

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**MISC APPL. NO. 185 of 2021**

**GEOFREY OTIENO ODUOR..... APPLICANT**

**VERSUS**

**COMMISSIONER OF DOMESTIC TAXES..... RESPONDENT**

**RULING**

1. The Applicant filed a Notice of Motion application dated 23<sup>rd</sup> December 2021 which was accompanied by a supporting Affidavit sworn by Geoffrey Otieno Oduor. The Applicant prayed for the following orders:
  - i. That the application be certified urgent and be heard ex-parte in the first instance.
  - ii. That the Tribunal be pleased to extend the time allowed for the Applicant to file the Notice of Appeal, Memorandum of Appeal, Statement of Facts and all other accompanying documents.
  - iii. That upon grant of prayer (ii) above, the Applicant be granted leave to serve the Respondent with the Memorandum of Appeal, Statement of Facts and all other accompanying documents.
  - iv. That the costs of this application be in the suit.
  
2. The application is premised on the following grounds:
  - a. That the Respondent issued the Applicant with a confirmation of assessment dated 27<sup>th</sup> January 2020 wherein an objected amount of Kshs 12,313,084.55 was confirmed.

- b. That the Applicant was unable to file a Notice of Appeal, Memorandum of Appeal, Statement of Facts and accompanying documents within the statutory stipulated time.
  - c. That the Applicant was required by law to file his Notice of Appeal not later than 30 days from the date of the objection decision and subsequently, his pleadings not later than 14 days from the date of Notice of Appeal.
  - d. That the Applicant experienced challenges in putting together the appeal documents due to complications of lack of staff and his illness.
  - e. That the appeal by the Applicant is meritorious and has a high chance of success if this application is granted.
  - f. That there will be no prejudice occasioned to the Respondent in granting the orders sought by the Applicant.
  - g. That undoubtedly the Tribunal has the powers to extend the time of filing the pleadings as granted by Section 13(3) of the Tax Appeals Tribunal Act of 2013 and Rule 10 of the Tax Appeals Tribunal Rules 2015.
  - h. That in the premises, it is only fair and in the interest of justice that the orders sought herein is granted.
3. In his written submissions dated 23<sup>rd</sup> February 2022, the Applicant stated that the delay in filing the Notice of Appeal and the current application

within time was occasioned by the Applicant's persistent health issues. The Applicant averred that the Respondent had not disputed the fact that the Applicant was suffering from ill health.

4. Regarding the intended appeal, the Applicant averred that the input VAT claimed was from actual purchases from his suppliers whose invoices can be availed and proof of payments of the same availed.
5. The Applicant further argued that if the application was not allowed, the Respondent will proceed to take enforcement action for the recovery of taxes which were very high and unsupported by any evidence. That in which case, the Applicant would suffer prejudice because he will be left without recourse for seeking justice against the said assessment.

### **Reply to the application**

6. The Respondent replied to the application by filing its grounds of opposition dated and filed on 11<sup>th</sup> January 2022:
  - i. That the objection decision was issued on 27<sup>th</sup> January 2020 and the delay of two years was inordinate.
  - ii. That according to the short medical notes provided, the Applicant was treated in an outpatient health facility in Ukunda where his business is located. No incapacity or admission to the hospital has been shown.

- iii. That the immense challenges and indisposition alluded to by the Applicant have not been substantiated.
  - iv. That it was incumbent upon the Applicant to move swiftly and retain a representative to file appeal on his behalf to preserve his rights.
  - v. That the Applicant is guilty of laches.
  - vi. That, consequently, the application dated 30<sup>th</sup> July 2020 is ripe for striking out.
7. In its written submissions dated 9<sup>th</sup> January 2022, the Respondent stated that the Applicant had annexed to his application copies of Doctor's notes, which do not disclose any major illness and there was no medical report clearly showing how the sickness prevented the Applicant from dealing with the very important tax issue concerning his business.
8. The Respondent argued that according to the doctor's notes, the Applicant was treated as an outpatient on various dates at a health facility in Ukunda where his business was located. That for example on 20<sup>th</sup> January 2020, he was treated for headache, dizziness and joint pain. On 23<sup>rd</sup> August 2021 he was treated for headache and shoulder pain while in December 2021 he was treated for headache and pain on swallowing.

9. The Respondent stated that the Applicant had not shown any incapacity from the illness and in its view the medical notes had been submitted only for the purpose of this application.
10. That the reasons given by the Applicant do not explain the delay in filing the appeal. The challenges insinuated by the Applicant have not been proven that they incapacitated him from normal operations of his business. The Respondent averred that it confirmed the assessments as the Applicant failed to support his objection. It argued that the application to file an appeal two years after the date the taxes were confirmed was an afterthought. If indeed the Applicant was interested in resolving the tax dispute, he would have supported his objection with relevant records to facilitate the Respondent in determining correct taxes due if any.
11. The Respondent submitted that the two-year delay in filing the appeal was inexcusable and without a valid reason. Therefore, the application dated 23<sup>rd</sup> December, 2021 should be dismissed.

## **ANALYSIS AND FINDINGS**

12. 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.

13. In determining whether to expand time, courts have in the past considered several 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.”*

14. The court in **Wasike vs 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.*

15. The Tribunal, guided by the principles set out in **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, Wasike vs Swala** and Section 13 of the Tax Appeals Tribunal Act 2013 used the following criteria to consider the application:

- i. The merits of the complained action.
- ii. Whether there will be prejudice suffered by the Respondent if the extension is granted.
- iii. Whether there is a reasonable cause for the delay.
- iv. Whether the Application for extension was filed without undue delay.

**i. Merits of the Complained action**

16. 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. 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 vs 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.”*

17. 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”*

This position was replicated 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.”*

18. The Respondent’s objection decision dated 27<sup>th</sup> January 2020 invalidated the Appellant’s Objection to tax amounting to Kshs 12,313,084.35. Looking at the arguments raised in this application and the Appellant’s submissions, the Tribunal noted that the Applicant stated that the VAT claims were from actual purchases from his suppliers whose invoices were available. With this argument, the Applicant had raised a valid ground for appeal against their disallowed VAT claims. The Tribunal was therefore of the view that the

Applicant had demonstrated existence of sufficient ground for appeal as set out above in the **Stanley Kangethe Kinyanjui vs Tony Keter** case.

19. Consequently, based on the existence of the ground of appeal the Tribunal finds that the Applicant had an arguable case and therefore we find it meritorious.

ii. **Whether the Respondent will suffer prejudice if the extension is granted.**

20. 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 vs 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...”*

21. The test, therefore, as set out in the case above is whether the Respondent will suffer irreparable prejudice if the application is granted. The Applicant on its part submitted that it will be prejudiced if it is made to pay the high taxes that it had disputed. The Respondent on the other hand did not demonstrate how it would suffer irreparable prejudice if an expansion of

time were granted for the Appellant to file its Memorandum of Appeal and Statement of Facts before the Tribunal.

22. It was the view of the Tribunal that the Appellant's recourse to justice lies in an appeal to the Tribunal. Thus, the Appellant would suffer prejudice if it is not granted leave to file its appeal. In any event, the Respondent would still collect the taxes inclusive of penalties and interest should it be found to be due and payable.
23. The Tribunal therefore finds that the Respondent will not suffer prejudice if the extension is granted.

**iii. Whether there is a reasonable cause for the delay.**

24. 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.”***

25. In the instant case the Applicant submitted that the delay in filing of the appeal was due to illness on his part. The Appellant added that he was a sole proprietor managing his business alone. The Respondent contended that the reasons given by the Applicant did not explain the delay in filing the Appeal.

That the Applicant did not prove that he was incapacitated from normal operations of his business.

26. The Tribunal noted from copies of medical documents attached by the Applicant showing that on various dates between January 2020 and December 2021 he had been attended to in different health facilities for some illnesses. Although the Tribunal unable to confirm the nature of illness or the level of indisposition, it was persuaded by the documents that the Applicant was indeed unwell.

27. Consequently, the Tribunal finds the reason of illness and the fact that he was a sole proprietor as advanced by the Applicant to be sufficient to support the cause of the delay.

**iv. Whether the application for extension was filed without undue delay.**

28. The Applicant in this case cited illness as the cause of delay. The Applicant attached documents to demonstrate that he was ill during the period of 20<sup>th</sup> January 2020 and 1<sup>st</sup> December 2021. This application was filed on 23<sup>rd</sup> December 2021 which is less than one month from the last medical appointment attached to the Applicant's application. The Tribunal does not find this period to be inordinate.

29. The Tribunal therefore finds that the Application has been brought without undue delay.

## Disposition

30. Following from the above analysis the Tribunal makes the following

Orders: -

- i) That the Applicant be and is hereby granted leave be and is hereby granted leave to file an appeal out of time.
- ii) The Appellant to file and serve its Notice of Appeal, Memorandum of Appeal, Statement of Facts and Tax Decision within 15 (fifteen) days of the date of delivery of this Ruling
- iii) The Respondent to file its response within the statutory period upon service.
- iv) No orders as to costs.

**DATED and DELIVERED at NAIROBI this 18<sup>th</sup> day of March, 2022.**

  
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**ERIC N. WAFULA**  
**CHAIRMAN**

  
.....  
**CATHERINE MUTAVA**  
**MEMBER**

  
.....  
**GABRIEL KITENGA**  
**MEMBER**

  
.....  
**ABRAHAM KIPROTICH**  
**MEMBER**

  
.....  
**ELISHAH NJERU**  
**MEMBER**