REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: GICHERU, TUNOI & PALL, JJ.A.)

CIVIL APPEAL NO. 67 OF 1998

BETWEEN

BARCLAYS BANK OF KENYA LIMITED..... APPELLANT

AND

THE COMMISSIONER GENERAL

THE KENYA REVENUE AUTHORITY.....RESPONDENT

(Appeal from a Ruling and Order of the High Court of Kenya at Nairobi (Mr. Justice Ole Keiwua) dated the 11th December, 1997,

in

H.C.MISC. (Income Tax) APPL. NO. 514 OF 1997)
****

JUDGMENT OF THE COURT

For the purposes of this appeal, the following is a summary of the relevant facts which are largely not in dispute. Barclays Bank of Kenya Limited, hereinafter referred to as the appellant, is one of the leading Banks in Kenya. The respondent is the Chief Executive of the Kenya Revenue Authority, an agency of the Government of Kenya, established by an Act of Parliament as a central body for all matters relating to assessment and collection of revenue. On 28th April, 1995, the appellant duly submitted its 1994 income tax return declaring a total taxable profit of ,147,421,400. The respondent thought that the assessment was wrong and on 3rd June, 1996, he wrote to the appellant intimating his intention to amend upward the appellant's self assessment tax computation from the sale of its shares in its subsidiary known as National Industrial Credit (N.I.C.) whose value amounted to Shs.621,665,838.00. The respondent's contention is that the gain on sale of N.I.C. shares is income chargeable to tax as a gain or profit from business in accordance with the provisions of section 3 (2)(a)(i) of the Income Tax Act Cap 470, Laws of Kenya, (the Act) because, he avers, unlike other businesses, the business of banking involves investment of funds as a normal course of business and banks do not and are not expected to have funds "sitting in the strongroom" doing nothing but those funds that have not been withdrawn are invested in whatever form for the purposes of multiplication either by way of interest, dividends e.t.c. or on disposal by way of securities. Consequently, he argued, it is immaterial whether or not a bank has held shares in a company for a long or short period.The gain or loss arising from its shareholding is part and parcel of the banks normal trading gain or loss and should not be classified as capital in nature.

On the other hand the appellant argues that the gain on sale of these shares is a capital receipt and does not form part of its normal trading activities. It supports its arguments further by the fact that the proceeds of the sale were used for the expansion of its core banking business particularly in respect of Information Technology.

The respondent confirmed the additional assessment on 28th August, 1996. Thereupon, the appellant, as it was entitled to do under section 86 (1) (b) of the Act, appealed to the Local Committee which on 15th January, 1997, allowed the appeal in its favour and ruled that the gain on the sale of the N.I.C. shares represented a capital receipt which did not attract tax.

On 30th January, 1997, the respondent being dissatisfied with the decision of the Local Committee, served the appellant with a notice of appeal. Rule 3 of the Income Tax (Appeals to the High Court) Rules (the Rules) mandates that an appeal be filed and served upon the appellant within 30 days from the date of notice. It is now common knowledge that the respondent did not prefer his appeal within the prescribed time. The delay involved is seven (7) days and its cause is variously attributed to some internal disorganisation within the offices of the Kenya Revenue Authority. For example,it is said that as soon as the Local Committee delivered its decision the file went missing until 26th February, 1997. Again, it took sometime to prepare a brief and when this was ready the respondent was not available in Nairobi to accord consent to the filing of the appeal as he was on duty up country. No other person whatsoever was authorised to do anything in this respect on his behalf.

By a notice of motion taken out in the superior court on 23rd May, 1997, the respondent applied to enlarge the time for filing the memorandum of appeal. The application was made in reliance upon section 86 (2) of the Act and rules 3, 17 and 20 of the Rules. It is supported by an affidavit deponed to by Helen Abila, an Assistant Commissioner of Income Tax. In the main, she depones to the events which prevented the respondent from instructing the Attorney General to lodge the intended appeal within time.

The learned Judge, Ole Keiwua, J. on 11th December, 1997, in a reserved ruling allowed the application. He held that the explanation offered by the respondent in not seeing that the appeal was within the prescribed time is hardly convincing and totally inadequate. He deemed the omission a pathetic excuse. However, after citing the case of ***Vincenzini v Regional Commissioner of Income Tax [1963] A C 453*** (House of Lords and Judicial Committee of the Privy Council - on Appeal from the Court of Appeal for Eastern Africa) where their Lordships pointed out that the Rules are procedural and are to be construed subject to the overriding consideration that the right of appeal provided by the statute survives, the learned Judge held that failure to observe the rules will be excused and has been excused where there is a question or matter of public importance whose value is a large looming loss of revenue.

Mr. Deverell, counsel for the appellant, submitted in the main that the learned Judge, having found:

a)that the Respondent's excuse for failing to file the Memorandum of Appeal in time was pathetic and

b)that the "other reasonable cause" required by Rule 3 of the Income Tax (Appeals to the High Court) Rules as a precondition to the granting of extension of time for the filing of an Appeal from the decision of the Local Committee must be something in the nature of a physical impediment from preferring an appeal and does not extend to bureaucratic incompetence; and,

c)by implication, if not expressly, that the Respondent was not physically impeded from preferring the Appeal, erred in failing to dismiss the application for an extension of time for filing the Appeal.

Mr. Deverell submitted that "other reasonable cause" in Rule 3 of the Rules must be something that prevents the respondent from doing the act in line with absence from Kenya or sickness including physical impediment. He argued that it does not extend to bureaucratic incompetence which the Act does not excuse. So far as this submission is concerned, the learned Judge and Mr. Deverell agree, but, they soon parted ways when the learned Judge held that under the same rule matters of public importance or the value of the subject matter must be considered and taken into account and that technicality of procedure will have to take second place when a matter is one of public importance and that the value of

the subject in issue is large. Rule 3 of the Rules reads as follows:-

> ***"No appeal shall be filed unless a m emorandum 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, ow ing to 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."***

Under this rule the intending appellant, in order to succeed, must satisfy the Judge that:-
(a)owing to sickness or other reasonable cause;
(b)he was prevented from presenting his memorandum of appeal within the permitted period; and
(c)there was no unreasonable del ay on his part.

It is Mr. Deverell's submission that the learned Judge erred in holding that in an application under rule 3 he could take into account matters of public importance or the value of the subject matter in issue since they did not amount to something which physically impeded the respondent from preferring the appeal. Mr. Deverell, further, argued that in a matter covered by rule 3 decisions of this court and of the superior court had no application.

In our view, the respondent cannot in the circumstances show any reasonable cause which prevented him from preferring the appeal within the prescribed time. We do not subscribe to the argument that because the delay was only of 7 days the learned Judge cannot be faulted. The period of time for presenting a memorandum of appeal is fixed by statute and as was said by Madan, J., (as he then was) in ***Sardah M. M. Shroff v The Commissioner of Income Tax*** , Case No. 101, E.A. Tax Cases Vol. IV Part 1, 89:

"In the context of statutory limitation, the length or shortness of the delay is irrelevant."

Mr. Deverell referred us to ***Commissioner of Income Tax v. A. Q. Case No. 43, EA Tax Cases Vo. 2 Part III 192***. In that case the Local Committee allowed an appeal in favour of a tax payer. The Commissioner of Income Tax lodged an appeal to the High Court against that decision. The memorandum of appeal was, due to a mistake on the part of the advocate, lodged out of time. On the appeal coming up for hearing a preliminary objection was taken that the appeal was not properly before the court. The advocate for the Commissioner of Income Tax then applied for an extension of the time for lodging the appeal. Mayers, J. held that the express power of the court to extend the time within which an income tax appeal may be preferred is derived from the proviso to rule 3 and that if the court has any discretion in determining whether that discretion ought or ought not to be exercised in favour of the appellant the court must have regard to the relevant provisions of the Income Tax Rules and not to those of the High Court of Kenya. The Judge further held that the court has no power to grant an extension of time for lodging an income tax appeal unless the application therefor is made within the time for appealing. Though the learned Judge (Ole Keiwua, J.) referred to this case, he only referred to it in respect of the holding that the giving of notice of appeal is a condition precedent to an appeal but not a step in the appeal.

Mr. Deverell, also, referred us to the case of the ***Northern Province Labour Utilisation Board vs. The Commissioner of Income Tax [1960] EA 1015*** where it was held that the words **"other reasonable cause"** in section 111 (3) of the Act should be construed ejusdem generis with the words **"absence from the territories"** and sickness in that sub-section; both absence and sickness connote a physical impediment preventing notice of appeal being given whereas there is no such element in the slip of an advocate.

The authorities cited to us by Mr. Deverell show that the predominant intention of the legislature gathered from the apparent purpose of the express provision of rule 3 is that in an application under rule 3 other matters not amounting to something which physically impedes an intending appellant from preferring the appeal should not be taken into account.

Section 86 of the Act and rule 3 of the Rules seem to have been drafted with the Commissioner of Income Tax absent in the mind of the legislature. Probably, the taxpayer was given a preferential treatment. Over a course of years the Commissioner has become a very common litigant in our courts. But, the Act and the Rules weigh very heavily against him. However, the legislature has not come to his aid. The court cannot aid the legislature's defective phrasing of the Act neither can it add, mend or make up deficiencies which are inherent in it.

Was the subject matter before the learned Judge of public importance? Certainly, the amount involved was quite substantial and of value in the collection of revenue. But, we are not impressed as to the argument that an important point of law of fundamental importance was at issue. The fact that large sums of money due to the Government may not be collected due to sheer incompetence is not an important point of law which needs clear definition by this court and neither does it, in our view, constitute sufficient reason nor other reasonable cause to justify extension of time under rule 3.

Though the learned Judge referred to the oft cited case of ***Esso Standard Eastern Inc. v Income Tax [1971] E.A. 127*** he, with respect, misapplied its principles. In that case the Commissioner of Income Tax confirmed an assessment on the appellant of income tax on interest received by it in respect of a loan. The agreement of loan was made with a Kenya company for the construction of a refinery in Kenya and for working capital. The agreement was made in New York in dollars and all repayments were to be made in New York in dollars. The question at issue was whether the interest on the loan accrued in or was derived from Kenya. It was held that (i) the words "accrued in" and "derived from" are synonymous, (ii) the source of income is the place from which it is derived and this is a question of fact; (iii) the source of the interest was the contract made in New York, the location of that source was New York and the interest neither accrued in nor was derived from Kenya.

The appeal was allowed and the assessment was set aside. The Commissioner of Income Tax appealed to the Court of Appeal for East Africa and applied orally at the hearing for leave to extend the time for the service of the notice of appeal. The respondent submitted that the appeal was on pure fact and accordingly would not lie. It was held that (i) the extension of time to file the notice of appeal would be allowed because the case involved points for decision which were on a matter of public importance; (ii) the appeal was not on pure fact and so was competent; (iii) the entire loan transaction was carried out in the U.S.A. and accordingly the interest neither accrued in nor was derived from Kenya. Appeal was accordingly dismissed.

At a glance, it is quite obvious that the above case is distinguishable from the present one and the principles enunciated therein have no relevance in the instant case. We agree with Mr. Deverell that the large amount of the claim to tax was not a sufficient ground or excuse to justify an extension of time.

For these reasons we allow the appeal. The ruling and order of the superior court dated 11th December, 1997, is set aside save for the order for costs. The appeal to the High Court filed pursuant to the extension of time granted by the superior court is hereby ordered struck out. The respondent shall pay to the appellant its costs of this appeal as well as costs of the appeal filed in the High Court by the respondent.

Dated and delivered at Nairobi this 20th day of November, 1998.

J. E. GICHERU

.....

JUDGE OF APPEAL

P. K. TUNOI

.....

JUDGE OF APPEAL

G. S. PALL

.....

JUDGE OF APPEAL

I certify that this is
a true copy of the original.

DEPUTY REGISTRAR