

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**APPEAL NO. 353 of 2019**

**ABDI AIDID ALI.....APPLICANT**

**-VERSUS-**

**COMMISSIONER OF INVESTIGATIONS &  
ENFORCEMENT.....RESPONDENT**

**RULING**

1. The Applicant is a male adult of sound mind and a director of Kazimoni Auto Tyres Limited and Blueline Auto Tyres Limited companies, both registered in Kenya under the Companies Act, 2015 Cap 486 of the Laws of Kenya.
2. The Respondent is a principal officer who is duly appointed under Section 11(4) of the Kenya Revenue Authority Act and is responsible for the control and management of the Domestic Taxes Department and accounting for tax under the Income Tax and Value Added Tax Act.
3. On 27<sup>th</sup> October, 2018 the Respondent raised an assessment for the sum of Kshs. 13,881,376.00 which it served upon the Applicant. The Applicant was reminded of his right to object to the assessment within thirty days in accordance with Section 51 of the Tax Procedures Act (TPA).
4. On 20<sup>th</sup> December 2018, the Applicant objected to the said assessment. He served his objection upon the Respondent on 21<sup>st</sup> December, 2018.

5. The Respondent acknowledged the Applicant's objection and vide a letter dated 8<sup>th</sup> January, 2019, notified the Applicant to provide supporting documentation and or evidence to support his grounds of objection to enable the Respondent review the assessment issued.
6. The Applicant's auditors PSK Associates wrote to the Respondent on 22<sup>nd</sup> November, 2018 and requested for a meeting date scheduled for 25<sup>th</sup> January, 2019. The Respondent confirmed the meeting vide its email dated 23<sup>rd</sup> January, 2019. Neither the Applicant nor his tax agents provided the requested supporting documents or attended the said meeting.
7. Consequently, the Respondent further reviewed the Applicant's Objection and issued its Objection Decision dated 18<sup>th</sup> February, 2019 to the Applicant in accordance with the provisions of Section 51 of the Tax Procedures Act.
8. The Applicant, on 11<sup>th</sup> July, 2019 applied to the Tribunal requesting for an extension of time to appeal against the Respondent's tax decision of 18<sup>th</sup> February, 2019. The Applicant proceeded to file its Memorandum of Appeal and Statement of Facts on 24<sup>th</sup> July 2019.
9. The Applicant's said letter dated 11<sup>th</sup> July, 2019 seeking for an extension of time to file an appeal out of time was based on the following grounds: -
  - a) THAT the director had travelled out of the country at the time and was not able to give instructions on the direction of the matter.
  - b) THAT the Applicant took time to consult on the matter at hand and hence took some time to decide on the matter.

- c) THAT the Applicant had just received instructions to give notice to the Tribunal.
10. On perusal of the record we note that the Applicant however did not attach a supporting affidavit to the said application, which affidavit is a mandatory requirement pursuant to the Tax Appeals Tribunal (Procedure Rules) 2015.
11. Upon service, the Respondent opposed the Applicant's application vide its Replying Affidavit sworn by Eugene Wanende and filed on 20<sup>th</sup> August, 2019. The Affidavit states as hereunder: -
- a) THAT investigations against the Applicant began after it emerged that he had received a lot of bank transfers of substantial amounts from two companies, namely Blueline Auto Tyres Limited and Kazimoni Auto Tyres Limited which companies were perpetual VAT credit filers who were evading taxes by manipulating their financial records. The Respondent also stated that the Applicant was a non-filer who failed to pay tax related to income and also claimed much less VAT than the actual VAT paid on imports.
- b) THAT the Respondent raised an assessment on 27<sup>th</sup> October, 2018 demanding the sum of Kshs. 13,881,376 from the Applicant.
- c) THAT the Applicant by a letter dated 20<sup>th</sup> December, 2018 and served upon the Respondent on 21<sup>st</sup> December, 2018 objected to the said assessment.
- d) THAT the Respondent acknowledged the Applicant's objection and by a letter dated 8<sup>th</sup> January, 2019 requested the Applicant to provide

supporting documentation and evidence to support his grounds of objection and to enable the Respondent review the assessment issued.

- e) THAT the Applicant's auditor (PSK Associates) wrote to the Respondent on 23<sup>rd</sup> January, 2019, explaining that they were not able to provide the supporting documents and requested for a meeting on 25<sup>th</sup> January, 2019. The Respondent confirmed its availability for the meeting as requested.
- f) THAT the Applicant neither regularized the position by providing the evidence to support his objection nor attended the meeting he requested for on 25<sup>th</sup> January, 2019.
- g) THAT the Applicant never communicated again to the Respondent and consequently the Respondent rendered its Objection Decision on 18<sup>th</sup> February, 2019 pursuant to the provisions of Section 51 of the TPA.
- h) THAT the Applicant failed to file an appeal within the timeline stipulated under Section 13 of the Tax Appeals Tribunal Act, No. 40 of 2013.
- i) THAT even if the Applicant's appointed tax agent indeed needed instructions from the Applicant as alleged, which allegation is vehemently opposed, then the said agent failed to make follow ups on whether the Applicant provided its instructions in good time. The decision which the Applicant wishes to appeal on is dated 18<sup>th</sup> February, 2019 and was served on the Applicant on 20<sup>th</sup> February, 2019. From February 2019 to July 2019 is a period of over five months. Such inordinate delay is inexcusable and that equity aids the vigilant and not the indolent.

- j) THAT the Applicant's application is misplaced as the Applicant seeks an extension of time to appeal an assessment which was confirmed five months ago with no valid explanation or supporting evidence in regard to the same.
- k) THAT the mere allegation that the Applicant had travelled out of the country does not suffice, as he did not produce a copy of his passport, visa and air ticket to prove that he was out of the country for the last five months since the Respondent issued an Objection Decision.
- l) THAT the Applicant has not given convincing reasons to warrant extension of time. Section 13(4) of the Tax Appeals Tribunal Act provides that an extension under Subsection (3) may be granted owing to absence from Kenya, sickness, or other reasonable cause that may have prevented the Applicant from filing the notice of appeal or submitting the documents within the specified period.
- m) THAT Section 107 of the Evidence Act, deals with the burden of proof in any case and it provides that: -  
***“whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”***
- n) THAT the Applicant's application lacks merit and the same should be dismissed with costs to the Respondent.

12. It is worth noting that on perusal of the record, the Applicant on 15<sup>th</sup> of October 2020 filed a supporting affidavit sworn on 14<sup>th</sup> October 2020, albeit without leave of the Tribunal and while the matter was pending for Ruling.

13. The Tribunal has carefully studied the parties' pleadings and is of the respectful view that the only issue for its determination is whether the Applicant has adduced sufficient reasons for the Tribunal to grant him leave to file an appeal out of time.
14. The Power to extend time to file an appeal is provided in Section 13 (3) and (4) of the Tax Appeals Tribunal Act which provides that; **“(3) The Tribunal may, upon application in writing, extend the time for submitting the documents referred to in subsection (2).  
(4) An extension under subsection (3) may be granted owing to absence from Kenya, or sickness, or other reasonable cause that may have prevented the applicant from filing the notice of appeal or submitting the documents within the specified period.”**
15. The Tribunal is guided by the criteria set out in the case of **Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 Others (2014) eKLR** where it was held that:
  - a) **Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.**
  - b) **A party who seeks for extension of time has the burden of laying the basis to the satisfaction of the court.**
  - c) **Whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis.**
  - d) **Whether there is a reasonable reason for delay, the delay should be made to the satisfaction of the court.**
  - e) **Whether there will be prejudice suffered by the Respondent if the extension is granted.**

**f) Whether the application for extension has been brought without undue delay.**

16. The Tribunal notes that the Respondent's demand was on 27<sup>th</sup> October 2018, to which the Applicant objected on 20<sup>th</sup> December, 2018, which objection was received by the Respondent on 21<sup>st</sup> December, 2018. The Respondent issued its Objection Decision on 18<sup>th</sup> February, 2019 which was served upon the Applicant on 20<sup>th</sup> February, 2019. It is further noted that the Applicant took a period of five months to file his application for leave to file its appeal out of time, on 15<sup>th</sup> July, 2019 and later filed Memorandum of Appeal and Statement of Facts on 24<sup>th</sup> July, 2019. The latter documents were filed late and without leave of the Tribunal.
17. In addition, the Applicant further took an additional period of approximately 15 months from the date of filing his application dated 11<sup>th</sup> July 2019, to file his affidavit in support of the said application, which affidavit was filed on 15<sup>th</sup> October 2020. The delay is inordinate and as such inexcusable.
18. Moreover, we note that while the matter was still pending Ruling, the Applicant filed a supplementary affidavit on 15<sup>th</sup> October 2020 without leave of the Tribunal. We are not aware that the same was served upon the Respondent. If it was not served, then this has denied the Respondent an opportunity to respond thereto.
19. It is worth noting that the above notwithstanding, the Applicant vide the said late supporting affidavit filed on 15<sup>th</sup> October 2020, which we have perused in order to meet the ends of justice to the parties, stated under Paragraph 6 that he was out of the country as per the copy of the passport

attached thereto, as Annexure AAA-3. Though it is correct that the Applicant stated that he was out of the country from 3<sup>rd</sup> January 2019 to 10<sup>th</sup> January 2019, which period is supported by the said document, we note that the period was before an Objection Decision was made by the Respondent, as the same was made on 18<sup>th</sup> February 2019.

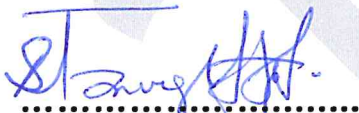
20. The Tribunal further notes that, having perused the said document, there is no clear evidence from the attached copy of the Passport as to whether the Applicant was still out of the country from 20<sup>th</sup> February 2019 when he was served with the Objection Decision to 20<sup>th</sup> April 2019 when he ought to have lodged his appeal and to 17<sup>th</sup> July 2019 when he filed the application for extension of time. A careful perusal of the said Passport indicates that the Applicant was in Zambia on 3<sup>rd</sup> January 2019, entered the country on 10<sup>th</sup> January 2019, exited on 15<sup>th</sup> March 2019, was in and out of JKIA to India and Dubai on various dates in March 2019. Thereafter there are various travel entries to various destinations. The Applicant has failed to demonstrate to the satisfaction of the Tribunal that there was continuous absence from the country for the five-month period within which he failed to file the appeal on time.
21. The Applicant further states in Paragraph 10 of the said Affidavit that he travelled to India for medical treatment. However, the Tribunal has no other evidence in support of the same, as the attached copy of the Passport only shows that he travelled to India among other places as shown hereinabove. Nothing could have been easier than producing the medical records in support thereof. He failed to provide the same.

22. In view of the foregoing, the Tribunal makes a finding that the Applicant has failed to demonstrate to its satisfaction as to the reasons for the delay in filing the appeal on time.
23. Consequently, the application is unmerited and the Tribunal makes the following orders: -
- a) The Application is hereby dismissed.
  - b) Each party to bear its costs.


**DATED and DELIVERED at NAIROBI this 11<sup>th</sup> day of December, 2020**



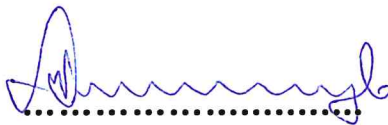
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**JOSEPHINE K. MAANGI**  
**CHAIRPERSON**



.....  
**TANVIR ALI**  
**MEMBER**



.....  
**GEOFFREY KARUU**  
**MEMBER**



.....  
**DELILAH K. NGALA**  
**MEMBER**

