



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL AND TAX DIVISION**

**HCCOMMISC/E098/2021**

**HELLEN MUTHONI NJIRU.....APPLICANT**

**VERSUS**

**COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT**

**RULING**

**Introduction**

1. On **20<sup>th</sup>** November, 2020, the Tax Appeals Tribunal (The TAT) dismissed with no orders as to costs the applicant's application for extension of time to file her appeal before the TAT on grounds that the application had been filed after an inordinate delay of over **6** years.

2. Aggrieved by the said Ruling, the applicant filed a Notice of appeal dated **11<sup>th</sup>** February 2021, signalling her intention to appeal against the said ruling. Concurrent with the Notice of Appeal the applicant filed a Memorandum of Appeal against the said ruling citing a raft of grounds.

**The instant application**

3. Contemporaneous with the Notice of Appeal and the Memorandum of Appeal, the applicant also filed the application of even date the subject of this ruling seeking leave to appeal against the said ruling out of time. She also prays for an order that upon grant of leave as aforesaid, her aforesaid Memorandum of Appeal be deemed to be duly filed.

4. Additionally, she prays for stay of execution and enforcement of the Notification of Charge on L.R. Nos. 589, Dagoretti/Riruta/1731 and 13709 pending the hearing and determination of the appeal. Further, she prays for any other order(s) this court may deem just in the circumstances and for costs of the application. Prayers **(d)** and **(f)** of the application are spent.

5. The application is premised on the grounds that the applicant's accountants and tax agents informed her in January 2021 that her application seeking leave to appeal out of time at the TAT was dismissed on **20<sup>th</sup>** November 2020 and that she should have filed her Notice and Memorandum of Appeal by **20<sup>th</sup>** December 2020. She states that since the Respondent has issued Agency Notices to her banks and her accounts are frozen, she had financial constraints and she had to borrow money from friends and family to instruct her advocate.

6. She states that there was further delay in collating the file so that the lawyer could be fully seized of the matter because she had some documents, and others were with the accountants and tax agents whilst others were with the former accountants and tax agents. She states that the accountants' mistakes should not be visited upon her, that she should not be condemned unheard, and that justice should not be sacrificed at the altar of procedure contrary to constitutional dictates.

7. In addition, she states that the decision by the TAT to deny her leave to appeal against the excessive, erroneous, unconscionable and punitive estimated tax assessment of **Kshs. 11,509,090/=** for the years 2009, 2010, 2011 and 2012 will occasion her hardship, prejudice and grave miscarriage of justice, and that the Respondent never gave her the basis of the computation contrary to the provisions of the Tax Procedure Act and Article **35** of the Constitution.

8. Additionally, she states that the Respondent refused and or failed to amend the Tax Assessment even after she availed documents showing that the computation was erroneous, and that she has an arguable appeal with high chances of success because the Respondent never issued an objection decision. Further, the applicant states that the Respondent issued Agency Notices on **1<sup>st</sup>** December 2016 and **8<sup>th</sup>** July 2020 to her Bankers effectively freezing her accounts and denying her access to funds.

9. Also, the applicant states that the Respondent issued Notification of Charges on LR. Numbers 589, 1731 and 13709 effectively imposing a caveat on the properties and there is a potential and imminent threat of selling her property. She states that she is not the beneficial and legal owner of Dagoretti/ Riruta/1731. In addition, she states that the Respondent's conduct has rendered her destitute and that she risks suffering substantial loss, and that failure to stay the enforcement of the Agency Notices and the Notification of Charges will render the application and the appeal a nullity. Lastly, the applicant states that the delay in lodging this application is not inordinate considering the challenges, limitations and restrictions attributed to Covid 19 Pandemic.

### **Respondent's Replying affidavit**

10. Edina Kabaka, an officer appointed under section 13 of the Kenya Revenue Authority Act swore the Replying affidavit on behalf of the Respondent in opposition to the application. She deposed that the applicant has not attached evidence to support her averment that she was notified by her tax agents about the TAT's decision delivered on 20<sup>th</sup> November 2020 in January 2021. She deposed that the agency notices complained of by the applicant were issued on 1<sup>st</sup> December 2016 and 8<sup>th</sup> July 2020 way before the applicant filed a Notice of Appeal and her application for extension of time at the TAT on 6<sup>th</sup> November 2020, hence, it cannot be a basis for her non-compliance with the timelines for filing her appeal.

11. She deposed that the applicant consistently failed to comply with the timelines provided by the law, for example, she filed a Notice of Appeal before the TAT 6 years and 7 months late; that she disregarded section 13(2) of the Tax Appeals Tribunal Act and filed a Memorandum of Appeal on 30<sup>th</sup> October 2020 and subsequently she filed an application to file the appeal out of time on 6<sup>th</sup> November 2020; and, that the application for extension of time was based on the grounds that: -

- i. The applicant had no knowledge of the Tax Appeals Tribunal;*
- ii. The applicant had engaged an auditor who did not know the law relating to Tax Appeals Tribunal;*
- iii. The applicant had to look for a tax expert to file the case before the Tax Appeals Tribunal;*
- iv. The agency notices and the caveat on the property were still in force.*

12. M/s Kabaka deposed that the TAT dismissed the application on grounds that no sufficient reason had been provided for the unreasonable and inordinate delay of over 6 years; that the applicant failed to lodge a notice of appeal within 30 days as required by section 32(1) of the Tax Appeals Tribunal Act; and, the applicant also failed to comply with the requirement of rule 3 of the Tax Appeals Tribunal (Appeal to the High Court) Rules.

13. Further, she deposed that the TAT's decision dealt with extension of time to file an appeal and did not deal with the merits of the appeal. Additionally, she deposed that extension of time to file an appeal is an exercise of judicial discretion and section 13(4) of the Tax Appeals Tribunal Act requires an applicant to provide a reasonable cause which may have prevented the applicant from filing the notice of appeal or submitting the documents within the specified period. Additionally, she deposed that the applicant has been indolent and the application ought not to be allowed.

### **The submissions**

14. The applicant's counsel essentially reiterated the contents of the supporting affidavit and the grounds cited in support of the application. It will add no value to rehash them here. It will suffice to state that she submitted that no objection decision was rendered. She invoked this courts overriding objective to do justice and blamed the delay in filing the application to the COVID 19 pandemic and urged the court to allow the application.

15. M/s Kithinji, the Respondent's counsel argued that the TAT considered the applicant's application and dismissed it, and, that the delay in filing the instant application has not been explained. She argued that it is not necessary to delve into the merits of the appeal, but, in any event, she argued that the Banks confirmed that there were no funds in the account, and that the applicant has not established any basis for this court to grant the leave sought.

### **Determination**

16. The core issue for determination is whether the applicant has established a basis for the court to grant the leave sought. A useful starting point is to recall the right to appeal is not automatic. This position has been reiterated by our Supreme Court in several decisions. In *Nyutu Aqrovet Limited v Airtel Networks Kenya Limited: Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [1] Apex court stated that a right of appeal is not automatic but is a creation of statute and the jurisdiction to grant leave to appeal is only excised where the right of appeal exists. Thus, an applicant for leave must show that the intended appeal raises substantial questions of law to be decided by the appellate court and that the intended appellant has a *bona fide* and arguable case. The applicant must demonstrate the issues raised or involved are of general principle(s) which are to be decided for the first time or where the question(s) is one upon which further argument and a decision of the superior court would be to the public advantage.

17. The Supreme Court *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*<sup>[2]</sup> set out the considerations to guide the court in exercising its discretion in cases of this nature. 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."

18. In granting leave, the court has to balance the competing interests of the applicant with those of the respondent, a position well stated in the following paragraph extracted from *M/S Portreitz Maternity v James Karanga Kabia*:-[3]

*"That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right."*

19. The applicant's application before the TAT was filed after a delay of over 6 years. The TAT held that the delay was unreasonable and inordinate and it was not explained sufficiently. These being the facts, I do not think the applicant has established that her intended appeal has high chances of success nor has she demonstrated that she deserves the said orders. From the material before me, she did not discharge the burden of laying a basis to the satisfaction of the court. Other than approaching the TAT after a delay of over 6 years, she also approached this court late and seeks to blame COVID 19 pandemic for the delay. The court were fully operational and e-filing was in operation, hence her self or her advocate could lodge the application from the comfort of their homes.

20. Decided cases are in agreement that delay, even for one day must be satisfactorily accounted to the satisfaction of the court. I am aware that whenever the court is invested with the discretion to do certain act as mandated by the statute, the same has to be exercised judiciously and not in an arbitrary manner and capricious manner. The classic definition of 'discretion' by Lord Mansfield in *R. v Wilkes*[4] is that 'discretion' when applied to courts of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, 'but legal and regular'. In exercise of discretion, the court cannot ignore the provisions of the Constitution or the law. In fact, discretion follows the law. The King's Bench in *Rookey's Case* [5] stated as follows: -

*"Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with."*

21. The court's discretionary powers are constrained by the objectives of the Constitution to grant access to justice. Access to justice is both ways. *One*, the right to enjoy the fruits of a judgment. *Two*, the right of an aggrieved party to appeal against the decision. 'Discretion' signifies a number of different legal concepts. Here the order is discretionary because it depends on the application of a very general standard — what is 'just and equitable' — which calls for an overall assessment in the light of the factors mentioned in the Constitution or a statutory provision, each of which in turn calls for an assessment of circumstances. (See *Norbis v Norbis*[6]).

22. Broadly speaking, the exercise of the court's discretionary power is influenced by considerations of justice and fairness, having regard to the facts and circumstances in the particular matter before it. A review of the tests and authorities discussed above and the facts of this case leave me with no doubt that this is not a proper case for the court to grant the leave sought. Having declined to grant leave, it follows that there is no basis upon which the prayers for stay ca be considered. Consequently, I dismiss the applicant's application dated 11<sup>th</sup> February 2021. I make no orders as to costs.

Orders accordingly

**DATED, SIGNED AND DELIVERED VIA E-MAIL AT NAIROBI THIS 5TH DAY OF JULY 2021**

**JOHN M. MATIVO**

**JUDGE**

[1] {2019} e KLR.

[2] {2014} eKLR.

[3] Civil Appeal No. 63 OF 1997.

[4] 1770 (98) ER 327

[5] [77 ER 209; (1597) 5 Co.Rep.99].

[6] [1986] HCA 17; 161 CLR 513; 60 ALJR 335; 65 ALR 12.