



REPUBLIC OF KENYA



Commissioner of Investigation & Enforcement v Asea Brown Boveri (ARB) Limited (Income Tax Appeal E073 of 2023) [2024] KEHC 917 (KLR) (Commercial and Tax) (30 January 2024) (Ruling)

Neutral citation: [2024] KEHC 917 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E073 OF 2023
A MABEYA, J
JANUARY 30, 2024**

BETWEEN

COMMISSIONER OF INVESTIGATION & ENFORCEMENT APPELLANT

AND

ASEA BROWN BOVERI (ARB) LIMITED RESPONDENT

RULING

1. Before Court is an application dated 22/5/2023 brought under rule 4 of the [Tax Appeals Tribunal \(Appeals to the High Court\) Rules 2015](#), section 32 of the [Tax Appeals Tribunal Act](#) and article 159 of the [Constitution of Kenya](#), 2010.
2. The application seeks leave to extend the time within which to file the memorandum of appeal against the judgment of the Tax Appeals Tribunal delivered on 17/3/2023 and have the annexed appeal be deemed as duly filed and served.
3. The application is premised on the grounds on the face of it and on the supporting affidavit of Shijenje Johnson Luyiakha sworn on 22/5/2023. It was the appellant's contention that the Tax Appeals Tribunal delivered its judgment on 17/3/2023 electronically. That he served his Notice of Appeal on 14/4/2023 but the certified copies of the proceedings and judgment were availed on 18/5/2023.
4. He contended that he had thought that he required certified copies of the proceedings and judgment before he could file the appeal. That the appeal is arguable and has a high chance of success and no prejudice would be suffered by the respondent if the orders sought are granted.
5. In opposition to the application, the respondent filed grounds of opposition dated 26/6/2023 and a replying affidavit sworn on 23/6/2023 by Jeremiah Samita. He deposed that Rule 5 of the Tax Appeals Tribunal (appeals to the high court) rules 2015 did not make provision for availability of certified typed



proceedings before filing an appeal. The respondent termed the appellants actions as an afterthought and a remedy to its failure to adhere to the timelines.

6. That the appellant did not give a suitable explanation for the delay and the appellant ought to have known that the memorandum of appeal should have been filed within 30 days. The respondent averred that the Court did not have unfettered jurisdiction to extend time for filing the memorandum of appeal and the respondent would be highly prejudiced if the orders sought are granted.
7. The application was canvassed by way of written submissions. The appellant submitted that according to the practice direction Number 14 of the Practice directions to standardize Practice and procedures in the High Court, the record of appeal should have certified typed records of the trial court's proceedings and the judgment and sentence. Counsel submitted that the appellant relied on the same and the certified copies of proceedings were received on 18/5/2023 and the appeal filed on 22/5/2023. That the delay was explained and not inordinate.
8. In its submissions, the respondent observed that the reason for delay was an afterthought since there is no requirement for certified copies of proceedings or the judgment. That the appellant being a litigant in tax appeal matters, it cannot use ignorance of the law as a defence and it did not provide any evidence to show that it followed up with the Tribunal for the alleged documents.
9. I have considered the rival pleadings by the parties as well as the written submissions. The core issue for determination is whether time for the filing of the appeal should be extended. Appeals to the this Court from the Tribunal are governed by section 32 of the [Tax Appeals Tribunal Act](#) which provides that: -
 - “(1) A party to proceedings before the Tribunal may, within thirty days after being notified of the decision or within such further period as the High Court may allow, appeal to the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party.
 - (1A) A party that has appealed against the decision of the Tribunal in subsection (1) shall within two days of lodging a notice of appeal, serve a copy of the notice on the other party.
 - (2) The High Court shall hear appeals made under this section in accordance with rules set out by the Chief Justice.
 - (3) The appellant shall, within thirty days, after the date of service of a notice of appeal under Section 32(1), file a memorandum of appeal with the Registrar and serve a copy on the respondent
 - (4) The Court may extend the time specified in rule 3 if the Court is satisfied that, owing to absence from Kenya, sickness, or other reasonable cause, the appellant was unable to file the memorandum of appeal within that period and that there has been no unreasonable delay on the part of the appellant.”
10. From the forgoing, it is clear that the time within which to file an appeal is 30 days from the time the Notice of Appeal is filed. That gives a party approximately 60 days from the time when the parties are notified of the decision.
11. Contrary to the contention by the respondent, the giving of extension under the subject provision is in the discretion of the Court. That discretion is unfettered, but as all other discretions, the same is to be exercised judiciously and not capriciously.



12. In *Nicholas Kiptoo Arap Salat v IEBC and 7 others* SCK App. No. 16 of 2014 [2014] eKLR, the Supreme Court of Kenya set out some of the factors for consideration in an application for extension of time as follows: -

- “i) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- ii) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- iii) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- iv) Whether there will be any prejudice suffered by the respondents if the extension is granted;
- v) Whether the application has been brought without undue delay; and
- vi) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

13. The judgment of the Tribunal was delivered on 17/3/2023 and the appellant served its notice of appeal and request for proceedings on 14/4/2023. The appellant had until the 14/5/2023 to lodge his appeal. The appeal was then lodged on 22/5/2023. The delay was only for 8 days in the circumstances.

14. In my view, 8 days delay is not inordinate. The appellant having taken immediate steps by lodging and serving the Notice of Appeal on time, it cannot be held that the subsequent filing of the Memorandum of Appeal was an afterthought.

15. The appellant stated that the reasons for delay in filing the Memorandum of Appeal was that there was a delay in obtaining the certified proceedings from the Tribunal. That he thought that he required the same before he could lodge his appeal. That the proceedings were finally obtained on 18/5/2023. I have considered the reason advanced by the appellant and I note that the same is supported by evidence. The appellant’s Counsel relied on the High Court Practice Directions which misled him as to the requirements of filing of an appeal from the Tribunal to this Court.

16. Accordingly, I find that this is a proper case for granting an extension of time. The notice of motion dated 22/5/2023 is hereby allowed as prayed. The costs of the application to be in the cause.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY, 2024.

A. MABEYA, FCI Arb

JUDGE

