



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

TAX APPEAL NO. E055 OF 2020

BETWEEN

COMMISSIONER OF DOMESTIC TAXES.....APPELLANT

AND

SCANIA EAST AFRICA LIMITED.....RESPONDENT

(An appeal from the Judgment of the Tax Appeals Tribunal

delivered on 30th March 2020 in Tax Appeal No. 146 of 2017)

RULING

1. The Respondent has moved the court by the Notice of Motion dated 24th August 2020 seeking to strike out the Appellant's appeal from the judgment of the Tax Appeals Tribunal ("the Tribunal") dated 30th March 2020. The Respondent has invoked **section 32** of the *Tax Appeals Tribunal Act, 2013* ("**TATA**"), **Rule 3** of the *Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015* ("the **Rules**") and the inherent powers of the court. The application is supported by the affidavit and further affidavit of Emma Muhia, the Respondent's Finance Director, sworn on 24th August 2020 and 18th September 2020 respectively. The application is opposed by the affidavit of Judith Kithinji, the Appellant's Advocate, sworn on 3rd September 2020.

2. The right of appeal to the High Court from decisions of the Tribunal as **section 32** thereof 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. [Emphasis mine]

3. The manner in which the appeal is to be filed and determined is provided for under **Rule 3** 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. [Emphasis mine]

4. The thrust of the Appellant's case is that no Notice of Appeal was served on the Respondent as required by **section 32(1)** of *TATA* as read together with **Rule 3** of the **Rules** hence no appeal lies in the circumstances. It urges that the law requires that a party who intends to appeal must first give a notice of intention to appeal and serve all persons likely to be affected.

5. The question for determination is whether the Respondent served the Notice of Appeal which is a prerequisite for the exercise of the right of appeal provided under **section 32(1)** of *TATA*. In this case, resolution of this issue is a matter of fact.

6. According to the Ms Muhia's deposition, the Notice of Appeal was purportedly served by Ms Kithinji as evidenced by a screen shot of the email sent to the Respondent's tax advisor, PKF Taxation Services Limited ("PKF") dated 30th April 2020. Ms Muhia explained that she was

informed by Nahashon Mathenge of PKF that the email used [particulars withheld] was the wrong address and that the email would have bounced back and the appellant would have received notification to that effect. She deponed that the correct address was [particulars withheld]. In this case therefore, the appellant failed to serve the notice as required.

7. Ms Kithinji deponed that upon receipt of instructions to appeal from the Appellant, she lodged the notice of appeal on 29th April 2020 and on 30th April 2020, she served the Notice of Appeal via email to the tax agent who was then on record at the Tribunal using the email address [particulars withheld] which is the same address that was used to share the judgment to the parties by the Tribunal. She stated that she only learnt of the correct email address when she was served with the application and supporting affidavit.

8. In the further affidavit, Ms Muhia deponed that although PKF received the judgment through the correct address by an email dated 30th March 2020 addressed to [particulars withheld] at 8.26PM. Prior to this the Tribunal had attempted to send the judgment to what was the wrong address [particulars withheld] at 8.12PM. She disputed the contention that Ms Kithinji did not know the respondent's correct email address because the memorandum of appeal was actually sent to the correct email address on 28th May 2020.

9. A reading of **section 31(2)** of **TATA** shows that service of the Notice of Appeal is what triggers the process of appeal. Without service of the Notice of Appeal, the right of appeal cannot be exercised. Service by its nature means to bring notice to the other party the process of appeal. Without actual notice, service is not effective hence service on the wrong address as admitted by the Respondent is not service.

10. The right of appeal is a creation of statute and its exercise is governed by statutory strictures governing the exercise of that right (see **Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) SCK Pet. No. 12 of 2016 [2019] eKLR**). The statutory provision governing exercise of the right of appeal is a jurisdictional issue as was held by the Court of Appeal **Patrick Kiruja Kithinji v Victor Mugira Marete MRU CA Civil Appeal No. 48 of 2014 [2015] eKLR** that:

It is our view, whether or not an appeal is filed on time goes to the jurisdiction of this Court. It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. Consequently, we find that an appeal filed out of time is not curable under Article 159.

11. Failure to comply with the condition precedent of exercising the right of appeal is not a mere technicality that can be cured by application of **Article 159(2)(d)** of the Constitution which provides that the courts shall administer justice without undue regard to technicalities. It goes to the competence of the appeal. Whether or not the failure to serve the Notice of Appeal at the proper address is excusable can only be addressed in an appropriate application which is not before the court.

12. This appeal is incompetent. It is struck out with costs to the Respondent.

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

D. S. MAJANJA

JUDGE

Mr Kimani, SC with him Mr Ruto instructed by Hamilton Harrison and Mathews Advocates for the appellant.

Ms Kithinji, Advocate instructed by the Commissioner of Domestic Taxes, Kenya Revenue Authority.