



Commissioner of Investigations And Enforcement v Ahmed (Tax Appeal E130 of 2020) [2021] KEHC 10 (KLR) (Commercial and Tax) (10 September 2021) (Ruling)

Neutral citation: [2021] KEHC 10 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
TAX APPEAL E130 OF 2020
DAS MAJANJA, J
SEPTEMBER 10, 2021

BETWEEN

COMMISSIONER OF INVESTIGATIONS AND ENFORCEMENT APPELLANT

AND

ABDI GEDI AMIN ALIAS ABDI IBRAHIM AHMED RESPONDENT

((Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 13th May 2021 in Tax Appeal No. 365 of 2020))

RULING

1. The Appellant (“the Commissioner”) has moved the court by the Notice of Motion dated 23rd July 2021 and made under sections 3A and 3B of the [Civil Procedure Act](#) and Order 51 Rule 1 of the Civil Procedure Rules seeking that the court extends time for serving the Notice of Appeal and Memorandum of Appeal upon the Respondent or in the alternative, the same be deemed to have been duly served.
2. The application is grounded on the facts set out on its face and the supporting affidavit of George Ochieng, an advocate, sworn on 23rd July 2021. In opposition to the application, the Respondent has filed a replying affidavit sworn on 24th August 2021.
3. The Commissioner’s application is precipitated by the decision of the Tax Appeals Tribunal (“the Tribunal”) dated 13th May 2021 where the Tribunal allowed the Respondent’s appeal. The Commissioner is dissatisfied with this decision and has lodged it appeal by filing the Memorandum of Appeal dated 15th July 2021 accompanied by the Record of Appeal. There is, however, a dispute as to whether the appeal has been duly and timeously filed and served.



4. The Commissioner avers that it filed and served its Notice of Appeal electronically on 11th June 2021 within the time frame provided for in section 32 of the Tax Appeal Tribunal Act, 2013 (“the TATA”). It physically served the Notice of Appeal upon the Respondent on 16th June 2021. The Commissioner states that its counsel on record became indisposed and was away from the office from 8th July 2021 to the time of filing the appeal. Due to his deteriorating health, counsel mistakenly diarized and noted to the Record of Appeal was on 15th July 2021 instead of 12th July 2021. Counsel states that he based his diarizing of the due date based on the receipt stamp appearing on the Notice of Appeal which is 16th June 2021 instead of the date of electronic filing of the Notice of Appeal which was 11th June 2021.
5. The Commissioner states that despite being away, the counsel struggled to work from home while undergoing medical treatment and filed the Memorandum and Record of Appeal on 15th July 2021 which was three days out of time as the record ought to have been filed on 12th July 2021. The Commissioner submits that it should be not be allowed to suffer because its counsel was unwell and due to the inadvertent mistake of the counsel. It contends that the delay of three days in filing the appeal has been explained and is not inordinate.
6. The Commissioner submits that it is in the interests of justice that its appeal be heard on its merit as it involves taxes amounting to KES 787, 471, 892.00 which is a colossal amount which the government is likely to lose if the appeal is not heard. It states that the appeal raises a point of law to the applicable law as to what was the applicable law. The Commissioner maintains that Respondent will not suffer any prejudice if the appeal is admitted and heard on merit.
7. The Respondent opposes the application. It submits that of the TATA requires that a party to the proceedings file and serve the Notice of Appeal within thirty (30) days of being notified of the Tribunal decision. It notes that the Notice of Appeal was filed on the last date after working hours at 6.02 PM when the registry was closed and that that filing outside of official court hours is not proper filing as such, the Notice of Appeal was filed out of time. It adds that the Commissioner had an entire 30 days to comply with section 32(1) of the TATA from 13th May 2021 when the parties were notified of the decision and since it filed the Notice of Appeal at 6.02 PM on a Friday, the same would have been officially filed on Monday, 14th June 2021 at 8:00 AM, which is outside the 30-day period.
8. The Respondent faults the Commissioner for failing to provide evidence that its counsel was unwell or was out of office and that accordingly, that averment that counsel was unwell is not supported by evidence and should be dismissed. The Respondent submits that attaching evidence in support of the deponent’s claim is a mundane matter that is common practice in our courts to prove illness or being out of office, and the failure to attach any evidence undermines the Commissioner’s reasons for seeking extension of time. It further contends that the Kenya Revenue Authority’s Legal Department has more than 20 litigation advocates who would have stepped in to ensure that the appeal was filed within time due to counsel’s illness.
9. The Respondent urges the court to strike out the Commissioner’s deposition for being sworn by its counsel instead of the counsel’s supervisor or superior. He urges that pursuant to Rule 8 of the Advocates (Practice) Rules, 1966, an Advocate should not appear as a witness to give evidence before any Court or Tribunal in any matter in which he acts or appears in which the evidence touches on contentious matters of fact.
10. The Respondent states that he won his case against the Commissioner at the Tribunal, and deserves the opportunity to move on with his life and that the Commissioner’s unreasonable and inadvertent mistake should not be visited on him. He argues that there are no taxes in dispute since the Tribunal quashed the assessments in question.



11. The Respondent states that a perusal of the Record of Appeal dated 15th July 2021 that contains the Memorandum of Appeal and the instant application does not contain a stamp from the registry or a copy of the filing receipt, therefore, it is unclear whether the same was filed as alleged by the Commissioner but that nonetheless, the Commissioner has conceded that the Memorandum of Appeal was filed out of time.
12. The Respondent submits that the reason of the Commissioner's counsel diarizing the wrong dates is unreasonable and does not fall within the ambit of Rule 4 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015. It urges the court to dismiss the Commissioner's application and make such orders as are necessary uphold the provisions of the Tribunal and the integrity of these proceedings.

Analysis and Determination

13. Before proceeding to the substance of the matter, let me deal with the Respondent's objection to the Appellant's deposition. Rule 8 of the Advocates (Practice) Rules, 1966 provides that:

No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear.

14. That Rule 8 aforesaid is a prohibition against an advocate in matter swearing an affidavit where the circumstances are such that he or she may become a witness and be subjected to cross-examination. The Respondent's objection is answered by the Court of Appeal in *Kamlesh Mansbuklal Damji Pattni v Nasir Ibrahim Ali and 2 others* NAI CA Civil Appl. No. 354 of 2004 [2005] eKLR where it observed that:

Muite is of course right in his concession that advocates should not swear affidavits on behalf of their clients when their clients are readily available to do so. It accords with the spirit of the best evidence rule and, in view of the provisions of order XVIII r 2, with common sense. It would otherwise be embarrassing to apply those provisions to an advocate who may have to relinquish his role as one, to become a witness. There is otherwise no express prohibition against an advocate who of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client. So too an advocate who cannot readily find his client but has information and the sources of which he can disclose and state the grounds for believing the information. On both counts we do not find Muite's remaining affidavit offensive. As we stated earlier he is possessed of the facts stated therein and secondly he has explained, and we believe him in the circumstances of this case, that his clients were not readily available. The affidavit in reply in Kenya Horticultural Exporters Ltd case (Supra) was sworn by the advocate. It was however not struck out for that reason, but because the advocate could not prove all the statements of information and belief that he had stated even if he was to be cross-examined on them. [Emphasis mine]

15. In this case, it is the conduct of the Advocate which is in issue and he is the one who has first-hand knowledge of the matters necessary for determination. Further, there was no indication that the Advocate would be called as a witness or be subjected to cross-examination in what is otherwise a straight forward application for extension of time.
16. I also wish to point out that under section 32(1) of the TATA, a party is not obliged to file a Notice of Appeal. All that is required is for the party serve the Notice of Appeal on the other party. In the



circumstances, the issue whether or not the Notice of Appeal was filed or served after working hours does not arise.

17. It is not in dispute that the determination of the Commissioner's application revolves around Section 32(1) of the TATA which provides that:

32(1) A party to proceedings before the Tribunal may, within thirty days after being notified of the decision or within such further period as the High Court may allow, appeal to the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party.

18. Further, Rule 3 of the Tax Appeal Tribunal (Appeals to the High Court) Rules, 2015 provides that:

3. The appellant shall, within thirty days, after the date of service of a notice of appeal under Section 32(1), file a memorandum of appeal with the Registrar and serve a copy on the respondent'.

19. The basic facts are not in dispute. The Commissioner admits that it served the Notice of Appeal on 11th June 2021, as evidenced by the email dated 11th June 2021 addressed to the Respondent's Counsel and which was within the time limited by section 32(1) of the TATA which only requires service of the Notice of Appeal. From that date, the Appellant had 30 days within which to file and serve the Memorandum of Appeal meaning that the latest date was 12th July 2021. From the online court portal, the appeal was filed on 15th July 2021. The appeal is therefore 3 days out of time.

20. The Commissioner's application seeks that the court extends the time for serving the Notice of Appeal and Memorandum of Appeal. Rule 4 of the Tax Appeal Tribunal (Appeals to the High Court) Rules, 2015 provides as follows:

4. Extension of time for filing memorandum of appeal The Court may extend the time specified in rule 3 if the Court is satisfied that owing to absence from Kenya, sickness, or other reasonable cause, the appellant was unable to file the memorandum of appeal within the period and that there has been no unreasonable delay on the part of the appellant

21. The above Rule only empowers the court to grant an extension in respect of filing rather than service of the Memorandum of Appeal and that there is no corresponding provision for extension of time for service. In my view, this implies that the service outside the prescribed time is not fatal, otherwise the issue of service would have been included in Rule 4 of the Rules. Further, service of the Memorandum of Appeal is consequential once the court grants leave thereunder.

22. Under Rule 4 of the Rules, the court must be satisfied that there is reasonable cause to grant the extension of time. In this case, the Commissioner filed the Notice of Appeal within time. It has explained that that reason it filed the Memorandum and Record of Appeal late was because of the illness by its counsel and that it mistook the date on the ground that date affixed on the receipt stamp was 16th June 2021. This is supported by the evidence and is a reasonable explanation for the delay of 3 days in filing the appeal. While the Commissioner did not produce evidence of its counsel's illness, I am willing to give it the benefit of doubt given that every effort was made to file the appeal and when the misstate was realised, the application for condonation was filed in short order. Lastly, I do not think that the Commissioner should be punished the mistake or inadvertence of its counsel on record.

23. This is case where the Commissioner should be allowed to exercise its statutory right of appeal hence any prejudice that would be occasioned on the Respondent would be assuaged by an order for costs. The Record of Appeal which contains the Memorandum of Appeal has now been filed and served.



Conclusion and Disposition

24. For the reasons I have set out above, I allow the Notice of Motion dated 23rd July 2021 to the extent that the Memorandum of Appeal and Record of Appeal filed in this appeal are deemed as duly filed and served upon the Respondent.
25. The Appellant shall bear the costs of this application.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF SEPTEMBER 2021.

D. S. MAJANJA

JUDGE

Mr Ochieng, Advocate instructed by the Commissioner of Domestic Taxes, Kenya Revenue Authority.

Mr Mwamuye instructed by Bahati Mwamuye and Associates Advocates for the Respondent.

