



REPUBLIC OF KENYA



Commissioner of Investigations and Enforcement v A One Healthcare Limited (Income Tax Appeal E120 of 2020) [2021] KEHC 45 (KLR) (Commercial and Tax) (21 September 2021) (Ruling)

Neutral citation: [2021] KEHC 45 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E120 OF 2020
DAS MAJANJA, J
SEPTEMBER 21, 2021**

**BETWEEN
COMMISSIONER OF INVESTIGATIONS AND ENFORCEMENT APPELLANT
AND
A ONE HEALTHCARE LIMITED RESPONDENT**

RULING

1. The application for consideration is the Appellant Notice of Motion dated 16th April 2021 seeking an order to extend time for filing the memorandum of appeal out of time and that the Memorandum of Appeal be deemed as duly filed. The application is opposed by the Respondent.
2. When I heard oral submissions, counsel for the Respondent, who vehemently opposed the application was however not opposed to having the application allowed, if it was allowed to file its cross-appeal since it was constrained to withdraw its application to file it cross-appeal on 7th May 2021 when the matter came up for mention.
3. It was understood at the material time that there was no right to file a cross-appeal under the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015. In *York Investments East Africa Limited v Commissioner of Investigations and Enforcement ML HC COMM Misc. Appl. No. E612 of 2021*, I considered whether a respondent in a tax appeal had the right to file a cross appeal. In summary I held as follows:

[10] Resolution of this matter depends on whether the Appellant has reasonable cause or expectation to believe that it was entitled to file a cross-appeal as neither TATA nor the Rules provide for the filing of cross-appeals in Tax Appeal. In the absence of a specific rule or procedure, Rule 20 of the Rules provides as follows:



20. The rules determining procedure in civil suits before the Court to the extent to which those rules are not inconsistent with the Act or these Rules, shall apply to the tax appeal as if it were a civil suit.

(11) I hold therefore that Rule 20 imports the provisions of the Civil Procedure Rules to the extent that they are not inconsistent with the Rules. Order 42 of the Civil Procedure Rules governs the procedure for appeals to the High Court and it too, does not expressly provide for the filing of cross-appeals in appeals to the High Court but Order 42 rule 32 of the *Civil Procedure Rules* suggest that a party to an appeal in the High Court may indeed file a cross appeal. It states as follows:

32. The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal.

(12) The aforesaid provision lead to the conclusion that although there is no express provision for filing a cross-appeal, the High Court exercising its appellate jurisdiction may entertain a cross-appeal as it required to consider and make judgment on objections to the judgment of the Tribunal or subordinate court even as to those portions that have not been appealed against by either party. This position has found favour in *Twaber Abdulkarim Mohamed v Independent Electoral and Boundaries Commission and 2 Others MSA CA Civil Appeal No. 154 of 2013* and *Bulsbo Trading Company Ltd v Rosemary Likhola Mutakha and Another Busia HCCA No. 1 of 2018* . Since the Civil Procedure Rules provide for the filing of cross-appeal, I do not find this position inconsistent with Rules. In my view, therefore the Applicant was entitled to file a notice of cross-appeal in response to the Appellant's appeal. This view is consistent with the constitutional edict under Article 159 of the Constitution which provides that the court should strive to do substantive justice unhindered by technicalities.

4. Based on the foregoing, I allow the Notice of Motion dated 16th April 2021 on the following terms:
- (a) Leave be and is granted the Appeal out of time and this appeal be and is hereby deemed as duly filed and served.
 - (b) The Respondent shall file and serve its cross-appeal within 14 days from the date hereof.
 - (c) The costs of the application shall be in the appeal.

DATED and DELIVERED at NAIROBI this 21st day of SEPTEMBER 2021.

D. S. MAJANJA

JUDGE

Ms Chelagat instructed by Kenya Revenue Authority for the Applicant.

Mr Mbaye instructed by Humphrey and Company LLP Advocates for the Respondent.

