



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
INCOME TAX APPEAL NO. 1 OF 2014

BOSS FREIGHT TERMINAL LIMITED.....APPELLANT

- VERSUS -

COMMISSIONER OF DOMESTIC TAXES..... RESPONDENT

RULING

1. On 14th November 2013, the Nairobi Income Tax Local Committee delivered its judgement, in the Appeal which the Appellant, **BOSS FREIGHT TERMINAL LIMITED** had filed against the Respondent, the Commissioner of Domestic Taxes.
2. The Local Committee dismissed the appeal.
3. By dismissing the Appeal, the Local Committee effectively upheld the assessment by the Commissioner of Domestic Taxes, to the following intents and purposes;
 - a. **The share capital receivable from the shareholders, who were also the directors of the appellant, constituted loans to the directors who had been allotted fully paid-up shares before they paid for the said shares.**
 - b. **In the light of the fact that the said receivables constituted a loan advanced to the directors, the loan attracted Fringe Benefit Tax amounting to Kshs. 756, 182/-.**
4. The appellant was dissatisfied with the decision of the Local Committee, and therefore lodged an appeal to the High Court.
5. On 26th November 2013, the Appellant gave Notice to the Respondent that it intended to challenge the decision of the Local Committee, through an appeal to the High Court.
6. It was the contention of the Respondent that the appeal should have been filed by 26th December 2013. However, as the 26th December 2013 was a public holiday, the Respondent submitted that the appeal should have been filed 27th December 2013.
7. In the light of that submission, the Respondent put forward a Preliminary Objection to the Appeal, insisting that the appeal, which was filed on 16th January 2014, was incompetent, bad in law and fatally defective.
8. The Respondent's position was that the appeal was filed late.
9. But the Appellant insists that the appeal was filed within the time prescribed by law.
10. Interestingly, both parties have cited Rule 3 of the Income Tax (Appeals to the High Court) Rules as the basis for their respective submissions. The said Rule stipulates as follows;

“No appeal shall be filed unless a memorandum of appeal is presented to the Registrar during office hours, and a copy served upon the Respondent, within 30 days after the

date of service upon the respondent of a notice of appeal under section 86(2); but where the Court is satisfied that, owing to the absence from Kenya, sickness or other reasonable cause, the appellant was prevented from presenting the memorandum of appeal within that period and that there has been no unreasonable delay on his part, the Court may extend that period”.

11. Pursuant to that Rule, the period of 30 days is to be computed from the date when the Notice of Appeal was served upon the Respondent.

12. In this case, the Notice of Appeal was served upon the Respondent on 26th November 2013.

13. Pursuant to the provisions of Section 57 (a) of the Interpretation and General Provisions Act;

“In computing time for the purposes of a written law, unless the contrary intention appears –

a. *A period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done:”*

14. Therefore, in computing the 30 days, one must exclude the 26th of November 2013, as that is the date when the Respondent was served.

15. Nonetheless, even if that were to be done in this case, it would appear that the appeal was, in a literal sense, still filed after the lapse of more than 30 days.

16. However, the Appellant emphasizes that the appeal was filed within time. That submission is premised upon the provisions of Order 50 Rule 4 of the Civil Procedure Rules, which provides as follows;

“Except where otherwise directed by a Judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the next year following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the Court) for the amending, delivering or filing of any pleading or the doing of any other act:

Provided that this rule shall not apply to any application in respect to a temporary injunction”.

17. In a nutshell, time does not run between the 21st day of December and the 13th day of the following month of January. That rule, if it is applicable to the appeals from the Local Committee to the High Court, would imply that the Appeal in this case was filed in time.

18. The Respondent submitted that the provisions of Order 50 Rule 4 of the Civil Procedure Rules do not apply to this appeal.

19. On its part, the Appellant submitted that in the event that the appeal was found to have been filed late, this court ought to take into account the following two matters:

a. Order 50 Rule 6 of the Civil Procedure Rules, which empowers the court to extend time for the doing of any act, under the Civil Procedure Rules; and

b. Article 159 (2) (d) of the Constitution, which enjoins the Court to administer justice without undue regard to technicalities.

20. As far as the Appellant was concerned, the objection to the appeal, on the grounds that it had been filed or served late, was simply a technicality.

21. I understand the Appellant to have invoked the Overriding Objective of the Court.

22. The question that then arises is whether or not the requirement that an appeal be filed within the time prescribed was a technicality.

23. In **FELISTER WAKONYO WARUHIU Vs JOSEPH WACHIRA MWANGI, CIVIL APPEAL No. 8 of 2013**, the appeal had been filed out of time. The Court of Appeal addressed that issue thus;

“Can the overriding objective of this Court be invoked to save the appeal? We are of the view that the competency of the appeal goes to the jurisdiction of this Court and cannot be cured by the overriding objective 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”.

24. I understand the Court of Appeal to have made the point that the question as to the time within which an appeal has to be filed, is not simply an issue of technicality. It is a substantive issue which goes to the jurisdiction of the court. Therefore, neither Article 159 (2) (d) nor Article 22 (3) (d) of the Constitution of the Republic of Kenya can cure the defect.
25. The appeal before me was filed out of time, and without leave of the court.
26. The appellant has, in its submissions, suggested that the court has power to extend time for the filing of an appeal.
27. It is true that pursuant Rule 3 of the Income Tax (Appeals to the High Court) Rules, the Court is expressly empowered to extend the period within which an appeal may be filed.
28. However, the appellant has not made an application for extension of time. The court has therefore not granted any extension of time.
29. But why would time need to be extended if the period between the 21st day of December 2013 and the 13th day of January 2014 were to be excluded from the computation of time?
30. That question could only arise if the provisions of Order 50 rule 4 of the Civil Procedure Rules were applicable to appeals from the Local Committee. Therefore, the broader question to be addressed relates to the application, if any, of the Civil Procedure Rules to Tax Appeals.
31. Rule 20 of the Income Tax (Appeals to the High Court) Rules expressly specifies the extent to which the Civil Procedure Rules are applicable to matters falling within the ambit of the Income Tax Act. This is what the Rule says;

“The rules determining procedure in civil suits before the Court in so far as those rules relate to recognized agents and advocates, to service, to consolidation, to admissions, to the production, impounding and return of documents, to the summoning and attendance of witnesses, to adjournment, to the examination of witnesses, to affidavits, to judgement and decree, to the execution of decrees, to attachment of debts, to the death, bankruptcy and marriage of parties, to withdrawal, discontinuance and adjustment, to security for costs, to commissions, to corporations, to trustees, executors and administrators, and to the enlargement of time shall, to the extent which those rules are not inconsistent with the Act or these Rules, apply to an appeal as if it were to a Civil suit, but, save as provided in these Rules, the procedure relating to civil suits before the Court shall not apply to an appeal”.

32. It is clear, from that Rule, that in general, the Civil Procedure Rules do not apply to appeals arising under the Income Tax Act. Therefore, Order 50 Rule 4 of the Civil Procedure Rules would not apply to this appeal, unless Rule 20 expressly indicated that it did.
33. The closest thing to the debate as to whether or not the period between 21st day of December and the 13th day of January of the following year was to be excluded when computing time, is the reference to the enlargement of time.
34. In my considered opinion the enlargement of time is not limited to any period of the year. It describes the increment of the period which had been prescribed for the doing of anything specific.
35. On the other hand, Order 50 Rule 4 is only applicable during the period between the 21st day of December and the 13th day of the following January. That period is to be excluded when time was being computed, under the Civil Procedure Rules.
36. If a party did not comply with the time limits, even under the Civil Procedure Rules, he could still seek an extension of time, even if the party was already a beneficiary of the freeze in time between 21st of December and 13th of January.
37. In the result, I hold that Order 50 Rule 4 of the Civil Procedure Rules was not applicable to this Tax Appeal. That means that the Appeal was filed and served outside time.

38. Whilst I recognize that the Appellant was entitled to seek an extension of time, the position is that the Appellant has not yet made an application for an extension of time. I so find because the mention in the appellant's submissions, that the court has authority to enlarge time cannot be deemed to constitute an application for the enlargement of time.

39. The appeal herein is struck out, with costs to the Respondent.

40. However, for the avoidance of any doubt, I wish to make clear that this does not constitute the determination of the Appellant's appeal on merit.

DATED, SIGNED and DELIVERED at NAIROBI this 13th day of July 2015.

FRED A. OCHIENG

JUDGE

Judgement read in open court in the presence of

Segi fir Ali for the Appellant

Chabala for Ms Mwaniki for the Respondent

Collins Odhiambo – Court clerk.