



REPUBLIC OF KENYA



**Kerai v Kenya Revenue Authority (Civil Case E486 of 2022)  
[2023] KEHC 2968 (KLR) (Commercial and Tax) (17 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2968 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E486 OF 2022  
DO CHEPKWONY, J  
MARCH 17, 2023**

**BETWEEN**

**KANJI VISHANJI KERAI ..... APPELLANT**

**AND**

**KENYA REVENUE AUTHORITY ..... RESPONDENT**

**RULING**

1. This is a ruling in respect of an application dated June 23, 2022 brought under Rule 4 of the [Tax Appeals Tribunal \(Appeals to the High Court\) Rules](#) 2015, in which the prayers sought are that:-
  - a. Leave be granted to the Applicant to appeal out of time and the draft Memorandum of Appeal annexed hereunder be deemed to be duly filed and properly served.
  - b. This Honourable Tribunal be pleased to grant any other or further order that it deems fit and just to grant in the circumstances.
  - c. Costs of this application be in the appeal.
2. The application is supported by the grounds set out on its face and the Supporting Affidavit sworn on June 23, 2022 by Kanji Vishanji Kerai, the Applicant, (“Taxpayer”).
3. According to the taxpayer, he filed an appeal with the Tax Appeals Tribunal, being Appeal No 117 of 2021, wherein Judgment was delivered on April 14, 2022. Being aggrieved with the decision, he filed the Notice of Appeal with the intention to lodge an appeal before this court. However, his mother, who resided in India passed on around the time he had given the Notice of Appeal and he had to travel to India to attend her funeral. He has attached a copy of the Death Certificate to that effect. He explains



- that because of this, the statutory period of 30 days set for lodging an appeal after filing of the Notice of Appeal lapsed while he was in India.
4. The Applicant has also stated that the delay in filing the Memorandum of Appeal is not inordinate as immediately upon realising the lapse, he has made efforts to correct the same by filing this application for extension of time to file the Memorandum of Appeal.
  5. The Applicant argues that if this application is not allowed, his business will suffer irreparable loss as the taxes being demanded by the Respondent (KRA) are colossal when compared with the value of his business and the revenue generated therefrom, hence the business operations will be hugely jeopardized.
  6. The Applicant also argues that the annexed draft Memorandum of Appeal raises strong and arguable points of facts and law with a good chance of success which should be dispensed with on merit rather than on a technicality. He goes on to state that this application will not prejudice the Respondent (KRA) in any way, but will provide this Honourable Court with an opportunity to decide on the issues in dispute on merit after hearing both parties so as to ensure dispensation of justice.
  7. The Applicant further states that he is ready and willing to abide by any reasonable and just terms that this court may impose in allowing the prayers sought in the application. He urges the court to allow the application since it has the jurisdiction to grant it.
  8. On its part, the Respondent (KRA) has responded vide a Replying Affidavit sworn by Fred Ndeleva the Chief Legal Manager in the Legal Services and Board Co-ordination Department of the Respondent sworn on September 8, 2022. It is argued therein that the Respondent is empowered by law to assess and collect taxes on behalf of the Government of Kenya. The Respondent has stated that the Applicant has not demonstrated sufficient reason for the delay in filing the Appeal since the passport attached to the Supporting Affidavit indicates that the Applicant arrived in Kenya on June 1, 2022 and has not provided any evidence to support the one-month delay.
  9. It is the Respondent's contention that if the court grants the extension of time, then it will be at risk of not being able to recover the outstanding taxes if no security is provided as the government depends on the revenue to sustain the economy. The Respondent argues that under article 201 of the Constitution of Kenya, the burden of taxation is on everyone and since the taxpayer was found liable to pay the tax by a competent body, it should pay the same while the appeal proceeds n as section 47 of the Tax Procedures Act provides for refund of tax with interest by KRA, if at all.
  10. The Respondent has urged that the taxpayer's right of appeal should be balanced with its right as a decree holder to enjoy fruits of the Judgment. The Respondent's view in that in the event the appeal succeeds, it is capable of reimbursing the taxpayer. The Respondent contends that should court grant the application, it should direct the Applicant to pay half the decretal sum and provide a suitable bank guarantee for the remaining half of the tax owed. The Respondent holds that the taxpayer has not demonstrated his readiness and willingness to deposit security for taxes and that the balance of convenience lies upon the Respondent to discharge the duty of collecting taxes to fund the National budget. For these reasons, the Respondent urges the court to dismiss the application with costs.
  11. On September 15, 2022, the parties were directed to file submissions in respect of their respective positions on the application and they complied with the Applicant filing submissions dated October 10, 2022 while the Respondents are dated October 11, 2022.

### **Analysis and Determination**



12. In consideration of the application filed herein, I have carefully read through the grounds set out on its face and Supporting Affidavit thereof and the Replying Affidavit sworn on behalf of the Respondent in response. I have also read through the submissions filed by both parties and considered the cited statute and case law. I find the issues for determination being:-
- a. Whether the conditions for extension of time to file an appeal have been met, and if so, and has the taxpayer met these conditions?
  - b. What orders should the court grant?
13. On the issue of whether the condition for extension of time to file an appeal have been met by the Applicant, these conditions this court attributes its jurisdiction to handle this suit from the *Tax Appeal Tribunal Act*, 2013 (“TATA”) which establishes the Tax Appeal Tribunal at Section 32 thereof which 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 appeal made under this section in accordance with the rules set out by the Chief Justice.
14. Rule 3 of the *Tax Appeals Tribunal (Appeals to the High Court) Rules*, 2015 then provides for the manner in which the appeal is to be heard. It states 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.
15. The jurisdiction of this court is also enshrined under the *Tax Procedures Act, 2015* (“the TPA”) which provides at section 53 that:
53. 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).
16. Having set out the express statutory jurisdiction of this court, I go on to the issue for determination which is whether the Applicant has met the conditions required for a party to be granted leave to file an appeal out of time. These conditions are to be provided for under Rule 4 of the Rules which states that:
- [4]. 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.”
17. As can be seen from the above provision, the Appellant is required to satisfy the court that he/she was unable to file the Memorandum of Appeal within the required period either because he/she was absent in Kenya, or was sick, or there was other reasonable cause. And secondly, that there has been no unreasonable delay on the part of the Appellant.



18. In this case, the taxpayer attributes the cause of delay to the death of his mother who resided in India and it required him to travel there for her burial. He has attached the Death Certificate to confirm the date of the mother's death as having been May 1, 2022 and the Passport No K6770345 which shows the date of entry back to the country as June 1, 2022. The application herein is dated June 23, 2022 with the draft Memorandum of Appeal annexed thereto.
19. On perusal of the above documents, it is established that the Judgment herein was delivered on April 19, 2022. The Notice of Appeal is dated April 28, 2022 and served upon the Respondent on May 5, 2022 as per the stamp affixed thereon. It is then clear that the timeline of 30 days within which the Applicant was required to file his Memorandum of Appeal started running from the date of service of the Notice of Appeal which was May 5, 2022 and was to lapse on June 5, 2022.
20. Looking at the passport, the Applicant travelled to India on May 2, 2022, a day after his mother died on May 1, 2022, he travelled back to Kenya on May 31, 2022 and arrived on June 1, 2022. In my opinion, it cannot reasonably be expected that he should have filed the Memorandum of Appeal within the remaining 4 days given that he was still grieving the loss of his mother and needed to settle down. The application under consideration is dated June 23, 2022 which is all within one month from the date of his arrival back in the country. All facts and or circumstances considered, there cannot be said to have been unreasonable delay in filing the same.
21. From the Passport and Death Certificate, it is clear and undisputed that soon after the Judgment was delivered by the Tribunal, the Applicant was out of the country and for good reason.
22. Further, it is noted that of the conditions provided for under Rule 4 of the Rules there is no requirement of an appeal having a high chance of success or for the Applicant to deposit security as a condition for granting leave to appeal out of time. In any case, the application herein is not that of stay of execution pending appeal as envisaged under Order 42 Rule 6 of the *Civil Procedure Rules* 2010 but it is one brought under Rule 4 of the Rules which is for extension of time within which to file an Appeal.
23. Having found as aforesaid, the reasons of his mother's death and having been out of the country coupled with the fact that there was no unreasonable delay on the part of the Applicant to file the present application, I find sufficient grounds have been raised to warrant the prayers sought to be granted.
24. In the end, the application dated June 23, 2022 is allowed and the following orders issue:
  - a. The Applicant be and is hereby granted leave to file Memorandum of Appeal out of time.
  - b. The annexed draft Memorandum of Appeal be and is hereby deemed to have been properly filed and served.
  - c. Mention on March 23, 2023 before the Presiding Judge of the Commercial and Tax Division for re-allocation before another Judge in the Division for directions on disposal of the appeal.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 17<sup>TH</sup> DAY OF MARCH , 2023.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:



M/S Nyanchana holding brief for Mr. Kioko for Applicant

M/S Wanjiku counsel for Respondent

Court Assistant - Sakina

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