicant contended that the Memorandum of Appeal is scandalous, frivolous and vexatious and a gross abuse of the process of the Court and urged this Court to strike it out with costs, as no appeal lies after the expiry of 60 days from the date of the judgment of the Tribunal, or any such other date certified by the Registrar.
5. The appellant opposed the application vide a replying affidavit sworn on 8th December, 2023 by Wanjiru Njuguna, working as a Legal Counsel in the Legal Services and Board Coordination Department within the respondent's Domestic Taxes Department. She admitted that the Tax Appeals Tribunal delivered its judgment on 14th July, 2023 and the respondent filed its Notice of Appeal on 13th August, 2023 in line with the provisions of Section 32(1) of the *Tax Appeals Tribunal Act*, 2023 which provides for issuance and service of a Notice of Appeal within (thirty) 30 days of the Tribunal's judgment.
6. She further stated that the *Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015* provide in Rule 3 that the appellant shall, within thirty (30) 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.
7. Ms Njuguna deposed that the Memorandum of Appeal was filed on 12th September, 2023 within the required timelines provided under the Act and the Rules thereto. She contended that the instant application is not in line with the law in regard to appeals to the High Court from the Tribunal. She also contended that the instant application is an abuse of the Court process and is only designed to delay the course of justice yet the respondent has a right to appeal against the judgment of the Tribunal before this Court. She prayed for the application to be dismissed with costs.

Analysis And Etermination

8. The Counsel for the parties made oral submissions. Mr. Mogeni, learned Counsel for the applicant prayed for the appeal to be struck out for having been filed out of time. He indicated that the judgment by the Tax Appeals Tribunal was rendered on 14th July, 2023 and the appeal was filed on 4th September, 2023. He relied on the provisions of Section 53 of the *Tax Procedures Act* which gives thirty (30) days or such other time as the Court may allow for the filing of an appeal.
9. Counsel submitted that Section 32(1) of the *Tax Appeals Tribunal Act* provides that within thirty (30) days or within such time as the Court may allow a party to file an appeal and serve the other party. He stated that the appeal was filed on 12th September, 2023, that they were served on 13th September, 2023 and that the applicant filed the application on 27th September, 2023. He contended that there is no competent appeal before this Court.
10. Mr. Mogeni stated that the replying affidavit lays emphasis on subsidiary legislation yet substantive law is clear. He prayed for the appeal to be struck out with costs to the applicant.
11. In response to the above submissions, Ms Njuguna, learned Counsel for the respondent stated that Section 53(2) of the *Tax Procedures Act* provides for Appeals to the High Court and that Section 32(1) of the *Tax Appeals Tribunal Act*, 2013 provides that a party may within thirty (30) days of



being notified of the decision file a Notice of Appeal. She submitted that the Tax Appeals Tribunal Rules, 2015 provide for the timelines for the filing of the Memorandum of Appeal. She stated that the timelines in total are sixty (60) days to the date of the filing of the Memorandum of Appeal.

12. Counsel relied on the case of the *Commissioner of Domestic Taxes v Africa Oil BV* [2022] eKLR, where Judge Majanja held that a Notice of Appeal must be served within thirty (30) days of the notification of the decision and therefore a Memorandum of Appeal is filed within thirty (30) days of the filing of the Notice of Appeal. Ms Njuguna prayed for the application herein to be dismissed with costs to the respondent.
13. In a rejoinder, Mr. Mogeni asserted that subsidiary legislation cannot supersede substantive law. He expressed the view that a Notice of Appeal is filed as a matter of good practice and an appeal must be filed within thirty (30) days. He contended that there is no provision that a Notice of Appeal must be filed before the Tribunal, but all documents must be filed before the High Court.
14. Counsel stated that this Court is not bound by the decision by Judge Majanja and should be guided by Section 53 of the *Tax Procedures Act* and the *Tax Appeals Tribunal Act*. He urged this Court to strike out the appeal.
15. The issue for determination is if the appeal filed by the appellant is properly before this Court. In order to establish if the appeal filed by the appellant meets the criteria set out under the *Tax Procedures Act*, it is important to reproduce the provisions of Section 53 of the *Tax Procedures Act*. It provides as follows-

“A party to proceedings before the Tribunal who is dissatisfied with the decision of the Tribunal in relation to an appealable decision may, within thirty days of being notified of the decision or within such further period as the High Court may allow, appeal the decision to the High Court in accordance with the provisions of the *Tax Appeals Tribunal Act* (Cap. 469A).” (emphasis added).
16. On the other hand, Section 32(1) and (2) of the *Tax Appeals Tribunal Act*, Cap 469A, Laws of Kenya provides as follows-
 - (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.

(1A) A party that has appealed against the decision of the Tribunal in subsection (1) shall within two days of lodging a notice of appeal, serve a copy of the notice on the other party.
 - (2) The High Court shall hear appeals made under this section in accordance with rules set out by the Chief Justice.” (Emphasis added).
17. To give effect to the provisions of Section 32 of the *Tax Appeals Tribunal Act*, the *Tax Appeals Tribunal (Appeals to the High Court) Rules*, were published vide Legal Notice No 226 of 2015. Although the said Rules are subsidiary legislation as was stated by Mr. Mogeni, I do not agree with his proposition that they should be disregarded in so far as computation of time in the filing of a Notice of Appeal from a decision of the Tax Appeals Tribunal to the High Court and the filing of the Memorandum of Appeal are concerned.

To give context to my departure from the submissions made by Mr. Mogeni, it is essential to reproduce Rule 3 of the Tax Appeals Tribunal (Appeals to the High Court) Rules. It provides as follows-



“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. (Emphasis added).

18. My understanding of the above provisions which are couched in mandatory terms is that they are complementary to the provisions of Section 32(1) of the *Tax Appeals Tribunal Act*, and cannot be swept under the carpet as Mr. Mogeni would like this Court to do. I therefore do not agree with Mr. Mogeni that the Tax Appeals Tribunal (Appeals to the High Court) Rules should be relegated to the periphery and disregarded for being subservient to the *Tax Appeals Tribunal Act*. The said provisions are very clear and leave no room for ambiguity that a party appealing from a decision of the Tax Appeals Tribunal has thirty (30) from the date the decision is communicated to him to file a Notice of Appeal and effect service of the same on the other party within 2 days of filing. An aggrieved party can however apply for extension of time to comply with the said provisions upon good cause being shown as to what caused the delay. Subsequently, the aggrieved party has another thirty (30) days from date of filing of the said Notice of Appeal, to file a Memorandum of Appeal to the High Court.
19. Having considered the applicable provisions of the law, I find that the applicant has not discharged its burden of proof in establishing that the appeal by the appellant was filed outside the timelines provided by law. I do agree with Ms Njuguna that the present application is an abuse of the Court process and was only filed as a delaying tactic in furtherance of directions being given as to the hearing of the appeal. Although Ms Njuguna cited the case of *Commissioner of Domestic Taxes v Africa Oil BV* [2022] eKLR, my search at the Kenya Law Reports for the said decision yielded nought as the reported authority in the said search engine is *Africa Oil Kenya BV v Commissioner of Domestic Taxes* [2020] eKLR, whose relevance I could not relate to the present application.
20. In the result, the application dated 27th September, 2023 is hereby dismissed, with costs being awarded to the appellant/respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF JULY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Gitonga h/b for Mr. K. Mogeni for the respondent/applicant

Ms Njuguna for the appellant/respondent

Ms B. Wokabi – Court Assistant.

