



Sixtyfour Arcade Ltd v Commissioner of Domestic Taxes (Miscellaneous Application E1307 of 2020) [2023] KEHC 3960 (KLR) (Commercial and Tax) (5 May 2023) (Ruling)

Neutral citation: [2023] KEHC 3960 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E1307 OF 2020**

A MABEYA, J

MAY 5, 2023

BETWEEN

SIXTYFOUR ARCADE LTD APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

RULING

1. Before Court is the Motion dated December 18, 2020. It was brought under section 53 of the *Tax Procedures Act, 2015*, Section 32(1) of the *Tax Appeals Tribunal Act 2013* Rules 3&4 of the *Tax Appeals Tribunal (Appeals to the High Court) Rules 2015*.
2. The application sought leave to appeal against the ruling of the Tax Appeals Tribunal (“the Tribunal”) made on September 25, 2020 and for extension of time within which to file the Memorandum of Appeal. There was also a prayer to restrain the respondent from demanding or continuing to demand taxes from the applicant pending determination of the final appeal.
3. The application was supported by the grounds on the face thereof and by the affidavit sworn by Peter Gakuru Waiganjo on December 18, 2020. These were that; the applicant only learnt of the judgment on October 13, 2020, that its previous advocate declined to have a meeting with its Managing director and failed to return vital documents and records to facilitate the lodging of the appeal. This frustrated the applicant’s effort to appeal in time and the failure by the previous advocate should not be visited upon it. That the delay was not inordinate as the application was filed ten days after receipt of the documents.
4. The application was opposed vide a replying affidavit dated January 15, 2021 sworn by Fridah Mwongera. She stated that the Tribunal rendered its judgment on September 25, 2020 and the



- applicant filed a notice of appeal on October 15, 2020. That the applicant was supplied with all the certified copies of the proceedings and judgment by the Tribunal by a letter dated November 10, 2020.
5. It was contended that the applicant had not given a satisfactory explanation for the delay. That the respondent would be prejudiced if the application was allowed. The respondent faulted the applicant for failing to offer security for the taxes and for not showing that it had a *prima facie* case with a probability of success.
 6. The application was canvassed by written submissions which I have considered.
 7. The applicant submitted that failure to file the appeal was not intentional rather it was occasioned by its former advocate. That the respondent would not be highly prejudiced as the mistake was beyond the control of the applicant. It was further submitted that the appeal was meritorious with high chances of success and the applicant would suffer irreparable loss if the orders sought were not granted.
 8. I did not see any submissions by the respondent in the CTS Portal as at the time of writing the ruling.
 9. I have carefully considered the application, the affidavit in support and the submissions on record. The main issue for determination is whether the applicant has made a case for the orders sought. This is an application for leave to file an appeal out of time and for stay of execution pending the hearing and determination of the intended appeal.
 10. The principles applicable on an application for the orders sought are; the length of the delay, the reason for the delay, the prejudice, if any, to be suffered by the opposite party, substantial loss to be suffered if stay is not granted and offer for security for the due performance of the order or decree that will ultimately be binding on an applicant.
 11. Section 53 of the [Tax Procedures Act](#) provides that: -

“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).”
 12. Similarly, Section 32 of the [Tax Appeals Tribunal Act](#) gives the time limit for filing an appeal as 30 days from the time the parties have been notified of the Tribunals decision.
 13. Rules 3 & 4 of the [Tax Appeals Tribunal \(Appeals to The High Court\) Rules, 2015](#) provide: -
 - “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 serve a copy on the respondent.
 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.”



14. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court held: -
- “i) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 - ii) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
 - iii) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 - iv) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - v) Whether there will be any prejudice to be suffered by the respondents if the extension is granted;
 - vi) Whether the application has been brought without undue delay; and
 - vii) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
15. The court has the discretion to grant leave for extension of time to file the appeal. However, this is upon weighing the interests of all the parties based on the facts presented.
16. As to the delay, the applicant is said to have been supplied with the documents to lodge its appeal on November 10, 2020. It took no steps to lodge the appeal. The present application was made on December 18, 2020 and the Memorandum of appeal filed together therewith. The delay was for slightly over 30 days and the same cannot be said to be inordinate.
17. The applicant’s reason for the delay is the alleged fallout with its previous advocate. According to the applicant, the said advocate had the possession of important documents that were required for the filing of the appeal. It was the applicant’s contention that its efforts to contact the advocate were in vain.
18. From the record it is evident that the notice of appeal was filed within the prescribed timelines however there was delay in lodging the appeal. The Based on the circumstances of the case and the reasons advanced by the applicant I find that there is a reasonable and satisfactory explanation to invoke the discretion of the court.
19. As regards stay, there was no material that was placed before the Court to show that the applicant would suffer substantial loss if the stay was not granted. In deed there was no allegation to that fact in the supporting affidavit. Further, there was no offer for security. In the circumstances, the prayers for stay cannot be said to be merited. However, I will exercise my discretion and grant the stay but on terms.
20. In the upshot, I find merit in the application and the same is allowed in the following terms: -
- a. The applicant is hereby granted leave to appeal out of time.
 - b. The Memorandum of Appeal be filed and served within fourteen (14) days from the date hereof.
 - c. There shall be a stay of execution until the determination of the appeal upon the applicant paying to the respondent taxes totaling Kshs. 4 million within 30 days of the date hereof as security.



d. The costs of the application to be in the appeal.

21 It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF MAY, 2023.

A. MABEYA, FCIArb

JUDGE

