



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

TAX APPEAL NO. E043 OF 2020

BETWEEN

COMMISSIONER OF DOMESTIC TAXES.....APPELLANT

AND

KIAMBU CLUB LIMITED.....1ST RESPONDENT

KENYA GOLF FEDERATION.....2ND RESPONDENT

(Being an appeal from the Judgment of the Tax Appeals

Tribunal delivered on 27th March 2020 in Tax Appeal No. 149 of 2017)

RULING

1. After the Appellant (“the Commissioner”) lodged the Memorandum of Appeal on 21st May 2020, the 2nd respondent (“the Respondent” unless otherwise stated) filed a Notice of Preliminary Objection dated 17th August 2020 seeking to strike out the appeal on the ground that it is time barred as it was filed outside the time stipulated in **section 32** of the *Tax Appeals Tribunal Act* (“TATA”) as read with **Rule 3** of the *Tax Appeal Tribunal (Appeals to the High Court) Rules, 2015* (“the Rules”). The Respondent therefore contended that the court lacks jurisdiction to entertain the appeal as it was lodged out of time as the appellant neither sought nor was granted to file the memorandum of appeal out of time.

2. The Preliminary Objection caused the Commissioner to move the court by a Notice of Motion dated 23rd September 2020 citing **sections 3A and 3B** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* and **Order 51 rule 1** of the *Civil Procedure Rules* seeking the following orders:

1. THAT this Honourable Court be pleased to extend the time for serving the Notice of Appeal and Memorandum of Appeal upon the Respondents.

2. In the alternative, that the Notice of Appeal and the Memorandum of Appeal filed in the consolidated Income Tax Appeals No. E043 of 2020, E044 of 2020, E045 of 2020 and E050 of 2020 be deemed as duly served.

3. THAT costs incident to this application be espoused in the Appeal.

3. The grounds of the application are set out in the face of the application and the supporting affidavit of Carol Kinya Mburugu, the advocate previously on record, sworn on 23rd September 2020. The Commissioner’s case is that after the Tax Appeals Tribunal (“the Tribunal”) delivered its decision on 27th March 2020 in a consolidated appeal in the following appeals; **Appeals Nos. 132, 148, 149 and 151 of 2017; Sigona Golf Club, Thika Sports Club, Kiambu Sports Club and Ruiru Sports Club v Commissioner of Domestic Taxes**, she effected service of the Notice of Appeal upon one of Respondents through email but mistakenly failed to effect service on all the Respondent’s email address.

4. The Commissioner contended that although it filed and served the Notice of Appeal timeously on one of the 1st Respondent through email but could not undertake physical service upon any of the parties due to the situation pertaining to the COVID-19 pandemic and the need to comply with the Ministry of Health guidelines. Ms Mburugu deponed that most offices were either closed at the material time or not

accepting physical service. In any case, the Commissioner managed to file the Memorandum of Appeal on 21st May 2020 which contained the Notice of Appeal and served it on the Respondents.

5. The Commissioner submitted that failure to serve the Notice of Appeal on all the parties was an inadvertent mistake of counsel which should not prejudice the Commissioner who is an innocent party. It submitted that it is in the interests of justice that it is granted an opportunity to argue its appeal on merits of the application. The Commissioner argued that if the intended Appeal is not heard on its merits, the Government stands to lose a colossal amount of taxes in terms of Value Added Taxes on club entrance and subscription fees since the dispute affects the whole sports/gold industry. The Commissioner added that there exists a lacuna in the law regarding the time within which to serve the Notice of Appeal which is compounded by the COVID-19 restrictions on physical movement and service of documents.

6. In response to the application, the Respondent reiterated the grounds set out in the Preliminary Objection. It also relied on the Grounds of Opposition dated 28th September 2020. The Respondent contended that the limitation periods defined in **section 32** of **TATA** go to the jurisdiction of the court. Further, since the provision concerns taxation law, it must be construed strictly and any ambiguity resolved in favour of the taxpayer. It submitted that the appeal against the 2nd Respondent remains time barred due to non-service of the Notice of Appeal within the stipulated 30 days after the decision of the Tribunal was issued. The Respondent also submitted that the Court lacks jurisdiction to retroactively issue any order extending time for service of the Notice of Appeal.

7. As regards the reasons for failure to serve the Notice of Appeal, the Respondent submitted that the alleged and unproved inadvertence relied by the Appellant is insufficient reason to warrant extension of time. It argued that the Commissioner was aware of the 2nd Respondent's participation in the appeal yet it did not give any tangible reason for failure to serve *Rachier & Amollo Advocates LLP* on record for the 2nd Respondent. The Respondent further submitted that the change of Advocates for the Commissioner was merely cosmetic as both outgoing and incoming counsel were in-house counsel within the legal department. They submit that the Respondents will suffer injustice and prejudice if the application is entertained or allowed because they will be exposed to defending a time barred appeal.

8. Counsel for both parties made brief oral submissions in which they highlighted the positions set in their written submissions and founding documents along the lines I have summarised above. The position taken by the Commissioner is that it inadvertently failed to serve the Notice of Appeal on the 2nd respondent and that such failure should be condoned by the court. The Respondent's position is that the appeal is time barred, that the Commissioner has not made out a case for extension of time and that in any event, the time prescribed having lapsed, the court cannot retroactively extend time to validate the appeal.

9. The right of appeal to the High Court from decisions of the Tribunal is provided for under **section 32** of **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.

(2) The High Court shall hear appeals made under this section in accordance with the rules set out by the Chief Justice.

10. The manner in which the appeal is to be filed and determined is provided for under **Rule 3** and **4** of the **Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015** ("the **Rules**") promulgated by the Chief Justice which provide as follows:

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 service a copy on the respondent.

4. 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 that period and that there has been no unreasonable delay on the part of the appellant.

11. The collective effect of the aforesaid provisions, is that in order to exercise the right of appeal under **TATA**, a party must serve the Notice of Appeal on the other party within 30 days after being notified of the Tribunal decision. Filing of the Memorandum of Appeal is predicated on service of the Notice of Appeal within the prescribed time. Reference in **section 32** to "*the other party*" means all the parties involved in the proceedings before the Tribunal. **Section 32(1)** also allows the court to extend the time to appeal by extending the time within which the party appealing may serve the Notice of Appeal in order to exercise the right of appeal.

12. Counsel for the Respondent was correct to state that service of the Notice of Appeal is a matter of jurisdiction. The process of appeal under **section 32** of **TATA** is triggered by service of the Notice of Appeal. This position is buttressed by **Rule 3** of the **Rules** which predicates the filing of the Memorandum of Appeal on service of the Notice of Appeal by providing that it shall be filed 30 days, "*after the date of service of a notice of appeal under section 32(1).*" These sections are very clear and do not admit any ambiguity hence I reject the Commissioner's argument that there is a lacuna in the law concerning the time for filing an appeal.

13. Counsel for the Commissioner, submitted that the 2nd Respondent was merely an interested party before the Tribunal as there was no claim against it hence service upon it was not fatal. This argument cannot be sustained as the Commissioner joined the 2nd Respondent as a party to the appeal hence failure to serve the Notice of Appeal on it was fatal to the appeal. As I stated, service of the Notice of Appeal is an issue of jurisdiction and having failed to serve the Notice of Appeal on the 2nd Respondent renders the appeal incompetent.

14. Having determined that the appeal is incompetent, the next issue for determination is whether the court may extend time for service of the Notice of Appeal and if so, whether the power may be exercised retroactively to validate the appeal. Counsel for the Respondent submitted that the court cannot issue a retrospective order to extend time where a record of appeal is already time barred as such an interpretation will take away the accrued right and entitlement of a party to rely on the correctness of the decision of the Tribunal. He contended that the tax

law, being penal in nature, should be construed prospectively and not retroactively so as not to penalize the taxpayer. He further submitted that in arranging its affairs, the Respondent was entitled to certainty and regularity in law brought about by the Tribunal decision and that it ought not to be exposed to arbitrary and capricious application of the law.

15. 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 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. Whether the court may do so retrospectively is answered by **section 59 of the Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya)** which states:

59. Where in a written law a time is prescribed for doing an act or taking a proceeding, and power is given to a court or other authority to extend that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed.

16. Although the Respondent submitted that the court should construe the provisions of **TATA** strictly in view of the fact that it is a tax statute. The provision being construed is a procedural provision and there is no limitation on the power of the court to extend time in **section 32(1) of TATA**. Further the language of the section does not admit any ambiguity or permit any inference of a contrary intention. I am therefore satisfied that the court may grant extension of time prospectively or retrospectively.

17. The final issue for determination is whether the court should extend time for service of the Notice of Appeal upon the 2nd Respondent. The facts deponed to by Ms Kinya are uncontested and must be taken as true and correct. However, this does not discharge the Appellant from establishing that it deserves the court's discretion. The factors the court may consider 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.*

18. From the facts of the case and in respect of the 1st Respondent, not only was the Notice of Appeal filed within time, the Memorandum and Record of Appeal were filed and served within the time prescribed. The only issue is whether the failure to serve the Notice of Appeal on the 2nd respondent can be condoned. Ms Kinya has explained that she failed to effect service of the Notice of Appeal by mistake. Having complied with all the provisions in respect of the 1st Respondent, I cannot say that the mistake or inadvertence was deliberate.

19. Counsel for the Respondent emphasised the issue of prejudice particularly given the fact that the Tribunal judgment reversed the tax liability imposed on the Respondents and that the taxpayer is entitled to arrange its affairs having regard to the finality of the Tribunal decision. On the other hand, the Commissioner was of the view that the Tribunal was wrong and that the taxpayer will suffer substantial prejudice if the matter is not appealed.

20. At this stage I cannot say whether the appeal will be successful or not but what is clear is that a party dissatisfied with the Tribunal has a right of appeal provided it is exercised in accordance with the strictures set out in the statute. **Section 32(1) of TATA** contemplates that the court may grant extension of time to appeal hence a decision by the Tribunal cannot be said to be final unless and until the court declines to exercise the power to extend time. Further, the parties have a right of appeal upto the Court of Appeal hence in arranging its affairs a party ought to take into account the possibility of an appeal or even when no appeal is filed, the further possibility that the court may extend time for filing such an appeal. The Commissioner has already served the Record of Appeal and the 1st Respondent, who is the primary party, is not affected in any manner. The same documents have been served on the 2nd Respondent and in my view, what remains is for the appeal to be admitted for hearing.

21. I hereby allow the Notice of Motion dated 23rd September 2020 on terms that the time for service of the Notice of Appeal from the decision of the Tribunal dated 27th March 2020 be and is hereby extended and the same is deemed as duly served together with the Memorandum and Record of Appeal filed herein. The Appellant shall bear the costs of this application.

22. Since the same facts and issue arise in similar appeals arising from the same judgment from the Tribunal. A similar order shall apply to the following appeals which shall be deemed as duly filed and served;

- (a) **COMM ITA Nos. E044 of 2020 Commissioner of Domestic Taxes v Thika Club Limited and Kenya Golf Federation**
- (b) **COMM ITA No. E045 of 2020 Commissioner of Domestic Taxes v Sigona Club Limited v Kenya Gold Federation and**
- (c) **COMM No. ITA No. E050 of 2020 Commissioner of Domestic Taxes v Ruiru Sports Club.**

DATED and DELIVERED at NAIROBI this 9th day of SEPTEMBER 2020.

D. S. MAJANJA

JUDGE

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

Mr E. Ochieng instructed by Rachier and Amollo Advocates LLP for the 2nd Respondent