



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

TAX APPEAL NO. E007 OF 2020

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

LOCAL PRODUCTIONS (KENYA) LIMITED RESPONDENT

RULING

1. The Respondent has moved the court by the Notice of Motion dated 19th March 2020 to strike out the appeal filed by the Appellant in respect of the judgment delivered in **Nairobi Tax Appeals Tribunals Appeal No. 50 of 2017 Local Productions (Kenya) Limited v Commissioner of Domestic Taxes**.

2. The application is supported by the affidavit of Tim Okwaro, a director of the Respondent, sworn on 18th March 2020 and the grounds set out on the face of the application. This application concerns the timelines for filing an appeal from the Tax Appeal Tribunal (“the Tribunal”) to the High Court.

3. The Respondent’s case is that after the Tribunal delivered its judgment on 17th December 2019, the Appellant filed a Notice of Appeal dated 18th December 2019 and served it on the Respondent on 20th December 2019. The Appellant then filed a second Notice of Appeal dated 14th January 2020 and thereafter lodged the Memorandum of Appeal on 13th February 2020. The Respondent argued that the second Notice of Appeal was improperly filed and therefore invalid. It urged that based on the Notice of Appeal served on 20th December 2020, the Memorandum of Appeal was filed out of time and should be struck out.

4. The Appellant has opposed the application through the affidavit of Twahir Alwi Mohamed, its Advocate on record dealing with the matter, sworn on 28th May 2020. He confirmed that the judgment was delivered on 17th December 2020. He deponed that at the time, he was on leave and his colleague, Ms Chelagat, dealt with the matter and in so doing filed and served the Notice of Appeal without his knowledge or instructions. That when he returned, he filed a second Notice of Appeal signed by himself on 14th January 2020 and thereafter based on that Notice of Appeal, he filed the Memorandum of Appeal on 13th February 2020.

5. Both sides filed written submissions which they highlighted briefly. The issue before the court is whether this appeal is competent based on the following uncontested facts emerging from the court record and depositions:

(a) The Tribunal delivered its judgment on 17th December 2019.

(b) The Appellant filed the first Notice of Appeal dated 18th December 2019 and served it on 20th December 2019.

(c) The Appellant filed the second Notice of Appeal dated 14th January 2020.

(d) The Appellant filed the Record of Appeal on 13th February 2020.

6. The controlling statute governing the filing of appeals from the Tribunal is the **Tax Appeal Tribunal Act, 2013** (“TATA”). **Section 32** thereof provides for a right of appeal to the High Court 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.

7. The rules contemplated under **section 32(2)** of **TATA** are the **Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015** (“the **Rules**”) promulgated by the Chief Justice. **Rule 3** thereof provides 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.*

8. A reading of **TATA** and the **Rules** is that a party who wishes to appeal from a decision of the Tribunal must serve on the other party a Notice of Appeal within 30 days of being notified of the decision in order to comply with **section 32(1)** of **TATA**. That provision does not contemplate a second Notice of Appeal. Thereafter the **Rules** provide for the manner in which the appeal is to be filed. Under **Rule 3**, the appellant is required to file the Memorandum of Appeal within 30 days. 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.

9. Since the Appellant served the Notice of Appeal on 20th December 2019, under **Rule 3** of the **Rules**, it was required to file the Memorandum of Appeal latest by 20th January 2020. As this was not done, this appeal is therefore incompetent.

10. The time, manner and process of filing an appeal is governed by statute as it is trite law that a right of appeal is a creation of statute and its exercise is governed by statutory strictures governing the exercise of that right (see **Nyutu Agrovat Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) SCK Pet. No. 12 of 2016 [2019] eKLR**). Whether a party has complied with statutory provisions is a jurisdictional issue. In **Patrick Kiruja Kithinji v Victor Mugira Marete MRU CA Civil Appeal No. 48 of 2014 [2015] eKLR**, the Court of Appeal considering the issue failure to file a Notice of Appeal, which under the applicable rules is a pre-condition for appealing against a decision of the High Court, observed as follows:

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. In its response to the application, the Appellant gave reasons why it filed and served a second Notice of Appeal and why its conduct should be condoned and the appeal allowed to proceed for hearing. I have deliberately avoided dealing with or commenting on the issues raised in that regard by both sides. I have confined this decision to the competence of the appeal which goes to the jurisdiction of the court to entertain the appeal. No doubt the appellant will have, as the law permits, to address those issues on another occasion.

12. What remains is an incompetent appeal and it is for that reason that the Notice of Motion dated 19th March 2020 is allowed. The appeal filed herein be and is hereby struck out with costs to the Respondent.

DATED and DELIVERED at NAIROBI this 01ST day of SEPTEMBER 2020.

D. S. MAJANJA

JUDGE

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

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