



**York Investments East Africa Limited v Commissioner of Investigations
and Enforcement (Miscellaneous Application E612 of 2021) [2021]
KEHC 7 (KLR) (Commercial and Tax) (10 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 7 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E612 OF 2021
DAS MAJANJA, J
SEPTEMBER 10, 2021**

BETWEEN

YORK INVESTMENTS EAST AFRICA LIMITED APPLICANT

AND

**COMMISSIONER OF INVESTIGATIONS AND
ENFORCEMENT RESPONDENT**

RULING

1. On 1st April 2021, the Tax Appeals Tribunal (“the Tribunal”) allowed the Appellant’s appeal before it to the extent that the assessment of taxes in respect of withholding tax as issued to the Appellant by the Respondent (“the Commissioner”) was vacated. However, the Tribunal upheld the Commissioner’s tax assessment in respect of VAT.
2. The Appellant is dissatisfied with this decision and is desirous of appealing. It has now filed the Notice of Motion dated 18th August 2021 made, inter alia, under section 32 of the *Tax Appeals Tribunal Act* (“the TATA”) and Rule 17 and 20 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015 (“the Rules”). It also seeks a stay of execution of the Tribunal’s judgment and extension of time for the filing of the Notice of Appeal and Memorandum of Appeal and leave to file the appeal out of time.
3. The application is supported by the grounds set out on its face and the affidavits of John Kin’gori Mwangi, a director of the Appellant, sworn on 18th August 2021 and 26th August 2021 respectively. The Commissioner has opposed the application through the Grounds of Opposition dated 24th August 2021.



4. The timelines and procedure of filing appeals from the Tribunal is governed by section 32(1) of the TATA which provides as follows:

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.

Further, Rule 3 of the Rules 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'

5. In its application and deposition, the Appellant admitted that the time for filing its appeal has lapsed and thus seeks the court's intervention to grant it leave to file the appeal out of time by extending the time within which it can file the Notice of Appeal and Memorandum of Appeal. The jurisdiction of this court to extend the time for appealing from a decision of the Tribunal cannot be gainsaid. It is implicit in section 32(1) of the TATA which provides a party may appeal within 30 days of being notified of the decision of the Tribunal or, "within such further period as the High Court may allow, appeal to the High Court". This court therefore has jurisdiction to extend time within which an appellant may serve the Notice of Appeal from the decision of the Tribunal.

6. Further, Rule 4 of the Rules grants the court discretion to extend the time specified in Rule 3 in respect of the Memorandum of Appeal 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

7. This court, in *Commissioner of Domestic Taxes v Kiambu Club Limited & another* ML HC ITA No. E043 of 2020 [2020] eKLR, held that the court may grant extension of time prospectively or retrospectively and in *Commissioner of Domestic Taxes v Mayfair Insurance Company Ltd* ML HC ITA No. 31 of 2017 [2017] eKLR it held that the court's powers and discretion to extend time is unlimited but it must not be exercised. The factors the court may consider to enable it exercise its discretion to extend time were condensed by the Supreme Court in *Nicholas Kiptoo Arap Salat v IEBC and 7 Others* SCK App. No. 16 of 2014 [2014] eKLR as follows:

1. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
2. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
3. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
4. Whether there will be any prejudice suffered by the respondents if the extension is granted;



5. Whether the application has been brought without undue delay; and
6. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
8. The Applicant has given the reason that it was led to believe that the Commissioner was filing an appeal as well and thus, was waiting for the Commissioner to file the same so that it could file a cross-appeal. The Applicant learnt that Commissioner had abandoned its appeal on or about 17th August 2021 without informing it and this denying it the opportunity to file and serve its cross-appeal. Having been caught flat-footed, the Applicant has filed this application in order to exercise its right of appeal.
9. The Commissioner opposes the application on the ground that the Applicant failed to file a Notice of Appeal and Memorandum of Appeal as required by the Rules and that it has not set out any circumstances that fall under the Rule 4 of the Rules that would entitle the court to exercise its discretion in its favour. The Commissioner adds that the Applicant has not shown exceptional circumstances to warrant an extension of time to file an appeal out of time under the Rules.
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 [2014] eKLR and *Bulsho Trading Company Ltd v Rosemary Likholo Mutakba and Another* Busia HCCA No. 1 of 2018 [2020] eKLR. 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.

13. The Commissioner has argued that the reasons proffered by the Applicant do not fall within the reasons enumerated in Rule 4 of the Rules which refers, "to absence from Kenya, sickness, or other reasonable cause". I hold other reasonable cause covers any other reasons that an applicant may proffer and that the court would be satisfied are reasonable in the circumstances. As I have stated, the Applicant's expectation was not unreasonable in the circumstances. It filed this application as soon as it discovered that Commissioner had abandoned its appeal and taking all the circumstances of the case, I am not convinced that the Applicant should be denied the opportunity to pursue its appeal.
14. The Applicant also applied for a stay pending appeal. From the ground of opposition, the Commissioner does not, in principal, have an objection to the grant of stay pending the intended appeal provided that court directs the Applicant to deposit 60% of the disputed taxes with it. In the absence of a replying affidavit, it is not clear what taxes are due to the Commissioner. I am not oblivious though, that the reason why the Applicant seeks to appeal is that the Commissioner was successful before the Tribunal and is entitled to fruits of its judgment hence I shall grant a conditional stay of execution in the final orders.
15. For the reasons, I have set out above, I allow the Notice of Motion dated 18th August 2021 on the following terms:
 - a. Leave be and is granted the Applicant to appeal against the Judgment of the Tax Appeal Tribunal Tax Appeal No. 398 of 2018 dated 1st April 2021.
 - b. The Applicant shall and serve the Notice of Appeal within 7 days from the date hereof and thereafter file and serve the Memorandum of Appeal and Record of Appeal within 21 days from the date of service of the Notice of Appeal.
 - c. There shall be a stay of execution pending the hearing and determination of the intended appeal on condition that the Applicant shall provide a Bank Guarantee for KES. 7,000,000.00 from a reputable bank within 21 days from the date hereof in default of which the stay shall stand discharged.
 - d. The stay shall remain in force for a period of one year from the date hereof unless otherwise extended by this court.
 - e. The costs of the application shall be in the appeal.

DATED and DELIVERED at NAIROBI this 10th day of SEPTEMBER 2021.

D. S. MAJANJA

JUDGE

Mr Wanyingi instructed by Njoroge O. Kimani Advocates for the Applicant.

Ms Leparashao, Advocate instructed by Kenya Revenue Authority for the Commissioner of Investigations and Enforcement.

