IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M?INOTI, JJ.A.)

CIVIL APPEAL NO. 224 OF 2015

BETWEEN

BOSS FREIGHT TERMINAL LIMITED..…….…....…...APPELLANT

AND

THE COMMISSIONER OF DOMESTIC TAXES…….....RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya, Commercial & Admiralty Division, at Nairobi (Ochieng, J.) dated 13th July, 2015

in

***Income Tax Appeal No. 1 of 2014*)**

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JUDGMENT OF THE COURT

The facts leading to this appeal are not in dispute. They are fairly simple and straightforward. On 13th July, 2015 **Ochieng, J.** upheld the preliminary objection raised by the respondent regarding the competency of the appeal before him.

The appellant is a limited liability company whose principal activity is provision of an integrated one-stop vehicle discharge, storage, clearance, documentation and verification services at the port of Mombasa. On the other hand the respondent is a statutory body established under the Kenya Revenue Authority Act, as the Central Agent of the Government for the assessment and collection of all taxes due to the Government. In executing its mandate, the respondent enforces all the provisions of written laws set out in Part 1 of the First Schedule to the Kenya Revenue Authority Act, among them the Income Tax Act.

Pursuant to the above mandate, the respondent sometimes in the year 2012 conducted an audit of the appellant's business operations to confirm compliance with tax laws for the period 2008 through to 2010, inclusive. The audit revealed that an amount of Kshs.756,182/- was due from the appellant to the respondent on account of fringe benefit tax on loans advanced by the appellant to its directors.

The appellant was not happy with the decision and in the exercise of its undoubted right of appeal lodged

an appeal with the Nairobi Income Tax Local Committee, ***"the local committee"*** on the ground that **section 12B(1)** of the Income Tax Act did not apply to the loans granted to its directors. The respondent on the other hand took the position that fully paid up shares owned by the directors were the counterpart of loans of equivalent value granted by the appellant to those directors. This therefore, the respondent argued, constituted a taxable income.

The local committee having considered the respective submissions determined that the appellant had failed to establish that the loans had not been granted as a consequence of the recipients being directors and that therefore theloans were a fringe benefit that was taxable. The appeal was accordingly dismissed.

Once again the appellant was dissatisfied with the decision of the local committee. Its next stop was the High Court, Commercial and Admiralty Division by way of yet another appeal. It raised a total of twelve grounds to impugn the decision of the local committee. However they all revolved around the local committee's application and interpretation of the term ***"loan"*** under **Section 12B** of the Income Tax Act and whether the appellant had in fact extended loans to its directors.

In response, the respondent filed a statement of facts opposing the appeal and urging the High Court to uphold the decision of the local committee on the ground that the appellant had deliberately falsified records in an attempt to avoid paying tax and denying the Government revenue. That in fact the local committee had properly understood and applied the term ***"loan"*** in the circumstances of the case.

In addition to the statement of facts, the respondent filed a Notice of Preliminary Objection on a point of law dated 3rd April, 2014 on the sole ground;***„THAT the appeal is bad in law, incompetent and fatally defective as the same is filed out of time.?*** In essence the respondent's position was that the appeal was filed late. But the appellant took a contra position; that the appeal was indeed filed within the time prescribed by law. Whereas the respondent sought refuge in **rule 3** of the Income Tax (Appeal to the High Court) Rules, the appellant invoked **order 50 rule 4** of the Civil Procedure Rules. **Rule 3** of the Income Tax (Appeal to the High Court) Rules is in these terms;

> **"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."**

On the other hand **order 50 rule 4** of the Civil Procedure rules provides *inter alia:-*

> **"……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 year next 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 of a temporary injunction."**

In support of the preliminary objection the respondent submitted before **Ochieng, J.** that on 26th November, 2013 the appellant served it with notice of its intention to challenge the decision of the local committee, through an appeal to the High Court. Pursuant to **rule 3** aforesaid it was the contention of the respondent that the appeal should then have been filed latest by 26th December 2013. However, since 26th December 2013 was a public holiday, the respondent submitted that the appeal should then have been filed on 27th December, 2013. However, it was not until 16th January, 2014 that the appeal was lodged, which was way out of time, according to the respondent.

On the other hand, the appellant relying on the provisions of **order 50 rule 4** of the Civil Procedure Rules submitted that the appeal was filed in time. According to the appellant, since the rule applied to income tax appeals and provides that time does not run between the 21st of December and the 13th of January, if that period is excluded in the computation of time, then the appeal in this case was surely filed in time. However the respondent, countered that argument by submitting that the provisions of **order 50 rule 4** of the Civil Procedure Rules did not apply to this kind of appeal. Citing **rule 20** of the Income Tax (Appeal to the High Court) Rules, the respondent maintained that these rules expressly specified the extent to which the Civil Procedure Rules were imported in matters falling within the ambit of the Income Tax Act and the appeals arising therefrom. The provisions imported are limited to the orders and rules relating to; recognized agents and advocates, production, impounding and return of documents, summoning and attendance of witnesses, adjournments, examination of witnesses, affidavits, judgment and decree, execution of decrees, attachment of debts, death, bankruptcy, marriage of parties, withdrawal, discontinuance and adjustment, security for costs, commission corporations, trustees, executors and administrators and to the enlargement of time. To the respondent therefore it was clear, that in general, the Civil Procedure Act and the rules made thereunder, save in respect of the above matter, do not generally apply to appeals arising from the Income Tax Act and since **Order 50 rule 4** was not among them, it could not be invoked to sustain an appeal which was filed way out of time.

Faced with this challenge the appellant then changed tact somewhat and stated that in the event that the appeal was found to have been filed out of time, that the court should consider **Articles 22** and **159(2) (d)** of the Constitution and the overriding objective and sustain the appeal. The respondent hit back by submitting that **Articles 22** and **159(2) (d)** of the Constitution were inapplicable as the issue was not a mere technicality but went to the root and or jurisdiction of the court. The same argument was proffered against the invocation of the overriding objective.

In his considered ruling delivered on 13th July, 2015, **Ochieng J.** upheld the preliminary objection and struck out the appeal with costs on the grounds that it was filed out of time; that **order 50 rule 4** of the Civil Procedure Rules was not applicable to income tax appeals; that he could not enlarge time as no application to that effect had been made; that the question of time was jurisdictional and not a mere technicality and therefore **Article 159(2)** of the Constitution and the overriding objective were inapplicable in the circumstances.

The appellant, obviously dissatisfied with the High Court's ruling has filed this appeal before us on the grounds that the judge erred in finding that **order 50rule 4** was inapplicable to income tax appeals, by failing to find that enlargement of time envisaged under **rule 20** of the Income Tax Rules encompassed **order 50** as well and finally, and by failing to exercise his discretion to extend time.

On 11th October 2016, at the case management conference parties agreed that the appeal be canvassed by way of written submissions to be filed within 30 days of the Conference and parties would then be allowed to briefly highlight the submissions on the scheduled day of hearing.

The appeal came before us for hearing on 7th February, 2016. However, only the respondent had filed its written submissions. The appellant had not. Instead,

Mr. Kiptum holding brief for **Mr. Abed**, learned counsel for the appellant applied for adjournment on the ground that the appellant had by an e-mail the previous day withdrawn instructions from Abed's firm.

Ms. Githuku, learned counsel for the respondent, opposed the application on the grounds that the hearing date had been taken by consent way back in October, 2016. That the appellant had not even filed submissions though the alleged withdrawal of instructions had only been the previous day, that in any event there was no evidence of the alleged withdrawal of instructions, and finally that the appellant was not acting in good faith.

We were persuaded by the grounds advanced by Ms. Githuku in opposition to the application for adjournment by the appellant. We declined the adjournment sought and directed that the appeal proceeds to hearing at which point **Mr. Kiptum** indicated that he had nothing to say in support of the appeal. On

the other hand, **Ms. Githuku** elected to rely entirely on her written submissions.

As it is therefore, in determining this appeal we do not have the benefit of the appellant's submissions in support of the appeal. Our decision will therefore turn entirely on the record, the law as well as the written submissions of the respondent.

Dealing with the first ground, did the court below err in holding that **order 50 rule 4** did not apply to income tax appeals to the High Court? We have carefully combed through the Income Tax Rules and we have not come across any provision applying the said order and rule to income tax appeals to the High Court. Similarly we note that **order 50 rule 4** is not among those orders and rules of the Civil Procedure, imported into the Income Tax Rules. The order and rule is therefore not applicable to income tax appeals as the learned judge correctly held.

It is instructive that the Income Tax Rules empowers the court to extend time for lodging the appeal, but even then the grounds upon which such application can be made are limited and circumscribed. The appellant made no such application and it cannot fault the learned judge for holding that no such application was before him. Again, the Income Tax Rules are categorical that a party dissatisfied with the determination of the local committee has 30 days to appeal to the High Court. Yet the appellant filed its appeal on 16th January 2014 and served it upon the respondent on 29thJanuary, 2014. The decision appealed from was made on 4th November 2013. There was obviously a delay in excess of the 30 days permitted. It cannot be gainsaid that the appellant filed its appeal way out of time and even so without leave of the court. In the event that the appellant was unable in the circumstances as set out in the proviso to **rule 3** aforesaid, to file the appeal within time, it was required to move the court and seek extension of time, but the appellant for reasons best known to itself opted not to pursue that route.

The appellant having filed its appeal to the High Court out of time and in contravention of the applicable law, it cannot purport to invoke the provisions of **Articles 22** and **159** of the Constitution to validate an incompetent appeal. Nor can the appellant hike a lift on **section 1A** and **1B** of the Civil Procedure Act on the court's discretion to save such an appeal. The Supreme Court in the case of **Raila Odinga & 5 others v IEBC & 3 Others (2013) eKLR** reiterated that **Article 159(2) (d)** of the Constitution should not be invoked in a manner that ousts the provisions of other equally or more important provisions of the law. See also **Ramji Devji Vekaria v Joseph Oyula (2011) eKLR** and **David Ochieng v SDA Church (2012) eKLR**. These authorities, we emphasize, reiterate the principle that an appeal filed out of time and without leave of the court is not a mere technicality that can be saved by **Article 159** of the Constitution or the overriding objective.

As a parting shot we can only reiterate what we said in the case of **Patrick Kiruja Kithinji** v.**Victor Mugira Marete(2015) eKLR** on time as a jurisdictional issue. We observed thus:-

> **"…. In 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 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 appeal in this Court."**

Given the foregoing, we have no hesitation whatsoever in holding that this appeal lacks merit and is accordingly dismissed with costs to the respondent.

Dated and delivered at Nairobi this 24th day of March, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

……..……

JUDGE OF APPEAL

K. M'INOTI

……

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR