



**Commissioner of Domestic Taxes v Kipeto Energy PLC (Income Tax Appeal E213 of 2023)
[2024] KEHC 14015 (KLR) (Commercial and Tax) (8 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14015 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E213 OF 2023
FG MUGAMBI, J
NOVEMBER 8, 2024**

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

KIPETO ENERGY PLC RESPONDENT

*(Being an appeal against the decision of the Tax Appeal Tribunal delivered
at Nairobi on the 5th May, 2023 in Tax Appeal No. 233 of 2022)*

RULING

Background and introduction

1. This ruling determines two applications. The first one is dated 9th December 2023, filed by the appellant. It seeks to extend time within which to file the Memorandum of Appeal against the Judgment of the Tax Appeals Tribunal delivered on 5th May 2023 (the first application). The second is dated 25th January 2024, and is filed by the respondent. It seeks to strike out the appeal.

The first application:

2. The application is supported by the grounds on the face of it in addition to an affidavit sworn on 19th December 2023 by Wanjiru Njuguna, an officer in the appellant's Legal Services Department.
3. The appellant acknowledges that the Tax Appeals Tribunal (the Tribunal) delivered its judgment on 5th May, 2023. It is further acknowledged that the law requires a person aggrieved by the decision of the Tribunal to serve a copy of the Notice of Appeal within 30 days of being notified of the decision. In this regard, the appellant asserts that the Memorandum of Appeal should have been filed by 2nd July, 2023. However, due to government bureaucracy, there was a delay in issuing the instructions for the appeal, necessitating this application.



4. It is the appellant's argument that the intended appeal is arguable and has high chances of success. It further argues that no prejudice will be suffered by the respondent if the application for extension of time is allowed.
5. The application is opposed through a replying affidavit sworn on 19th January 2024, by Allan Arthur Munyua, a Director of the respondent. The respondent points out that the appellant filed its appeal more than 5 months out of the statutory timelines, without first seeking the leave of the Court to do so. The respondent takes issue with the reason advanced by the appellant, which does not explain the details of the 'government bureaucracies' that led to the late filing of the appeal.
6. The respondent further notes that in any case, the appellant is an autonomous institution and not subject to the bureaucracies highlighted. The respondent further argues that the appellant is well aware of the timelines of appeal and was under an obligation to ensure that such bureaucracies, if any, did not impede court processes.
7. The respondent submits that it will be prejudiced from an operational and financial point of view by allowing the appeal to be filed out of time, and that this would be tantamount to defeating the doctrine of finality in litigation.

The second application:

8. The application is supported by the affidavit of Allan Arthur Munyua, a Director of the respondent, sworn on 25th January 2024. The same is premised on the same grounds as the response to the first application. For good order I would therefore take the second application to be a response to the first.
9. The application is equally opposed by the appellant through the replying affidavit sworn on 24th February 2024 by Wanjiru Njuguna. She avers on behalf of the appellant that owing to sickness and government bureaucracy she was unable to file the appeal herein within the required timelines. It is her case that in any case, even if the appeal had been filed, the same would not have been heard to date due to the lack of typed proceedings.
10. The appellant further avers that given the colossal amount of taxes due, being Kshs. 652,838,359/=, the court should exercise its discretion and extend time to file the appeal.

Analysis and determination

11. Following directions issued by this Court, the parties filed their respective submissions to the two applications, which I have carefully considered alongside the pleadings, authorities and caselaw cited. The submissions mirror the above cases advanced by the respective parties and as such it would serve no benefit to regurgitate the same.
12. At the heart of the two applications is the question of whether the appellant has made a case for an extension of time to file its appeal out of time.
13. The parameters for consideration in an application for extension of time is as set by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat V The Independent Electoral and Boundaries Commission & 7 Others*, [2014] eKLR. The Court established the following guiding principles:
 - 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;
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time; and
 - viii. The degree of prejudice to the respondent if the application is granted.
14. Against these binding principles, and on the first ground of whether there is a reasonable reason for the delay, the Court makes a few observations. Firstly, as the respondent correctly notes in its supplementary affidavit sworn on 26th April, 2024, the appellant's case in its application and subsequent response to the second application appears to have changed.
 15. In the first instance, the appellant claims that the delay in filing its appeal was due to government bureaucracy. This assertion of government involvement has neither been explained nor substantiated. The appellant's claim that there was a delay in obtaining approval for the appeal could have been easily proven if it was indeed the genuine cause of the delay.
 16. In the second application, the appellant also attributed the delay to illness and absenteeism from the office during the relevant period. The Court notes, as highlighted by the respondent, that the appellant's claimed period of maternity and medical leave commenced after the deadline for filing the appeal had already passed. Even if this were not the case, the Court observes that the appellant is an institution and questions why the indisposition of a single advocate should have hindered the filing of an appeal involving such significant amounts as noted by the appellants themselves.
 17. The appellant's argument regarding its critical role in collecting taxes on behalf of the government cannot be relied upon to persuade the Court to allow the application. If anything, this role underscores why the Court should hold the appellant to an even higher standard of responsibility. Tax matters can have far-reaching consequences for businesses and may disrupt their operations.
 18. It is therefore reasonable to expect that an institution such as the appellant, entrusted with the collection of taxes would be well aware of tax procedures and adhere strictly to related timelines. Allowing leniency in this instance could set a concerning precedent.
 19. I therefore find that the reason for the delay has not been explained to the satisfaction of the Court. I am also persuaded by the respondent's arguments regarding the operational inconveniences that would result from reopening this trial after an inordinate delay of more than five months in filing the appeal.
 20. Once again, I reiterate that there is a valid reason for the precise timelines established for filing appeals, particularly within the context of tax litigation. These deadlines are designed to maintain fiscal certainty for both taxpayers and the government, prevent undue delays that could disrupt public revenue collection, and ultimately safeguard businesses and economic stability.



Disposition

21. Accordingly, for the reasons that I have given, the first application dated 9th December 2023 for extension of time is dismissed. The second application dated 25th January 2024 is successful. Consequently, the appeal is hereby struck out but with no orders as to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 8TH DAY OF NOVEMBER 2024.

F. MUGAMBI

JUDGE

