



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
COMMERCIAL & ADMIRALTY DIVISION
INCOME TAX APPEAL. NO. 6 OF 2013

**NYERI TEACHERS SAVINGS AND
CREDIT CO-OPERATIVE SOCIETY LTD.....APPELLANT**
VERSUS
THE KENYA REVENUE AUTHORITY RESPONDENT

RULING

1. The application herein turns on the question of the court's authority to grant a stay of execution pending an appeal to the Court of Appeal. The Appellant (" the Applicant") seeks to restrain the Respondent from recovering some odd Kshs. 25,957,363.00 from the Applicant as outstanding tax following the dismissal of an appeal lodged in this court by the Applicant.

2. The appeal had originated from the decision of a local committee – Nyeri Area, which had on 8 May 2013 determined that the Applicant was under an obligation to pay withholding tax and that the Applicant's FOSA income and sundry income also fell squarely under Section 19A(4)(d) of the Income Tax Act (Cap 470) and thus subject to taxation.

Narrative

3. The Applicant's appeal was dismissed by the court after discussion on merit on 7 December 2016. The court further made it clear that it could not adjudicate on the quantum of assessment as the appeal had been restricted to whether the FOSA Income and sundry income was taxable under Section 19A (4)(d) of the Income Tax Act (Cap 470). The Applicants appeal failed in its entirety.

4. Being dissatisfied, the Applicant filed a Notice of Appeal under Rule 75 of the Court of Appeal Rules, 2010 thus signaling an intent to appeal. The Notice of Appeal was filed on 12 January 2017. Some ten days later the Applicant filed the instant motion.

5. The motion seeks a stay of execution of the judgment of this court rendered on 7 December 2016 pending filing, hearing and determination of an appeal to the Court of Appeal. The motion is contested.

Law

6. In view of the recent amendments to the Income Tax Act, I deem a brief prologue on the law as necessary.

7. The Appeal before the High Court was filed in June 2013 under Section 37(7) of the Income Tax Act and Rule 4 of the Income Tax (Appeals to the High Court) Rules. The determination was however rendered under Section 87(2)(c) of the Income Tax Act. The order made by the judge was that the Appeal be dismissed and no more. The judge expressly declined to annul, confirm, reduce or increase the assessment of tax concerned. The Applicant states, and this met support from the Respondent, that the Applicant is entitled to appeal under Section 91A of the Income Tax Act.

8. I must quickly point out that the Income Tax Act (Cap 470) was amended through the various provisions of the Tax Procedures Act No. 29 of 2015, which came into force on 19th January 2016. Sections 84 through 91A of the Income Tax Act were repealed. The sections dealt with objections and appeals to and from assessments and tax decisions. The sections provided for procedures on appeals, including appeals to both the High Court and Court of Appeal.

9. The transitional and saving provisions of the Tax Procedures Act, No. 29 of 2015 stipulate that:

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1. Subject to this Section, this Act shall apply to any act or omission that occurred or is occurring for which no prosecution has been commenced or any assessment made against which no appeal has been made before the commencement date

2. Any appeal or prosecution commenced before the commencement date may be continued and disposed of as if this Act had not come into force

3. If the period for any application, appeal or prosecution had expired before the commencement date, nothing in this Act shall be treated as having enabled the application, appeal or prosecution to be made under this Act by reason only that a longer period is specified in this Act.

4. Any tax liability that arose before the commencement date may be recovered under this Act despite any action already taken for the recovery of the tax".

10. The Applicant's appeal enjoyed the benefit of section 113 of the Tax Procedures Act, No. 29 of 2015. It was an appeal commenced before the 19 day January 2016 (the commencement date of the Tax Procedures Act). No other act or prosecution or application was pending as at 19 January 2016.

11. While it is therefore correct to state that the appeal had to be determined under Part X of the Income Tax Act, any intended appeal to the Court of Appeal had to be guided by both the Tax Procedures Act and the Appellate Jurisdiction Act (Cap 9) of the Laws of Kenya together with any rules made thereunder. That explains the route adopted by the Applicant in filing a Notice of Appeal under Rule 75 of the Court of Appeal Rules, 2010. The judgment of 7 December 2016 must however be deemed as rendered under the Income Tax Act as if the Tax Procedures Act had not come into force, while on the other hand the intended appeal must be guided by the provisions of the Tax Procedures Act and the Appellate Jurisdiction Act.

12. Section 54 of the Tax Procedures Act expressly allows a party to proceedings before the High Court who is dissatisfied with the decision to appeal within 30 days of the decision to the Court of Appeal. The time for appeal may be extended by the Court of Appeal. The decision for which an appeal lies as of right must be "an appealable decision". An appealable decision is defined under the Tax Procedures Act as "*an objection decision and any other decision made under a tax law other than a tax decision or a decision made in the course of making a tax decision*".

13. The appeal to the Court of Appeal is thus limited, both in procedure and substance.

Determination

14. Three core issues emerge for determination.

15. First, is the judgment of the court rendered on 7th December 2016 capable of being stayed? If so, is there a competent appeal to peg the stay of execution upon. Thirdly, should the court exercise its discretion in favour of the Applicant and grant a stay of execution and, if so, on what terms.

16. With a view to swaying the court that there exists an order or decree of this court capable of being executed; the Applicant's Counsel Mr. Onsando drew the court's attention to section 87(3) of the Income Tax Act. The section, which has since been repealed, read as follows:

“87(3). An order made by the court on an appeal shall have the effect, in relation to the amount of tax payable under the assessment as determined by the judge, as a decree for the payment of that amount, whether or not the amount of tax is specified in the decree”

17. It was Mr. Onsando's submission that an amount (he did not specify what amount) was to be 'read in' the judgment of the court of 7 December 2016 pursuant to the above provision, and thus a decree capable of execution could be extracted.

18. It is first to be noted that the Applicant is yet to extract the decree in this matter to enable the court to ascertain with ease whether the same contains any positive command capable of being executed. I must secondly also confess that I found counsel's reading of Section 87(3) of the Income Tax Act rather textual and limited.

19. Section 87(3) makes explicit reference to an *“assessment as determined by the judge”*. The entire section 87 must be read together with specific reference to Section 87(2)(b) which gives the court the power to confirm, reduce, increase or annul the assessment.

20. The court in the instant case made it relatively clear that the appeal was not a monetary appeal and though it involved a challenge to assessment the court would not undertake any assessment. The very last sentence of the judgment read as follows *“it is unnecessary therefore for the court to adjudicate upon the quantum of the assessment”*. This was a clear indication that the court had no figures in mind.

21. The now repealed Section 87(3) of the Income Tax, in my view, anticipated a situation where the court was involved in assessing the quantum of tax payable and that such involvement reflected in the body of the judgment but not necessarily as a final disposal order. The essence is to have any decree agree with the judgment itself.

22. In my view, the section also points to a situation where the court has been involved in one way or the other with the assessment and had in the body of the judgment made a determination confirming, increasing or reducing the contested assessment or has imposed an amount where there was none in the first place, but without making a specific directive as to payment.

23. The law is now relatively clear that the court will not exercise its discretionary powers and order a stay of execution unless the order sought to be stayed consists of a positive and enforceable order or command capable of being executed: see **Nguruman Ltd vs. Shompole Group Ranch & Another [2014]eKLR**. Thus no stay order is capable of being issued by a court of law against a negative order such as a dismissal or a striking out order: see **National Cereals & Produce Board vs. Errad Suppliers & General Contractors Ltd Nairobi Civil Application No. Nai 48 of 2012**.

24. In the instant case the judgment simply dismissed the appeal and no more. The learned judge further also made it clear that she would not deal with any issues regarding assessment. It thus took the judgment out of the ambit of section 87(3) of the Income Tax Act. As it were, there only exists a negative order of dismissal which is in-capable of being stayed.

25. I turn to the issue of whether there is an appeal filed from the judgment of the court dated 7 December 2016.

26. There is evidently no appeal filed as yet. An appeal consists of a full record of appeal together with a

Memorandum of (the grounds) Appeal. The record of Appeal itself consists of documents prescribed by the Court of Appeal Rules, 2010. The actual appeal pursuant to Section 54 of the Tax Procedures Act, 2015 is to be filed within 30 days of the decision of the High Court being appealed from. Appeals to the Court of Appeal are however also subject to the rules of the said court. And the jurisdiction of the Court of Appeal though conferred by the Constitution under Article 164(3) is only ignited once an intention to appeal is lodged. Such an intention is exhibited through the filing of a Notice of Appeal pursuant to rule 75 of the Court of Appeal Rules, 2010. Once a Notice of Appeal is filed an appeal is deemed to be in existence: see **Equity Bank Ltd vs. Westlink MBO Limited [2013]eKLR**.

27. The Applicant filed a notice of appeal on 12 January 2017. The Respondents counsel Mr. A. Chabala contended that there is no appeal as the Notice of appeal was filed hopelessly out of the prescribed time.

28. A notice of appeal must be lodged within 14 days of the date of the decision against which it is desired to appeal: see Rule 75(2) of the Court of Appeal Rules, 2010. The decision against which the Applicant desires to appeal was delivered on 7 December 2016. Ordinarily time would have lapsed on the 21 day of December 2016. Rule 3(e) of the Court of Appeal Rules 2010 however excludes the period of Christmas vacation from being reckoned with in the computation of time. Section 26 of the Court of Appeal (Organization and Administration) Act 2015 provides that the court recess (vacation) during Christmas shall be between 21st December and 7th January both days inclusive. The Notice of Appeal in the instant case should have been filed on 8th January 2017 by the latest.

29. There is no indication that the time for filing of the same was extended by either this court under Section 7 of the Appellate Jurisdiction Act (Cap 9) or by the Court of Appeal under Rule 4 of the Court of Appeal Rules. Neither is there any indication of an application for extension of time having been made.

30. The law as it stands is that a notice of appeal filed out of time and without the leave of the court is fatally defective. It is simply not a matter of a procedural hiccup capable of being cured by the provisions of Article 159 of the Constitution or the overriding objectives principles which guide courts of law: see **Patrick Kirunja Kithinji vs. Victor Mugira Marete [2015]eKLR**. It goes to the jurisdiction issue.

31. In the absence of a valid notice of appeal this court should not ignite its residual and hermetical jurisdiction of granting stay of execution as there is no appeal.

32. I find it unnecessary to consider the third core issue as to whether the discretion should be exercised in favour of the Applicant.

33. The Application is consequently dismissed with costs to the Respondent.

Dated, signed and delivered at Nairobi this 9th day of February, 2017.

J. L. ONGUTO

JUDGE