Commissioner of Investigations and Enforcement v Mzuri Sweets Limited (Income Tax Appeal E015 of 2022) [2024] KEHC 14387 (KLR) (Commercial and Tax) (20 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14387 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E015 OF 2022

A MABEYA, J

NOVEMBER 20, 2024

BETWEEN

COMMISSIONER OF INVESTIGATIONS AND ENFORCEMENT APPELLANT

AND

MZURI SWEETS LIMITED ..... RESPONDENT

RULING

1. This ruling determines two applications both filed by the appellant. The applications are dated 14/4/2023 and 27/6/2023, respectively.

Application dated 14/4/2023

2. The application was brought under section 53 of the *Tax Procedures Act*, rule 4 of the Tax Appeals Tribunal (Appeals to the High Court) rules 2015 and the Inherent jurisdiction of the Court and article 159 of *the Constitution* of Kenya. It sought for enlargement of time to comply with the order of 23/3/2023 for payment of thrown away costs.

3. The application was based on the grounds set out on the face of the Motion and the affidavit of DIANA ALMADI of even date. She stated that the appellant had not been able to comply with the payment of thrown away costs but it was almost being finalized. That the appellant had already complied with the other orders of the Court by filing a record of appeal and filing submissions.

4. She further stated that the appellant was apprehensive that the respondent would commence the process of striking out the appeal. That it would be in the interest of justice if the court allows the application and the respondent would not be highly prejudiced.

5. The respondent opposed the application vide a replying affidavit of Hitendra Solanki sworn on 2/6/2023. He averred that the order of 23/3/2023 was clear that the appeal stood struck out if thrown

away costs were not paid within 7 days. That pursuant to the said order, the appeal herein stood struck out and any application for extension ought to have been made before the lapse of 7 days. It was contended that several parts of the record of appeal were illegible

Application dated 27/6/2023.

6. This application was brought under Rule 4 and 5 of the Tax Appeals Tribunal (appeals to the High Court) Rules 2015 and the Inherent Jurisdiction of the court and Article 159 of *the Constitution* of Kenya. It sought the setting aside of the order of 23/3/2023 and the issuance of any orders and directions as the Court may deem fit.

7. In support of the application, the appellant relied on the grounds on the face of the Motion and the affidavit of DIANA ALMADI sworn on 27/6/2023. It was contended that the said orders directed the appellant to pay the respondent Kshs. 200,000/- as throw away costs in default whereof the appeal be dismissed, that a supplementary record of appeal be filed and served as well as written submissions.

8. That the appellant stated had been able to comply with the said orders save for the payment of Kshs 200,000/- to the respondent due to the fact that government approval processes were lengthy. That the orders were made on misrepresentation of facts by the respondent. That the record of appeal was proper and should not be struck out.

9. That it had not been demonstrated how the record of appeal was against the rules which governed the appeals to the High Court. That if the appeal is not heard on merit, the government was bound to lose taxes in the dispute which was substantial. That the orders sought should be granted in line with Article 159(2)(c) of *the Constitution* by dispensing with procedural technicalities.

10. The application was opposed by the respondent vide a replying affidavit of Hitendra Solanki sworn on 12/7/2023. It was deposed that the appellant had again failed to follow the directions of the Court. That the application before court was defective as the appeal stood struck out and the Court was therefore functus officio.

11. That in the number of times the appeal was mentioned before the deputy registrar and this Court, the advocate appearing for the appellant had agreed that the record was incomplete. Further, that the appellant had failed to comply with Rule 5 and 6 of the *Tax Appeals Tribunal Act*.

12. The applications were canvassed by way of written submissions which I have considered. The appellant submitted that at all times, the appeal was proper and in compliance with all the rules and therefore the Court should set aside the impugned orders. That the respondent had failed to respond to the issues raised by the appellant in the applications.

13. The appellant urged the Court to exercise its discretion in its favour to allow it to prosecute its appeal to conclusion. That the respondent had not demonstrated any prejudice it would suffer if the orders sought were granted. Counsel submitted that if the appeal is not heard on merit, the government stood to lose taxes. That striking out an appeal was a drastic measure that should be resorted to in the clearest of cases.

14. For the respondent, it was submitted that the issue as to whether the record of appeal was filed was res-judicata and the appellant could not re-litigate the issues. That a Court sitting on appeal should have all the pleadings filed before the Tribunal as well as typed proceedings.

15. That the Court could not be expected to hear an appeal against the decision of the Tribunal on the basis of selected documents presented by the appellant. That the respondent was supposed to produce documents that had been placed before the Tribunal by the respondent. Counsel submitted that, in

line with Rule 20 of the Tax Appeals Tribunal (Appeals to the High Court Rules), the Civil Procedure Rules apply to tax appeals as long as they are not inconsistent therewith. That the appellant could not shift the burden of producing documents to the respondent. Finally, that failing to file a complete record of appeal was not a procedural technicality.

16. I have considered the pleadings on record and the rival submissions presented by parties. The two issues that arise is whether the time for compliance with the order of 23/3/2023 should be enlarged and whether the said orders should be set aside.

17. The record shows that on 23/3/2023, the Court directed the appellant to pay thrown away costs of Kshs. 200,000/- and file a compliant record of appeal within a specified period. These drastic orders were issued because the appellant had dragged its feet in filing the record of appeal for a period of one year. The matter had come up severally before the Deputy Registrar and before this Court whereby directions to lodge a compliant record were not heeded.

18. The appellant has filed the present applications seeking enlargement of time within which to comply with that part of the order that required it to pay the throw away costs. It had already complied with the other parts of the said order. The reason advanced was that, owing to the complex and lengthy government approval processes, the appellant was unable to get the money within the 7 days directed.

19. In Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR, the Supreme Court set out the considerations that should guide the Court in exercising its discretion in cases for extension of time. It stated: -

    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 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."

20. From the foregoing, it is clear that an order for extension of time is discretionary. However, that discretion has to be exercised within the known principles set out by the Supreme Court.

21. In the present case, it is not in dispute that the order was partially complied with. The part that did not require financial commitment was complied with within the time fixed by the Court. That shows that the appellant was not over-reaching.

22. The part that remained to be complied with was the one that required the appellant to pay the thrown away costs of Kshs.200.000/-. The appellant explained that, it is because of the lengthy government approval processes that had led to the delay in complying with the order.

23. The Court is alive to the fact the appellant is a government institution. That unlike in the private sector where decisions on fiscal matters are swiftly dealt with, it is different with the government. It is because of the constitutional tenets and or imperatives of transparency and accountability, that matters finance have to undergo bureaucratic processes that may take some time. The Court recognizes that the said bureaucratic processes often causes delays.

24. In this regard, I find that the reasons put forth by the appellant for the failure and or delay in complying with that part of the order that required payment of thrown away costs to be reasonable and justifiable.

25. Further, the constitutional overriding objective under section 1A of the *Civil Procedure Act* requires the Court to ensure that justice is administered fairly and equitably for all parties involved. It also mandates the Court to take appropriate measures to advance this goal, promoting an efficient and just resolution of civil disputes.

26. The Court notes that the respondent has confirmed that the thrown away costs were paid, albeit late. The dispute before Court touches on recovery of alleged taxes which is a public interest issue. The justice of the case dictates that the parties set down the appeal for hearing on merit.

27. I reject the contention by the respondent that the Court is functus officio and that the issue of proper or improper record is res-judicata. This is so because, the Court has the discretion to revisit its orders if an appropriate application is made. The jurisdiction is exercisable whether or not the time for doing the thing has passed or not.

28. In the present case, although the record stood struck out on the lapse of the time ordered by the Court, it is clear that the appellant attempted to comply, though partially and by extending the time, the part of the order deeming the record struck out would dissipate and revive the appeal.

29. In any event, I find that the respondent will suffer no prejudice if the orders sought are granted. One thing that is disturbing is that, the documents alleged by the respondent to be missing from the record are documents within the possession of the respondent. Indeed, the respondent itself contended that the record of appeal was incomplete because the documents it had produced before the Tribunal had been left out.

30. At this time when the constitutional imperative is that, courts lean towards substantive justice rather than technicalities, I opine and find that, there was nothing that prevented the respondent itself from filing a supplementary record to introduce the clear documents that were in its possession and which it insisted had been left out by the appellant from the record. The application for extension of time is therefore for granting.

31. On the application that the orders be set aside, I think the same is spent the Court having extended the time for compliance of those orders.

32. Accordingly, the Court finds the application for extension of time merited and allows the same as prayed.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF NOVEMBER, 2024.

A. MABEYA, FCI ARB

JUDGE