



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

INCOME TAX APPEAL NO. 17 OF 2013

COMMISSIONER OF DOMESTIC TAXES.....APPELLANT

- VERSUS -

TOTAL TOUCH CARGO HOLLAND.....RESPONDENT

RULING

[1] This ruling is in respect of the Appellant's Notice of Motion dated **27 March 2017**. That application was filed pursuant to the orders of the Court given on **25 January 2017** and seeks that the same be set aside and that leave be granted to the Appellant to file and serve Written Submissions and List of Authorities for consideration. The application is supported by the affidavit sworn by Learned Counsel, **Ms. Lavuna**, on **27 March 2017**. Other than providing a blow by blow account of the steps taken in these proceedings, leading up to the Order of **25 January 2017**, Counsel explained in the said affidavit the reasons why the Appellant was unable to file comprehensive submissions in time.

[2] The explanation that has been offered herein is that **Ms. Lavuna**, Counsel for the Appellant was away from the office on sick leave and subsequently on maternity leave during the period granted for filing submissions; and that the Advocate that was assigned to handle the matter on her behalf, **Ms. Anne Githinji**, later resigned and was therefore not able to conclude the matter. Consequently, the Appellant was unable to file written submissions within the stipulated time. It was thus the contention of the Appellant that the omission was not deliberate; and that **Mr. Ochieng, Advocate**, had no option but to step in and hurriedly file and serve draft submissions out of time.

[3] Counsel further averred that, having resumed duties, she has since prepared the Appellant's Written Submissions as well as a List and Bundle of Authorities, hence the application for leave to have the same filed and considered in the interest of justice. Attached to the Supporting Affidavit are medical documents to prove that **Ms. Lavuna** was indeed hospitalized around the material time. She also annexed the Appellant's draft List and Bundle of Authorities, among other documents. She argued, in her submissions, that tax is a special regime of law and that it was not easy for another Counsel to step in for her and prepare the Written Submissions on short notice, and urged the Court to allow the application.

[4] **Ms. Malik**, Learned Counsel for the Respondent, opposed the application, relying on the Replying Affidavit sworn by her on **18 April 2017**. She averred that it was the Respondent who had been keen on having this appeal fixed for hearing for much of the period preceding **Ms. Lavuna's** hospitalization; and that she constantly followed up the matter with **Ms. Githinji** to enquire why the Appellant's Written Submissions had not been filed. She exhibited a letter dated **20 January 2017** as proof of her earnestness and added that she was never informed at the time that **Ms. Lavuna** was away on maternity leave, until **25 January 2017**. She therefore averred that the Appellant is not deserving of any further indulgence, granted the numerous opportunities given herein by the Court for the specific purpose of filing submissions.

[5] She further posited that the application is an abuse of process and is therefore detrimental to the Respondent; and that, if allowed, it would have the prejudicial effect of further delaying the finalization of this matter, in addition to adversely affecting the Respondent's cash flow, as the Appellant is using this pending matter as the reason for withholding tax refunds that are due to the Respondent. In her submissions, Counsel reiterated her averments in the Replying Affidavit and stressed that the Appellant has not been diligent in prosecuting this appeal. She urged the Court to note that no draft submissions had been attached to the application to enable the Court assess the same, to arrive at a just conclusion. She accordingly made a pitch for the dismissal of the application.

[6] From the foregoing summary, it is evident that most of the facts relied on are not in dispute. The Court record speaks for itself that the parties have had more than ample time to file their written submissions; and that it was with that in mind that the Court declined to grant more time for that purpose on **25 January 2017**. It is noteworthy that Counsel did not specify under what

provisions she approached the Court; but that notwithstanding, it is now a constitutional imperative, under **Article 159(2)** of the **Constitution**, for justice to be administered without undue regard to procedural technicalities. Additionally, **Section 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, recognizes the inherent power of the Court "...to make such orders as may be necessary for the ends of justice..." Accordingly, there can be no gainsaying that the Court does have the discretion to entertain the application and to set aside the orders of **25 January 2017** if such an order is warranted; and to do so on terms that are just. Accordingly, the single issue for my determination is whether sufficient cause has been shown for the re-opening of this matter for the purpose of taking in **Ms. Lavuna's** Written Submissions.

[7] The principles guiding the exercise of discretion by the Court in such circumstances was well explicated in the case of **CMC Holdings Limited -vs- Nzioki [2004] 1 KLR 173** thus:

"In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order... was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would ... not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here... In doing so, she drove the Appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate."

[8] The Appellant's Counsel has endeavoured to explain why she was unable to personally attend to the task of filing written submissions as had been directed by the Court. She annexed documentation in support of that explanation, namely that she was expecting a baby and was not in good health prior to her hospitalization for delivery; and that thereafter, she was away on maternity leave for about four and a half months. That explanation was unassailed, save that, from the standpoint of **Ms. Malik**, she was never informed that **Ms. Lavuna** was on maternity leave, and only got to learn of it on **25 January 2017**.

[9] As to whether the matter could have been handled by any other Counsel, it was explained by Counsel for the Appellant that **Ms. Anne Githinji** who was assigned to hold her brief during that period tendered her resignation around the same time; and was, in any case, overwhelmed for the reason that she had to handle the dockets of two colleagues. A copy of **Ms. Githinji's** email to her supervisor in this connection dated **20 January 2017**, marked **JKL3**, was exhibited in proof of the averment.

[10] Taking all the foregoing into account, I am satisfied that sufficient cause has been shown by the Appellant to warrant the setting aside of the order of the court dated **25 January 2017**. As stated by the Court of Appeal in **Commissioner of Income Tax vs. Kencell Communication Limited [2013] eKLR** the Court's primary duty, with the inclusion of the Oxygen Principles in the law, is to administer substantive justice. Accordingly, I would allow the Notice of Motion dated **27 March 2017** and direct as follows:

- [a] That the matter be and is hereby re-opened for the purpose of taking further submissions as prayed;
- [b] That the Appellant's Supplementary Written Submissions be filed within the next 7 days from the date hereof;
- [c] That corresponding leave be and is hereby granted to the Respondent to file Further Submissions in response within 7 days of service by the Appellant
- [d] That the costs of the Application be costs in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JULY 2017

OLGA SEWE

JUDGE