

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 820 OF 2021

RENOVA LIMITED.....APPLICANT/APPELLANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

RULING

1. The Applicant filed a Notice of Motion application on 20th December 2021 seeking the following orders;
 - i. That the application be certified as urgent and heard on a priority basis.
 - ii. That the Tribunal be pleased to extend the time for filing the Memorandum of Appeal upon the Applicant.
 - iii. That in the alternative, the Memorandum of Appeal and Statement of Facts filed in the Tax Appeals No. 820 of 2021 be deemed duly filed and served.
 - iv. That the costs of this application be espoused in the appeal.
2. The application which was supported by an Affidavit sworn by Joram Gatei is based on the following grounds:
 - i. That the objection decision which is the subject of this application was issued on 26th March 2021.
 - ii. That the Applicant being dissatisfied with the assessment, opted to explore negotiations for an out of court settlement with the

Respondent, in a bid to save on the time and resources that would accrue as a result of the anticipated lengthy litigation that would ensue.

- iii. That it was at this juncture that the Appellant was informed that a valid appeal needs to have been lodged at this Tribunal, before the dispute can be dispensed with through the process of ADR.
- iv. That the Applicant immediately proceeded to lodge a Notice to Appeal, out of time.
- v. That shortly thereafter, the Applicant filed its Memorandum of Appeal and Statement of Facts, as duly required by this Tribunal.
- vi. That the Applicant now comes to the Tribunal with clean hands, seeking it to exercise its discretionary power to grant leave in its favour, and in effect have the Appeal adopted as one filed within the statutory timelines.
- vii. That since the Respondent has expressed their willingness to engage the Applicant on the ADR proceedings, no prejudice will be suffered by them if the Appeal is allowed.
- viii. That it is in the interest of justice that this application is allowed as prayed, and the Applicant not to be condemned unheard.
- ix. That this Tribunal has jurisdiction to grant the orders sought.

3. In its written submission filed on 10th February 2022, the Applicant further offered the following arguments;

- a) That in its view, the issues for determination were whether the Applicant had grounds to seek to extend time within which to file the

Appeal and whether the Applicant has met the threshold for a grant of the orders of leave to file an appeal out of time.

- b) The Applicant drew the attention of the Tribunal to the provisions of Section 13(3) and (4) of the TATA with regards to extension of time for filing and appeal.
- c) The Applicant stated that from a reasonable interpretation of Section 13(4), it can be inferred that the draftsman intended to give the Tribunal a wide discretion, with regards to what constitutes a reasonable cause.
- d) The Applicant averred that the delay in filing the appeal was due to the fact that the Applicant decided to explore negotiations for an out of court settlement with the Respondent and was only aware that a valid appeal needed to have been lodged at the Tribunal when the parties decided to dispense with the dispute through ADR.
- e) The Applicant averred that the delay in filing the said appeal was neither deliberate and was in the interest of justice. That it was indeed a honest error.
- f) The Applicant urged the Tribunal to find words in Briggs JA in the case of *Shabir Din v, Ram Parkashana nd (1955) EACA* as follows;

“In particular, mistake or misunderstanding of the appellant’s legal advisers even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case...”

- g) The Appellant emphasised that its explanation of the delay was reasonable and warrants the exercise of the Tribunal's discretion, in favour of the Applicant.
- h) It was the Applicant's view that since the parties had already begun negotiations for out of court settlement and in furtherance of the same, intended to begin ADR proceedings, there will be no prejudice occasioned to the Respondent.
- i) That in the event that the ADR proceedings collapse, the Applicant contended that from the Memorandum of Appeal and Statement of Facts dated 13th December 2021, they have an arguable Appeal with high chance of success.
- j) The Applicant stated that it was in the interest of justice that this appeal be admitted as properly on record as prayed, so as to allow the parties to commence ADR proceedings in the spirit of Article 159(2) of the Constitution.
- k) The Applicant urged the Tribunal to draw inspiration from Article 159(2)(d) of the Constitution of Kenya 2010, which urges judicial officers to administer justice without undue regard to procedural technicalities. That substantive justice be the Tribunal's driving force in deciding this matter.
- l) The Applicant prayed that in the interest of justice and in the unique circumstances of this case the Tribunal grant its prayers under the application dated 13th December 2021 and filed on 20th December, 2021.

4. The Respondent in reply to the application raised the following grounds of opposition:
- a. That the application offends/flaunts the statutory provisions of Section 13(1) of the TATA 2013.
 - b. That the application offends the statutory provisions of Section 13(4) of the TATA 2013.
 - c. That the Applicant has failed to furnish sufficient reasons coupled with evidence to enable the Tribunal exercise its discretion.
 - d. That the Applicant's delay is inordinate because it never lodged an appeal since 11th November 2020 which is one year down the line.
 - e. That the Respondent's Agency Notice dated 5th October 2021 was not arbitrary or unlawful since the Appellant failed to lodge an appeal against its decision as per the statutory provisions of Section 13(1) of the TATA 2013.
 - f. That in the month of May 2018, the Respondent partially accepted the Applicant's objection for the invoices with VAT amount of Kshs 44,788.49.
 - g. That the Respondent resorted to enforcement measures as per the statutory provisions of Section 42 of the TPA 2015.
 - h. That the Applicant despite being issued with a demand notice failed and or ignored to make payment for taxes due and payable
 - i. That the Agency Notices issued against the Applicant are lawful and as such ought to be upheld.

- j. That the application is unmerited and should be dismissed with costs to the Respondent.
5. In its submission filed on 9th February, 2021, the Respondent further offered the following grounds of opposition:
- a. That the Respondent duly notified the Applicant of their right of appeal to the Tax Appeals Tribunal as per Section 52 Of the TPA.
 - b. That the Applicant had not complied with the provisions of Section 13(1) and 13(2) of the Tax Appeals Tribunal Act. Further, Section 13 of the Act goes on to provide the ingredients of the Notice of Appeal.
 - c. The Respondent further cited the provisions of Section 13(3) and 13(4) of the TATA and Rule 10 of the Tax Appeals Tribunal (procedures) Rules 2015.
 - d. The Respondent stated that it was not aware of any such negotiations as averred by the Applicant. That the Applicant had not provided any evidence of such engagement. In any event, out of court negotiations do not stop statutory timelines from running and the Applicant ought to have filed appeal to preserve its rights in law.
 - e. The Respondent stated that the Tribunal cannot excuse such inordinate delay as no plausible reason had been given as provided by the law. That the Applicant went on to file a late Appeal without leave in blatant disregard of the provisions of the law.
 - f. The Respondent submitted that to allow an intending appellant who has inordinately and unreasonably delayed in moving the appeal

process, to come to the Tribunal and claim that it was involved in non-existent ADR process would be setting a negative precedent.

- g. The Respondent averred that the Applicant had not shown any prejudice it would suffer if the orders sought are not granted. That it was the obligation of every citizen to pay taxes as and when they fall due. That the Application was an afterthought and a delay tactic by the Applicant meant to delay the conclusion of the matter which holds substantial Government Revenue.
- h. The Respondent insisted that the taxes demanded became due on confirmation of the assessments on 26th March 2021. The Respondent prayed that if the Tribunal is inclined to allow the Application, the Respondent prays for payment on account of the full amount of principal taxes as security.

Analysis and Findings

- 6. The application before the Tribunal is for extension of time to file an appeal out of time by the Applicant.
- 7. 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).”

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

8. In determining whether to expand time, courts have in the past considered a number of factors. These factors were discussed in **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, Civil Application Nai. 251 of 1997** where the Judge held that:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

9. The court in **Wasike V Swala [1984] KLR 591** provided the hierarchy of the factors to consider when it stated that:

“an applicant must now show, in descending scale of importance, the following factors: -

- a) That there is merit in his appeal.*
- b) That the extension of time to institute and/or file the appeal will not cause undue prejudice to the respondent; and*
- c) That the delay has not been inordinate.*

10. The Tribunal, guided by the principles set out in **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, Civil Application Nai. 251 of 1997, Wasike V Swala [1984] KLR** and Section 13 of the Tax Appeals Tribunal Act 2013 used the following criteria to consider the application:

- a. The merits of the complained action.
- b. Whether there will be prejudice suffered by the Respondent if the extension is granted.
- c. Whether there is a reasonable cause for the delay.

a) Merits of the Complained action

11. The Tribunal considered whether the matter under dispute was frivolous to the extent that it would be a waste of the Tribunal time, or it was material to the extent that it deserved its day in the Tribunal.
12. The test is not whether the case is likely to succeed. Rather, it is whether the case is arguable. This was the finding in **Samuel Mwaura Muthumbi V Josephine Wanjiru Ngungi & Another (2018) eKLR** where the court stated that

“Looking at the draft Memorandum of Appeal filed, I am unable to say that the intended Appeal is in arguable. Of course, all the Applicants have to show at this stage is arguability- not high probability of success. 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. The Applicants have easily met that standard. I believe that the Applicant has discharged this burden.”

13. The Tribunal was further guided by the findings of the court in **Kenya Commercial Bank Limited Vs Nicholas Ombija (2009) eKLR** where 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.”

14. Similarly, in **Kenya Commercial Bank Limited Vs Nicholas Obija (2009) eKLR** it was stated 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 held in **Stanley Kangethe Kinyanjui Vs Tony Keter & others (2013) eKLR** where the court held that:-

“on whether the appeal is arguable, it is sufficient if a single bonafide 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.”

15. It was not in dispute that the Respondent’s Objection Decision was issued on 26th March, 2021 that required the Applicant to settle tax amounting to Kshs 148,260,193.00. Looking at the grounds raised in Applicant’s Memorandum of Appeal filed, the Tribunal noted that the Applicant raised eleven (11) grounds for appeal. Although it was not mandatory to have more than one ground, the Tribunal was of the view that the Applicant had demonstrated existence of sufficient grounds for appeal as set out above in the **Stanley Kangethe Kinyanjui Vs Tony Keter** case.

16. Consequently, based on the existence of these grounds of appeal the Tribunal finds that the Applicant had an arguable case that needs to proceed to hearing on its full merits.

b) Whether the Respondent will suffer prejudice if the extension is granted.

17. The courts have held that in considering whether to extend time, due regard must be given to whether the extension will prejudice the opponent. In determining this, the Judge in **Patrick Maina Mwangi v Waweru Peter [2015] eKLR** quoted the finding in **United Arab Emirates V Abdel Ghafar & Others 1995 IR LR 243** in finding that:

“.....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 causes prejudice to his opponent for which an award of cost cannot compensate.....”

18. The test, therefore, as set out in the case above is whether the Respondent will suffer irreparable prejudice if the application is granted.

19. The Applicant submitted that since the parties had already begun negotiations for out of court settlement and in furtherance of the same, intended to begin ADR proceedings, there will be no prejudice occasioned to the Respondent.

20. The Respondent on the other hand averred that the Applicant had not shown any prejudice it would suffer if the orders sought are not granted

21. After weighing the degree of prejudice to be suffered by the Applicant if the application was not granted against that of the Respondent if the application was granted, the Tribunal found that the Respondent would not suffer any

disclosed prejudice if the application was granted, and the intended Appeal proceeded to be heard on merit.

22. The Tribunal therefore finds that the Respondent will not suffer prejudice if the extension is granted.

c) Whether there is a reasonable cause for the delay.

23. Section 13(4) of the Tax Appeals Tribunal Act Provides as follows regarding extension of time;

“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.”

24. In the instant case the Applicant submitted that the delay was because it had opted to explore negotiations for an out of court settlement with the Respondent in a bid to save on the time and resources that would accrue as a result of the anticipated lengthy litigation that would ensue. That it was only made aware that a valid appeal needed to have been lodged at the Tribunal when the parties decided to dispense with the dispute through ADR.

25. The Respondent on its part contended that the Applicant had failed to furnish sufficient reasons coupled with evidence to enable the Tribunal exercise its discretion. It further averred that it was not aware of the negotiations mentioned by the Applicant.

26. Section 13(1) & (2) of the Tax Appeals Tribunal Act in regards to the procedure for appeals to the Tribunal provides as follows;

“(1) A notice of appeal to the Tribunal shall— (a) be in writing; (b) be submitted to the Tribunal within thirty days upon receipt of the decision of the Commissioner.

(2) The appellant shall, within fourteen days from the date of filing the notice of appeal, submit enough copies, as may be advised by the Tribunal, of—

(a) a memorandum of appeal;

(b) statements of facts; and

(c) the tax decision.”

27. The Tribunal noted that the Objection Decision was issued on 26th March 2021. The Appellant ought to have issued a Notice of Appeal on or before 25th April 2021 and was subsequently expected to file its appeal by 9th May 2021. This application was filed on 20th December, 2021 which is approximately seven Months after the expiry of time for Appeal.
28. The Applicant averred that the delay in filing the said appeal wasn't deliberate and that it was indeed an honest error.
29. The Tribunal noted that although there was no documentary evidence to support any engagement with the Respondent, in the interest of justice, it was its view that the delay of seven months could not be considered so inordinate to the extent of throwing away the case unheard. In any case this issue was not appropriately controverted by the Respondent through any affidavit.

DISPOSITION

30. In the circumstances the Tribunal finds that the Application has merit and proceeds to make the following orders:

- i. That leave be and is hereby granted for the Applicant to file its Appeal out of time.
- ii. The Notice of Appeal, Memorandum of Appeal, Statement of Facts and Tax Decision filed on 17th December, 2021 be and are hereby deemed as duly filed and served.
- iii. The Respondent to file and serve its response to the Appeal within 30 days of the date of delivery of this Ruling.
- iv. No Orders as to costs.

DATED and DELIVERED at NAIROBI this 8TH day April, 2022.


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ERIC N. WAFULA
CHAIRMAN


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CATHERINE N. MUTAVA
MEMBER


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ABRAHAM K. KIPROTICH
MEMBER


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ELISHA NJERU
MEMBER


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GABRIEL M. KITENGA
MEMBER