

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
TAX APPEAL NO. 262 OF 2020

BON BOREHOLE DRILLERS LIMITED.....APPELLANT

-VERSUS-

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

RULING

The Application

1. The Appellant by a Notice of Motion application filed before the Tribunal on the 10th day of July, 2020 under a Certificate of Urgency sought for the following Orders:-
 - i) That this Honourable Tribunal be pleased to allow the Appellant/Applicant to file an objection out of time.
 - ii) That consequently the said late objection lodged is deemed to have been properly lodged and within time.
 - iii) That this Honourable Tribunal be pleased to enlarge the time within which the Applicant is to file the Memorandum of Appeal, Statement of Facts and Tax Decision by 65 days.
 - iv) That consequently, the said Memorandum of Appeal, Statement of Facts and Tax Decision be deemed to have been properly filed within time.

- v) That the Respondent lift Agency notice placed on Appellant's bank accounts in relation to this debt, pending its determination by this Honourable Tribunal.
- vi) That the Appellant/Applicant be at liberty to apply for further orders and/or directions as the Honourable Tribunal may deem just to grant.
- vii) That the Appellant costs of this application be in the cause.

Grounds for Application

2. The Appellant premised its application on the following grounds:-
 - a) THAT the 14 days within which the Appellant/Applicant was supposed to have filed the Memorandum of an objection for review has since lapsed.
 - b) THAT consequently the 60 days within which the Applicant was required to lodge an Appeal has since lapsed.
 - c) THAT upon being served with the objection decision dated 16th December, 2019, that the Applicant did not receive the decision until April, 2020. This was after the Appellant's bank accounts and clients had been served with agency notices. The Appellant immediately filed a notice of appeal on 24th April, 2020.
 - d) THAT the Appellant has since 24th of April, 2020 been restricted to move due to the Corona movement prohibitions.

- e) THAT this being the case Respondent is prohibited from turning around and now seek to enforce the taxes by issuing additional agency notices to the Applicant's bankers and clients.
- f) THAT the Respondent will not suffer any prejudice if the orders sought herein are granted.
- g) THAT it is in the interests of justice and fairness that the application is allowed to pave way for hearing and determination of the Appeal on its merit.

Grounds for opposition

- 3. The Respondent opposed the application through the Grounds of Opposition dated the 17th day of July, 2020 filed before the Tribunal on the same date and in which it states as follows:-
 - a) The application herein does not clearly state what is being sought and will cause embarrassment to the Respondent if allowed as drafted.
 - b) The application contains prayers which ought to be canvassed separately.
 - c) The application herein does not clearly bring out the grounds upon which it is premised.
 - d) The application breaches the doctrines of equity.
 - e) The application herein clearly does demonstrate indolence on the part of the Applicant.
 - f) The application is an abuse of the court process.
- 4. The prayers relating to the extension of time to lodge an objection to the tax assessments were misplaced and are superfluous to the extent that the Appellant had lodged an objection prompting the Respondent to issue an objection decision on the 16th December, 2019 confirming the

assessed tax liability. To that extent the only prayers that fall for determination in this application relate principally to extension of time to lodge an Appeal out of time and the lifting of the agency notices.

Tribunal's Findings and Ruling

5. The duty to expand time for filing an Appeal is donated by Section 13 (3) of the Tax Appeals Tribunal Act which provides that:-

*“The Tribunal **may**, upon application in writing, extend the time for filing the Notice of Appeal and for submitting the documents referred to in subsection (2).”*

It is therefore a discretionary power to be exercised judiciously and not a right to be granted to the Applicant.

6. In **Joseph Ondiek Tumbo v Sony Sugar Co Ltd [2014] eKLR**, the learned Judge quoted the decision in **Costellow V Somerset County Council (1993)1 All ER 952** where it stated that:-

“First, the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation must be observed. The prescribed time limits and are not targets to be aimed at or expressions of pious hope but requirements to be met. Second, a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of a procedural default unless the default cause prejudice to his opponent for which an award of costs cannot compensate.... Further, an

extension of time is an indulgence requested from the court by a party in default. He is not entitled to an extension. He has no reasonable or legitimate expectation of receiving one. His only reasonable or legitimate expectation is that the discretion relevant to his application to extend time will be exercised judiciously in accordance with established principles of what is fair and reasonable.”

7. The Tribunal set out four criteria extracted from **Nicholas Kiptoo Arap Korir Salat V independent Electoral and Boundaries Commission & 7 Others (2014) eKLR** and **Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR** and Section 13 of the Tax Appeals Tribunal Act to help it decide on whether to reject or allow the prayer in the application for expansion of time to commence the Appeal process as requested by the Appellant as follows:-
 - a. Whether there is a reasonable cause for delay?
 - b. The merits of the complained action.
 - c. Whether there will be prejudice suffered by the Respondent if the extension is granted?
 - d. Whether the application for extension has been brought without undue delay?

a) **Whether there is a reasonable cause for delay?**

8. The Applicant submitted that the delay in submitting the Notice of Appeal that was belatedly filed on the 24th day of April, 2020 without manifestly the leave of the Tribunal was that it was not until the agency notices were issued and served upon the Appellant's bankers and clients in April, 2020 that the Appellant learned of the fact of the objection decision having been issued on 16th December, 2020. This fact was not controverted by the Respondent who failed to indicate the manner in which the objection decision was served upon issuance on the 16th December, 2019. The delay in the filing of the Memorandum of Appeal and related documents subsequent to the filing of the Notice of Appeal was attributed to the lockdown and/or prohibition of movement in the country following the onset of the Covid-19 pandemic. The Tribunal takes judicial notice of this fact on the restriction of movement following the Covid-19 pandemic.

9. Section 13 (4) of the Tax Appeals Tribunal Act provides that:-

*“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.”*

10. Moreover, it is provided in Rule 10 of the Tax Appeals (Procedures) Rule 2015 that:-

“(1) Where the documents referred to in rule 3(2) are not filed within the time specified therein, the Tribunal may, upon application in writing, extend the time for submitting the documents

(2) An Application of time referred to in rule 10(1) shall be

(a) Supported by an affidavit stating reasons why the Applicant was unable to submit the documents in time.

(b) Served on the Respondent by the Applicant within two days of filing with the Clerk.”

11. In absence of any evidence or intimation from the Respondent as to the manner and the date when the objection decision was served upon the Appellant the Tribunal therefore found that the Applicant did submit a reasonable reason for the delay in the filing of the Notice of Appeal and in submitting Appeal documents within the 30 days provided for by the law.

b) The merits of the complained action.

12. Under this test, the Tribunal was required to examine whether the matter being complained of was material to extent that it deserved a day in court or whether it was a frivolous one that would lead to a waste of the Tribunal's time. One of the tests for meritocracy of a complained action is whether the applicant has an arguable appeal. In **Kenya**

Commercial Bank Limited Vs Nichols Ombija (2009) eKLR it was held that “ *an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court*” that was also the position in **Stanley Kangethe Kinyanjui Vs Tony Ketter & others (2013) eKLR** where the court held that “*on whether the appeal is arguable, it is sufficient if a single bonafied ground of appeal is raised, .. an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court: one which is not frivolous.* Similarly in Ngugi J in **Samuel Mwaura Muthumbi V Josephine Wanjiru Ngungi & Another (2018) eKLR** Stated: *At this point the Applicant is not required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the Appeal, a demonstration that the Appellant has plausible grounds of either facts or law to overturn the original verdict.*

Looking at the facts presented in the memorandum and statement of facts, in this dispute the Tribunal found that the Applicant had plausible grounds for appeal and had passed this test.

13. Based on the Statement of Facts filed on the 6th day of June, 2020 the Tribunal noted that the matter complained of was a contested assessment of an aggregate sum of **Kshs. 6,279,054.92** in VAT and Corporation tax which had been assessed in respect of transactions which the Appellant denies to have performed. This, the Tribunal found to be material based on the financial magnitude of the amount disputed.

c) **Whether there will be prejudice suffered by the Respondent if the extension is granted?**

14. The Appellant indicated that the Respondent will not suffer any prejudice if the application is granted. The Appellant however did not equally intimate any possible prejudice or loss to be suffered were the Respondent to enforce payment of the assessed taxes. The Appellant did not suggest in any manner that the Respondent would be unable to refund should there be measures taken to enforce recovery of the taxes in issue. The Tribunal notes the holding in **James Wangalwa & another Vs Agnes Naliak Cheseto in Misc Appl. No. 42 of 2011 (2002) eKLR** when **Gikonyo J** argued that enforcement of recovery of tax did not amount to substantial loss. The Tribunal in the circumstances found that Respondent did not demonstrate how it would suffer any prejudice if expansion of time was granted.

d) **Whether the application for extension has been brought without undue delay?**

15. The Respondent submitted that the Appellant did not comply with Sections 13(1) and 13(2) of the Tax Appeals Tribunal Act. It relied on **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** where the Supreme Court Stated that:-

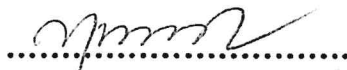
“A Notice of Appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which .requires leave or not. It is a jurisdictional pre-requisite.”

16. The Respondent further submitted that the application was fatally defective given that the Appellant ought to have sought leave for expansion of time to file a Notice of Appeal prior to or simultaneously with the application for leave to file Memorandum of Appeal and other Appeal documents out of time as it had done. The Respondent proceeded to argue that there were no reasonable circumstances to warrant an order of enlargement of time as sought by the Appellant.
17. The Tribunal notes that with the objection decision having been issued on 16th December, 2019 the Appellant was expected to file a Notice of Appeal before 30th December, 2019 and submit the Appeal documents by the 29th January, 2020. This was however predicated upon the service of the objection decision immediately upon its issuance. The Appellant maintains to have been served with or of having learned of the issuance of the objection decision in April, 2020 and having immediately subsequent thereto filed a Notice of Appeal. The delay in filing the Appeal documents was attributed to the situation precipitated by the Covid-19 pandemic. In its considered view, the Tribunal finds that the application was brought to the Tribunal without considerable delay with its due regard to the facts and circumstances as presented before the Tribunal.

DATED and DELIVERED at NAIROBI this 28th day of August, 2020



ERIC NJ WAFULA
CHAIRMAN



JOHN K. WANGARI
MEMBER



GABRIEL M. KITENGA
MEMBER

