

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 805 OF 2021

NAMELOK DISTRIBUTORS.....APPELLANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

RULING

1. The Appellant filed an application vide a Notice of Motion dated 23rd December 2021 and filed on the 18th March, 2022 supported by an Affidavit sworn by Jane Nyawira Kiama, a Director of the Appellant, on the 6th day of December, 2022 and which application seeks for the following Orders:-
 - a) Spent.
 - b) That the intended Appellant/Applicant be granted an extension of time with regard to filing the Notice of Appeal and Memorandum of Appeal to this Honourable Tribunal.
 - c) That the intended Appellant/Applicants Notice of Appeal and Memorandum of Appeal dated 6th December 2021 be admitted into the record of this Honourable Tribunal as having been filed in time.
 - d) That the costs of this application be in the cause.
 - e) That the Honourable Tribunal be pleased to issue any such orders that it deems just and expedient.

2. The application is premised on the following grounds: -

- a) That due to factors beyond the control of the intended Appellant it missed the statutory timeline for filing the Notice of Appeal and the Memorandum of Appeal.
 - b) That the Applicant was pretty aware that it had provided all the documents and its case to be vacated, something which never happened but when VAA cases were brought to stations, it was confirmed without its knowledge by the Nyeri TSO yet it was being handled by HQ Legal Section.
 - c) That the Applicant has approached the Tribunal at the earliest juncture and the failure to file the Notice of Appeal was out of its control
 - d) That the Appeal has high chances of success
 - e) That the Applicant will be highly prejudiced if the orders are not granted as the assessed taxes are excessive and estimated.
3. The Respondent opposed the application through filing of the Grounds of Opposition dated and filed on the 24th day of March, 2022 and which state as follows:-
- a) That there is inordinate delay in bringing this application and the Applicant has not given sufficient reason to warrant the delay with the objection decision having been issued on 14th March, 2020.
 - b) That the Applicant has not invoked the grounds of filing an appeal out of time set out in the Tax Appeals Tribunal to warrant granting the prayers sought.
 - c) That the application is misconceived and lacks merit.

- d) That the Respondent will suffer prejudice if the application is allowed as it shall not be able carry out its statutory mandate and the Applicant may remove its funds out of the reach of the Respondent.
- e) That if the Tribunal deems fit to allow the application, the Applicant be compelled to furnish security to secure payment of the taxes.
- f) That there is no evidence to show that the Applicant's Managing director was incapacitated by illness during the period when the objection decision was issued and after.

ANALYSIS AND FINDINGS

- 4. The parties filed written submissions which were duly adopted by the parties for consideration by the Tribunal on the 6th May, 2022 and the Tribunal has duly considered the separate submissions in arriving at its findings hereinafter.
- 5. The power 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)."
- 6. Further ***Section 13(4) of the Tax Appeals Tribunal Act*** provides as follows regarding extension of time to file an appeal before the Tribunal;

"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"

7. The gist of the above statutory provision is that extension of time is a discretionary power and not a right to be granted to the Applicant. In determining whether to expand time, courts have in the past considered a number of factors and in that regard the Tribunal refers to the case of ***Paul Musili Wambua v Attorney General & 2 others [2015] eKLR*** where The Court of Appeal in considering an application for extension of time and leave to file Notice of Appeal out of time stated the following;

‘.....it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.’

8. The Tribunal, guided by the principles set out in ***Paul Musili Wambua v Attorney General & 2 others and Section 13 of the Tax Appeals Tribunal Act 2013*** used the following criteria to consider the application:

- a) Whether there is a reasonable cause for the delay.
- b) Whether the application for extension was filed without undue delay.
- c) The merits of the complained action.
- d) Whether there will be prejudice suffered by the Respondent if the extension is granted.

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

9. The decision of the Respondent sought to be challenged was delivered on 14th March 2020, hence the 30 days' window period provided under statute within which the Applicant was to file a Notice of appeal lapsed on or about the 13th April 2020. The instant application was filed on 23rd December 2021, about one year eight months later. To this Tribunal's mind, a one year, Seven Months delay period is inordinate. The Court must however consider the reasons for the delay before making a final determination on whether it is inordinate and unexplained.
10. The Applicant in this case cited the reason for delay to be that the decision was rendered by the Nyeri TSO whereas it was being handled by the HQ Legal Section of the Respondent. The Applicant further states that it submitted documentation which it thought would be used to waive the taxes claimed. The Tribunal assumes that these documents were provided prior to the objection decision. The Tribunal notes that the Applicant has not given any evidence or accounted for the time between the date of issuance of the objection decision up to the date of filing of this application. There is no evidence that the Applicant made any follow up to know whether the documentation provided was considered. There is equally no evidence to show that the Applicant checked the Itax portal where it appears the assessments emanated to confirm the status of its tax affairs. The Applicant has simply not explained why it did not file the appeal in time.
11. The Tribunal has no doubt that indeed the Applicant has been an indolent litigant who has been jolted back to action by the threat of recovery of taxes by the Respondent. Basically no reason has been given for the delay and failure to timeously commence the appeal process. Clearly the Applicant had enough

time and ability to confirm its tax status and file an appeal if need be. The delay of over one and a half year is inexcusable. The responsibility to know the status of one's tax affairs lies with the tax payer and not the Respondent. The burden can never shift.

12. The importance of offering a sufficient explanation for delay was underscored by the Court of Appeal in ***Susan Ogutu Oloo & 2 others vs Doris Odindo Omolo [2019] eKLR*** where ***Otieno-Odek JA*** held as follows: -

*“The instant application is founded on **Rule 4** of the Rules of this Court. In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the **Supreme Court in Nicholas Kiptoo arap Korir Salat V. IEBC (2014) eKLR Sup. Ct. Application No. 16 of 2014.***

The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted.”

13. To show the gravity of the length of time spent by the Applicant prior to filing the present application the Tribunal refers to the case of ***Congress Rental South Africa v Kenyatta International Convention Centre; Co-operative Bank of Kenya Limited & another (Garnishee) [2019] eKLR***, where Justice ***J. A. Makau*** stated as follows when dismissing an application for stay of execution;

*“The ruling of this Court was made on 19th July 2018. This application is made under Order 22 of Civil Procedure Rules and on the material date no application for stay of execution was informally made following the delivery of this Court’s ruling. The formal applicant before Court was made on 17th August 2018; **almost a month from the date of Court’s ruling.** The Notice of Appeal was filed on 30th July 2018. The delay for 1 month in filing the application has not been explained. I find that the applicant’s application is inordinately delayed and no explanation has been offered for the inordinate delay.”*

14. The upshot of the foregoing is that the Tribunal finds the delay in bringing up the application was inordinate and the Applicant has not demonstrated any reasonable cause for the delay. Having entered the above finding, the Tribunal finds it completely unnecessary to consider the other factors, which are rendered moot.

DISPOSITION

15. Based on the foregoing the Tribunal finds that the application is not merited and accordingly makes the following Orders:
 - a) The application be and is hereby dismissed.
 - b) No orders as to costs.
16. It is so ordered.

DATED and DELIVERED at NAIROBI this 29th day of July, 2022.



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ERIC N. WAFULA
CHAIRMAN



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JOHN KINYUA
MEMBER



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HABON FARAH
MEMBER

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