



**Cephas Ventures Enterprise Limited v Commissioner of  
Domestic Taxes KRA (Miscellaneous Application E448 of 2022)  
[2023] KEHC 1533 (KLR) (Commercial and Tax) (6 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1533 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E448 OF 2022  
PN GICHOHI, J  
MARCH 6, 2023**

**BETWEEN**

**CEPHAS VENTURES ENTERPRISE LIMITED ..... APPLICANT**

**AND**

**COMMISSIONER OF DOMESTIC TAXES KRA ..... RESPONDENT**

**RULING**

1. Before this court is a Notice of Motion dated June 14, 2022 under a certificate of urgency filed by the applicant through the firm of Muchiri Gathecha & Co Advocates seeking orders that:-
  1. Spent
  2. Spent.
  3. The applicant be granted leave to file its appeal out of time and its Memorandum of Appeal dated February 25, 2022 filed on February 28, 2022 be admitted and deemed to have been filed out of time.
  4. The costs of this application be provided for.
2. The grounds are on the face of the application are that applicant lodged his Memorandum of Appeal on February 28, 2022 which was the day after the judgment by the tribunal. The Memorandum of Appeal was paid for but unfortunately the receipt was issued on March 7, 2022.
3. He states that the tribunal made its verdict erroneously without true material placed before it and that the freezing the applicant's accounts has rendered the applicant to loose income and the operation of the company has become redundant yet the respondent want to be paid by the applicant.



4. Further, he states he has a *prima facie* appeal and that he will suffer irreparable damage if the respondent is allowed to execute the judgment as he has not in any way refused to clear any taxes by the respondents but only the amount that was taxed is in dispute and now stands at kshs 3,359,512/=.
5. In support is the affidavit sworn by Peter Nganga on June 14, 2022 in his capacity as the general manager of the applicant. He reiterates the grounds above and states that the appeal was late only by 7 days and no prejudice will be occasioned on the respondent. Further, he states that the directors of the company are willing to have the matter referred to ADR in order to agree on the appeal and on the issue of payment in an agreed payment plan.
6. The respondent filed a replying affidavit sworn by Charles Turgut on June 29, 2022 through the firm of Patricia Naeku Leparashao Advocates and seeks that the application herein be dismissed with costs for reasons that the tribunal rendered its judgment on January 28, 2022 but the applicant seeks leave to appeal out of time without demonstrating any justifiable reasons or evidence to support that application.
7. Further, he states that the applicant failed to file a Notice of Appeal and Memorandum of Appeal to this court within the required timelines contrary to sec 53 of the [Tax Procedures Act](#) 2015 and, section 32 of the [Tax Appeal Tribunal Act](#) and rule 3 of the [Tax Appeals Tribunal 2015](#) and therefore no appeal lies before this court. He further depones that if the court is inclined to grant the application, then it should direct that the sixty percent (60%) of the decretal amount of taxes be paid to the respondent's account and the applicant to provide a suitable bank guarantee for the remaining half of the tax held to be due and owing.
8. In his further affidavit sworn on August 23, 2022 by Peter Nganga, the applicant depones that the respondent having frozen the applicant's accounts have rendered the applicant lifeless and it cannot pay 60% as requested by the respondent.

### Submissions

9. Parties filed and exchanged submissions as a way of disposal of this application. Citing sec 79G of the [Civil Procedure Act](#), counsel for the applicant submits that this court has discretion to grant the application if the applicant satisfies the court that he had good and sufficient cause for not filing the appeal.
10. While citing several cases including the case of [Nyaigwa Farmers Co- Operative Society Limited v Ibrahim Nyambare & 3 others](#) [2016] eKLR on principles to guide in an application for extension of time, counsel submits that delay was about seven (7) days in that the judgment dismissing the applicant's appeal was on January 28, 2022 and upheld the respondent's objection decision dated May 7, 2022.
11. He further submits that was caught up with time as was trying to get proceedings and having not received the them by the last date, he filed his appeal on Febraury 28, 2022. He further submits that the applicant will suffer greater prejudice if the application is not allowed as he will have lost his chance to ventilate his appeal.
12. On his part, the respondent filed their submissions giving the background and submits that the applicant has failed to demonstrated exceptional circumstances to warrant extension to file an appeal out of time. While citing the case of Income Tax Appeals No 31 of 2017 [Commissioner of Domestic Taxes v Mayfair Insurance Company Limited](#) [2017]eKLR, counsel submits that the applicant has failed to satisfy the principles of set out for extension of time and more so, the principle of explainnhg to the satisfaction of the court a reasonable reason for the delay.



## Determination

13. Having considered the application herein, affidavits and submission, it is clear that the applicant had appealed to the Tax Appeals Tribunal and it is the judgment delivered by the said tribunal on February 28, 2022 that triggered his quest to appeal before this court. There are timelines set for filing the appeal and in particular, Rule 3 of The Tax Appeals Tribunal (Appeals to The High Court) Rules, 2015 provides;

“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.”

14. Further, sec 53 of the [Tax Procedures Act](#) 2015 also provides for the timelines 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](#), 2013 (no 40 of 2013) There is no dispute that the applicant failed to adhere to the said times.”

15. There is no dispute that the applicant failed to adhere to the said timelines. That however does not mean that no appeal lies as stated by the respondent. Rule 4 of The [Tax Appeals Tribunal \(Appeals to The High Court\) Rules, 2015](#) provides for extension of time for filing memorandum of appeal as follows;

“The court may extend the time specified in rule 3 if the court is satisfied that, owing to absence from Kenya, sickness, or other reasonable cause, the appellant was unable to file the memorandum of appeal within that period and that there has been no unreasonable delay on the part of the appellant.”

16. The broad issue therefore is whether the applicant has provided the court with justifiable reasons for granting his application for extension of time to appeal. In *Nyaigua Farmers Co- Operative Society Limited v Ibrahim Nyanbane & 3 others* [2016] e KLR, Musinga JA had this to say regarding application to file appeal out of time;

“The principles that guide this court in considering an application of this nature are well known. They are the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, and lastly, the degree of prejudice to the respondent if the application is allowed.”

17. In this case, the applicant states that though he lodged the Memorandum of Appeal a day after the judgment was rendered and paid for it, the receipt was issued on May 7, 2022. That is a lapse of a period of about seven (7) days. That lapse is not comparable to the delay in the case of Income Tax Appeals No 31 of 2017 *Commissioner of Domestic Taxes n v Mayfair Insurance Company Limited* [2017] eKLR cited by the Respondent where Onguto J held as he dismissed the application for extension of time together with the appeal record;

“The parties in the instant case were under the wrong impression that the time herein lapsed on August 3, 2017. That certainly is not so. The appeal was to be or ought to have been lodged on or before June 2, 2017, given that the judgment by the Tax Appeals Tribunal was



rendered on May 2, 2017. There was thus a delay of nearly 2 ½ months. The appeal was only filed on August 17, 2017. This too is the same date the motion seeking condonation was filed. I deem it that there was inordinate delay in filing the motion for condonation. The appellant should have moved faster than it did to file the motion earlier and seek extension of time.”

18. In *Kiu & another v Khaemba & 3 others* (Civil Appeal (Application) E270 of 2021) [2021] KECA 318 (KLR) (17 December 2021) (Ruling), Nambuye JA had this to say while allowing application dated October 3, 2019 for extension of time;

“From the above, the factors I am supposed to take into consideration in the determination of an application of this nature are firstly, the length of the delay. Secondly, reason for the delay. Thirdly, “possibly” arguability of the intended appeal and fourthly, any prejudice to be suffered by the opposite party should the relief sought by the applicant be granted.

Starting with the period of delay, it is evident from the record that the impugned judgment was delivered on July 22, 2019. The notice of appeal sought to be validated was filed on August 13, 2019 being a period of seven (7) days delay from the date it ought to have been filed. The application under consideration which seeks the court’s intervention was filed on October 3, 2019, being a period of about two (2) months and twelve (12) days.

19. Guided by the principles stated in the above cases, I am satisfied that the applicant herein has demonstrated the reasons for the delay to the satisfaction of this court. Further, I do not find delay of Seven (7) days unreasonable. The arguability of his appeal discerned from the Memorandum of Appeal annexed and it is in the interest of justice that he be given a chance to ventilate it.
20. Again, the fact that the respondent has frozen the applicant’s accounts shows that the alternative sought by the respondent that the applicant deposits with the respondent sixty percent (60%) of the disputed taxes and a bank guarantee on the remaining forty percent (40%) as a condition for grant of this application is highly crippling on the applicant in the circumstances. He will suffer great prejudice if this application is not allowed as opposed to the respondent.
21. However, nothing should prevent the parties from alternative dispute resolution mechanism in an attempt to settling this matter out of court in this as provided for under art. 159 (2) of the Constitution even after delivery of this ruling, particularly if the respondent has framework for such discussion.
22. In the upshot the application dated June 14, 2022 is allowed in the following terms.
1. The applicant is granted leave to file appeal out of time.
  2. The applicant to file and serve the notice of appeal and memorandum of appeal within 14 days from the date of this ruling.
  3. The applicant to file and serve the record of appeal within 30 days days from the date of filing the notice of appeal.
  4. The costs of the application be borne by the Applicant

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 6<sup>TH</sup> DAY OF MARCH, 2023.**

**PATRICIA GICHOHI**

**JUDGE**

**In the presence of:**



**Ms Soi for Mr Gathecha for applicant**

**N/A for respondent**

**Isindu, Court assistant**

