



Tractor Den (K) Limited v Commissioner of Domestic Taxes (Income Tax Appeal E215 of 2021) [2023] KEHC 3996 (KLR) (Commercial and Tax) (2 May 2023) (Judgment)

Neutral citation: [2023] KEHC 3996 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E215 OF 2021
JWW MONG'ARE, J**

MAY 2, 2023

BETWEEN

TRACTOR DEN (K) LIMITED APPELLANT

AND

THE COMMISSIONER OF DOMESTIC TAXES RESPONDENT

(Being an Appeal from the Order of the Tax Appeals Tribunal delivered on 17/9/2021 in Tax Appeal No. 297 of 2020)

JUDGMENT

1. Upon examining the Appellant's tax affairs, the Respondent discovered variances between the sales as declared in the VAT returns and sales as declared in income tax returns. Consequently, the Respondent raised an assessment of Ksh2,145,318.75/- on account of VAT for the year 2018 on December 30, 2019 and a further assessment of Ksh 22,486,526.50/- on account of income tax for the year 2017 on December 31, 2019.
2. The Appellant objected to the assessment on January 28, 2020 and the Respondent subsequently issued its objection decision by way of confirmation assessment notice dated 26/3/2020 confirming the income tax assessment for the year 2017 for Ksh 22,486,526.50/-. Aggrieved by that decision, the Appellant lodged an appeal before the Tax Appeals Tribunal (the Tribunal) by way of a Notice of Appeal dated July 15, 2020 filed before the Tribunal on July 24, 2020. The Respondent opposed the appeal via a statement of facts dated August 5, 2020.
3. The matter was thereafter referred to alternative dispute resolution on the Appellant's application but the parties did not reach an amicable solution to the dispute.



4. Consequently, the Tribunal determined the matter vide its judgement dated September 27, 2021. The Tribunal struck out the appeal before it, having found that it was not properly before the Tribunal since the Appellant had filed its Notice of Appeal out of the stipulated timelines and did not seek an extension of time as set out in the *Tax Appeals Tribunal Act*.
5. The Appellant being dissatisfied with the Tribunal's judgement appealed to this court against the whole of the judgment on the following grounds: -
 - a. That the Honourable Tribunal erred in law and fact by making a finding that the Appeal was not properly on record when the same had already been admitted and parties submitted themselves to the Respondent's Alternative Dispute Resolution Forum.
 - b. That the Honourable Tribunal erred in law and fact by failing to appreciate that the matter had already been admitted by the Honourable Chairman of the Tribunal on November 24, 2020.
 - c. That the Honourable Tribunal erred in fact and in law by revisiting on matters that were already outside their scope and purported to veto, reject and/or overturn the Honourable Chairman of the Tribunal of November 24, 2020 admitting the Appeal as properly tried.
 - d. That the Honourable Tribunal violated the Appellant's legitimate expectation by delving into procedural technicalities that had already been dealt with by a different panel thus resulting in a punitive decision against the Appellant.
 - e. That the Honourable Tribunal erred in law and in fact by failing to find that the delay in filing the Appeal cannot be entirely visited upon the Appellant in view of the active negotiations that were going on during the said period.
 - f. That the Tribunal erred in law and fact in not making a decision on the merits of the case before it and only opted to rely on a procedural issue, which it also based on misappreciation of the decision they relied on to dismiss the appeal."
6. Based on these grounds the Appellant sought to have the appeal herein allowed and to have the judgment set aside. Further, the Appellant sought an order directing the Tribunal to hear the appeal on its merits.
7. The Respondent opposed the appeal vide statement of facts dated May 25, 2022. In the said statement of facts, the Appellant contended that the Respondent raised an assessment of Ksh 2,145,318.75/- on account of VAT for the year 2018 on December 30, 2019 and a further assessment of Ksh 22,486,526.50/- on account of income tax for the year 2017 on December 31, 2019; that the Appellant objected on January 28, 2020 but failed to provide supporting documents thus the assessment was confirmed on March 26, 2020.
8. The Respondent stated that the Appellant was aggrieved by the confirmed assessment and filed an appeal at the Tribunal being Tax Appeal No 297 of 2020; that the appeal before the Tribunal was not valid due to the Notice of Appeal being filed late, outside the statutory period; that the objection decision was issued on March 26, 2020 and the Appellant should have filed its notice of appeal within 30 days from March 26, 2020, that is on April 25, 2020.
9. That however the notice of appeal was filed after April 25, 2020, that is on July 15, 2020 therefore the Tribunal arrived at the correct decision in holding that the appeal was not properly before it; that although the appeal was found to be invalid, the Tribunal and/or the Chair, in the course of its/his duty, had to mention the matter on November 24, 2020 and subsequent dates and that the legitimate



expectation was not violated following the invalidity of the appeal due to failure by the Appellant to strictly observe the statutory timelines.

10. The Respondent prayed to have the court dismiss the appeal and affirm the judgment delivered by the Tribunal on September 17, 2021 and an award of costs of this appeal and the costs at the Tribunal.
11. I have considered the entire record of appeal, the opposition to the appeal and the documents filed by the parties. The grounds of appeal can be condensed to the following issue for determination: -

“Whether the Tribunal erred in law and in fact in holding that the appeal was not properly before it and whether by refusing to hear the appeal on its merits, the Tribunal violated the Appellant’s legitimate expectation.
12. The Appellant submitted that by allowing the parties to ADR, the Tribunal implicitly signalled their willingness to conclusively determine the appeal in the event that the ADR negotiations collapsed. The Appellant therefore urged this court to exercise its supervisory jurisdiction and direct the Tribunal to determine the matter on its merits.
13. The Respondent on its part submitted that the appeal before the Tribunal was not proper as the Appellant failed to follow the procedural requirement stipulated by the *Tax Appeals Tribunal Act* Section 13(3) and (4) by filing a late appeal and not seeking leave to do so; that although the parties submitted themselves to ADR, this did not automatically negate the procedure provided by the law.
14. The Tribunal held that the appeal was not properly before it as the Appellant failed to preliminarily make an application seeking extension of time to file the appeal out of time and that the appeal as framed by the Appellant was omnibus in nature having merged the application for extension of time to the appeal seeking substantive orders.
15. Further the Tribunal found that even if it were to construe the Appellant’s prayer seeking extension of time as constituting a sufficient application for extension of time, the same would fail by virtue of there being no sufficient explanation to justify the delay in filing the appeal.
16. It is not disputed that the Appellant filed its appeal out of stipulated timelines set out in the Tax Appeal Tribunal Act which provides that a notice of appeal ought to be filed within 30 days of an objection notice being issued. The Respondent issued its objection decision on March 26, 2020 and the Appellant lodged its notice of appeal against it on July 15, 2020.
17. Further Section 13(3) the *Tax Appeal Tribunal Act* provides that the Appellant may apply to the Tribunal for an extension of time to file a notice of appeal and the Tribunal may grant such an extension if a reasonable cause has been given.
18. The Record of Appeal under pages 21-23 shows that the Appellant sought an extension of time within its substantive memorandum of appeal but did not apply for an extension of time beforehand.
19. Pages 47-51 of the Record of Appeal contain the proceedings before the chairperson and the Tribunal. While reading the proceedings I note that the parties both appeared before the chairperson on several occasions, that the issue of late filing of the appeal was never raised by the Respondent nor the chairperson and that the chairperson inquired from the parties on more than one occasion about the status of the ADR process between the parties.
20. The proceedings of April 22, 2022 indicate that the chairperson of the Tribunal stated that the parties had by consent allowed for the hearing to continue by way of submissions and on July 14, 2021 a date was set for the highlighting of submissions filed by the parties.



21. The proceedings show this court that both the Appellant and Respondent had submitted themselves to the jurisdiction of the Tribunal and that neither the chairperson nor the Respondent took issue with the late filing of the notice of appeal. In fact, the proceedings went as far as the highlighting of submissions.
22. It therefore comes as a surprise that the issue of late filing of the appeal only came up when the ADR proceedings failed and the Tribunal held that the appeal was not properly before it.
23. Legitimate expectation was defined in the Court of Appeal case of *Kenya Revenue Authority & 2 others v Darasa Investments Limited* [2018] eKLR where the court quoted the text book by *Pollard, Parpworth And Hugheswriting at page 583 in the 4th edition of Constitutional And Administrative Law*: Text With Material:-

“Legitimate expectation refers to the principle of good administration or administrative fairness that, if a public authority leads a person or body to expect that the public authority will, in the future, continue to act in a way either in which it has regularly (or even always) acted in the past or on the basis of a past promise or statement which represents how it proposes to act, then, prima facie, the public authority should not, without an overriding reason in the public interest, resale from that representation and unilaterally cancel the expectation of the person or body that the state of affairs will continue. This is of particular importance if an individual has acted on the representation to his or her detriment.”

24. In the case of *Keroche Industries Limited v Kenya Revenue Authority & 5 Others*[2007] eKLR it was held:

“Legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the Respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables affected people to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation.”

25. I am guided by the authorities above. By allowing the parties before it to pursue resolution of the dispute through ADR the Tribunal implicitly signalled their willingness to conclusively determine the appeal in the event that the ADR negotiations failed.
26. I therefore find that the Tribunal erred in holding that the appeal was not properly before it and violated the Appellant’s legitimate expectation by refusing to hear the appeal on its merits.
27. The appeal is meritorious and is allowed as prayed. Costs of this appeal are awarded to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF MAY 2023.

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J. W. W. MONG’ARE

JUDGE

IN THE PRESENCE OF: -

- 1. Ms. Saul holding brief for Mr. Kinyanjui for the Applicants.**
- 2. Ms. Jemutai holding brief for Ms. Mwago for the Respondent.**



3. Sylvia- Court Assistant.

