



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

TAX APPEAL NO. E051 OF 2020

BETWEEN

COMMISSIONER OF DOMESTIC TAXES.....APPELLANT

AND

AFRICA OIL BV.....RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal

made on 17TH December 2019 in Nairobi Tax Appeal No. 141 of 2017)

RULING

1. The Respondent has moved the court by the Notice of Motion dated 18th June 2020 seeking to strike out Notice and Record of Appeal filed by the Appellant in respect of **Nairobi Tax Appeals Tribunals Appeal No. 347 of 2018 Africa Oil BV v Commissioner of Domestic Taxes**. The respondent has invoked **section 32** of the *Tax Appeals Tribunal Act, 2013*, **section 53** of the *Tax Procedures Act, 2015*, **Rules 17 and 20** of the *Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015*, **Order 2 Rules 15(1)(b) and (d)** and **Order 42** of the *Civil Procedure Rules*.

2. This application concerns the timelines for filing an appeal from the Tax Appeal Tribunal (“the Tribunal”) to the High Court. The application is supported by the affidavit of Mark Dingley, a director of the respondent, sworn on 18th June 2020. The Appellant has opposed the application through the affidavit of Geoffrey Njuguna, an officer working for the Kenya Revenue Authority, sworn on 29th June 2020.

3. Determination of the application involves interpretation of the tax statutes and applicable procedures based on undisputed facts which are either common ground or can be readily discerned from the record as follows:

(a) The Tribunal delivered its judgment on 27th March 2020

(b) The Appellant filed its Notice of Appeal on 24th April 2020.

(c) The Record of Appeal was filed on 21st May 2020 as confirmed on the Court’s electronic portal.

4. Based on the aforesaid facts, the Respondent’s case is that the appeal was filed out of time as the appeal ought to have been filed within 30 days from the date of the judgment hence the last day for filing the appeal was 26th April 2020. The Appellant obviously takes a different view and insists that it filed the Notice of Appeal and Record of Appeal within the prescribed time. Before I deal with their respective positions, let me set out the applicable statutory provisions to give the matter context.

5. The first port of call is the *Tax Appeal Tribunal Act, 2013* (“TATA”) which establishes the Tax Appeal Tribunal and also provides for a 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 appeal made under this section in accordance with the rules set out by the Chief Justice.*

6. The manner in which the appeal is to be heard 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.

7. There is also the **Tax Procedures Act, 2015** (“the **TPA**”) which is an act that consolidated the procedural rules for administration of tax laws in Kenya. It also provides for a right of appeal to the High Court at **section 53** which states as follows:

53. A party to proceedings before the Tribunal who is dissatisfied with the decision of the Tribunal in relation to an appealable decision may, within thirty days of being notified of the decision or within such further period as the High Court may allow, appeal the decision to the High Court in accordance with the provisions of the Tax Appeals Tribunal Act, 2013 (No. 40 of 2013).

8. The issue raised by the Respondent must of course be determined on first principles. A right of appeal is a creation of statute and its exercise is governed by statutory limitations governing 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**). In this case, a party seeking to exercise its right of appeal from a decision of the Tribunal must comply with the provisions of the **TPA** and **TATA**.

9. **TATA** which is the specific statute on the issue of procedures governing the Tribunal and appeal to the High Court deals with the time in which the party intending to appeal must signify its intention to appeal and the manner it does so. The party who wishes to appeal is required and serve the Notice of Appeal within 30 days of notification of the decision by the Tribunal in order to comply with **section 32** of **TATA**. **Section 53** of the **TPA** only deals with the time within which the party may appeal. Although the provision seems to suggest that an appeal must be lodged within 30 days, it is not inconsistent with **TATA**. The **TPA**, which is a later statute, defers or makes reference to **TATA** in manner in which notice of appeal must be signified and that process in which the appeal processed, heard and determined.

10. Under **Rule 3** of the **Rules**, an appellant is required to file the Memorandum of Appeal within 30 days of service of the Notice of Appeal. Under **Rule 5**, the Memorandum of Appeal is accompanied by other documents supporting the appeal including a copy of the decision and the notice of appeal. This is what is normally referred to as the Record of Appeal.

11. In summary, the process of appeal provided under **TATA** and the **Rules**, is that a party must serve the Notice of Appeal on the other party within 30 days of notification of the Tribunal decision. Although there is no requirement to file the Notice of Appeal, it is good practice as this would enable the Tribunal prepare a record of the proceedings. Thereafter, the appellant files the Memorandum of Appeal in the High Court with the documents set out in **Rule 3**. It is at this point that the appeal is considered as filed. In other words, under the **Rule 3** of the **Rules**, a party who wishes to lodge an appeal has 30 days from the date of service of the Notice of Appeal to file the Memorandum of Appeal.

12. The Respondent’s application is grounded on the fact that the Memorandum of Appeal ought to have been filed within 30 days of the Tribunal judgment, that is, latest by 26th April 2020. This position is not supported by the **section 32** of **TATA** and **Rule 3** of the **Rules** which are the exclusive provisions governing the time and manner of lodging of an appeal in the High Court from a decision of the Tax Appeal Tribunal.

13. For the reasons I have set out above, the Notice of Motion dated 18th June 2020 is dismissed with costs to the appellant.

DATED AND DELIVERED AT NAIROBI THIS 01ST DAY OF SEPTEMBER 2020.

D. S. MAJANJA

JUDGE

Ms Mwangi instructed by Coulson Harney LLP Advocates for the appellant.

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