

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**MISC APPL NO. 149 OF 2021**

**EQUISTAR LIMITED .....APPLICANT**

**-VS-**

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

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**RULING**

1. The application before the Tribunal was filed through a Notice of Motion on 22<sup>nd</sup> November, 2021 seeking for orders :
  - a. That the application be certified as urgent and be heard ex parte in the first instance
  - b. That the Honourable Tribunal be pleased to extend the time allowed for the Applicant to file and serve the Memorandum of Appeal, Statement of facts and all other accompanying documents.
  - c. That upon grant of prayer two above, the Memorandum of Appeal and Statement of Facts be deemed as duly filed upon payment of requisite fees.
  - d. That the costs of this application be in the cause.
  
2. The application is premised on the following grounds:
  - a. That the Respondent issued the Applicant with a confirmation assessment for the months of February, March, and April 2018 wherein an objected amount of Kesh 047,199.04, Kesh 1,279,241.78 and Ksh 2,553,165.78 respectively was confirmed.

- b. That the Applicant was required by law to file a Notice of Appeal not later than 30 days from the date of objection and subsequently, their pleadings not later than 14 days of the Notice of Appeal.
  - c. That however the Applicant was unable to file the Memorandum of Appeal, Statement of Facts and the attached documents within the required period of 14 days from the date of filing the Notice of Appeal.
  - d. That the Applicant experienced challenges compiling the appeal papers due to complications in staff logistics as a result of Government-imposed directives for the control of COVID 19
  - e. That the Applicant had issued a notice to its managerial staff requiring them to work from home, which meant that normal and regular tasks such as retrieval of documents became a challenge.
  - f. That the Appeal by the Applicant is meritorious and has high chance of success if this application is granted.
  - g. That there will be no prejudice occasioned by the Respondent in granting the orders sought by the Applicant.
  - h. That undoubtedly, this Honourable Tribunal has the powers to extent the time of filing the pleadings as granted by Section 13 (3) and (4) of the TAT and Rule 10 of the TAT rules 2015.
  - i. That in the premises, it is only fair and in the interest of justice that the orders sought herein be granted.
3. The application was supported by the Affidavit deponed by Salim Awadh Ahmed sworn and filed on 22<sup>nd</sup> November 2021.

## Grounds of opposition.

4. In its opposition to the Application the Respondent submitted that **Section 13(3) and 13(4)** of the Tax Appeals Tribunal Act provides as follows:-

*(3) 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)*

*(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.*

5. It further submitted that **Rule 10 of the Tax Appeals Tribunal (procedure) Rules 2015** fortifies Section 13 of the Tax Appeals Tribunal Act and provides: -

*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 for extension 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*

*3. The Tribunal may grant the extension of time if it is satisfied that the applicant was unable to submit the documents in time for the following reasons-*

- a. *absence from Kenya,*
- b. *sickness; or*
- c. *any other reasonable cause”*

6. The Respondent submitted that the conditions to be met for the grant of extension of time have been settled by the Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat V Independent Electrol and Boundaries Commission and 7 others (2014) eKLR**. The main conditions are:
- a. **Reason for the delay and whether the appeal has been brought without undue delay;** in an application for extension of time, the entire period of delay has to be stated and explained to the satisfaction of the court.
  - b. **Prejudice suffered by the Respondent;** the court will consider the prejudice occasioned to the respondent if the extension of time is granted
  - c. **Arguable appeal:** the applicant must demonstrate that the intended appeal is arguable, and this is done by attaching a draft appeal to the application.
7. The Respondent submitted that in this particular case, the Applicant alleges in its application that the Covid Pandemic disrupted their operations after the government directive to control the pandemic. However, the Respondent submits that the Appeal was due way before the Covid pandemic was recorded in the country.
8. The Respondent further submitted that the courts facilitated normal operations by embracing the new directives issued by the Chief Justice on 4<sup>th</sup> March 2020 by allowing digital transmission of documents and virtual court sessions.

9. The Respondent argued that the said allegation is not a reasonable cause as envisaged under the above referenced provisions of statute. That the Applicant was smack in the middle of the process of engaging the Respondent regarding the taxes demanded, having lodged its objection to the Respondent's assessment. The Act grants a party 30 days upon the decision of the Commissioner, to lodge a Notice of Appeal against the objection decision, which the Applicant failed to do.
10. To buffer its case, the Respondent cited that case of **In Income Tax Appeal No. 31 of 2017 Commissioner of Domestic Taxes vs Mayfair Insurance Company Limited (2017) eKLR** where the court held that

*“One of the reasons stated under the Rule is that the court may extend time where there is reasonable cause for the delay. Effectively, the court's powers and discretion to extend time is unlimited. It is however not to be capriciously exercised. Time, in other words, is not to be extended as a matter of right. Each case is to be viewed sui generis and on its own circumstances and facts. The starting point is that the Applicant ought to advance sufficient and reasonable grounds for any delay on its part.*

11. The Respondent also cited the case of **Misc. Application No.18 of 2019 – Nanasai Logistics Ltd –vs- Commissioner of Domestic Taxes**, in which Application the Applicant sought to file an Appeal out of time and this Honourable Tribunal in held as follows:-

*“....the Appellant is guilty of latches in the filing of the Notice of Appeal that was filed on the 6th day of December 2018. The Notice of Appeal was filed in complete disregard and in contravention of the provisions of Section 13(1) of the Tax Appeals Act that provides for filing of the Notice of Appeal within 30 days of the issuance of the tax*

*decision. In the circumstance, the Tribunal agrees with the Respondent that the Application herein fails to satisfy the conditions for enlargement of time for filing of an appeal as set forth in Section 13(4) of the Tax Appeals Tribunal Act, 2013 and Rule 10(2) and 10(3) of the Tax Appeals Tribunal (procedure) Rules, 2015.*

*The Tribunal finds this delay to be unreasonably long and unexplained. Accordingly, the Tribunal finds that the Applicant has failed to demonstrate to its satisfaction as to the reasons for not filing the Appeal on time as envisaged in law. In view of the foregoing, the order that commends itself to the Tribunal is that the Application dated 19th August 2019 has no merit and the same is hereby dismissed...”*

12. Additionally, it is clear that the Applicant, since the assessment was issued has had no plans of settling its tax arrears and has instituted these proceedings to further hamper the Respondent’s efforts in recovering taxes that are due and payable.
13. The Respondent submits that no substantial loss will be occasioned to the Applicant in the event the orders being sought are not granted because the said issue is monetary and the Applicant has not alleged or proved that in the event of recovery of taxes, the Respondent will be unable to refund the same.
14. The Respondent relied on the case of **James Wangalwa & Another –vs- Agnes Naliaka Cheseto in Misc Appl No. 42 of 2011 [2012] eKLR** Gikonyo J. stated that.

*“No doubt, in law the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and*

*completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss.*

15. The respondent further submitted that this Application is clearly an afterthought aimed at scuttling and fettering the Respondent's mandate of tax collection. It argued that the Application lacks merit and the Respondent prays that the same be dismissed with costs to the Respondent.

### **Analysis and determination.**

16. The brief facts leading to this application are that on 21<sup>st</sup> November 2019 the Respondent informed the public through a general notice that all mismatched invoices under the then recently introduced VAA system were disallowed on 15<sup>th</sup> November 2019 and advised affected taxpayers to seek guidance from its offices on the manner in which to resolve the discrepancies.
17. The Applicant sought such guidance and was advised that if aggrieved by the assessment to file objection through the iTax portal which it did on 28<sup>th</sup> November 2019. On 30<sup>th</sup> January 2020 the Applicant received the Objection Decision which was headed "Confirmation of Assessment "
18. Upon further engagement with the Respondent the Applicant was informed that the only recourse open for it to be accorded opportunity to be heard and the assessment reviewed was to appeal to the Honourable Tax Appeals Tribunal through the Respondent's iTax portal. Consequently, the Applicant filed a notice of intention to Appeal on 6<sup>th</sup> February 2020 well within the statutory stipulated timeline for lodging Appeals before the Tribunal.
19. Upon filing, the Respondent's iTax system automatically listed the notice to appeal as being filed out of time. The Appellant again tried to file on 17<sup>th</sup> February 2020 but got the same response.

20. Section 13(4) of the Tax Appeals Tribunal Act provides as follows regarding extension of time to file an appeal to the Tribunal;

*“(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”*

21. In **Wasike V Swala [1984] KLR 591** the Court laid a hierarchy of factors to consider when dealing with applications for extension of time 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.”*

22. An appeal being merited does not mean that it should necessarily succeed it is arguable. It is one that would not be frivolous and lead to a waste of the Tribunal's time. The Tribunal was 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*” 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 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.*

23. Ngugi J in **Samuel Mwaura Muthumbi V Josephine Wanjiru Ngugi & Another (2018) eKLR** on arguable Appeal stated that:

*“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.”*

24. Similarly, Justice Bosire JA (as he then was) in **Mrao Limited –vs- First American Bank Limited (2003) KLR 125**, observed that

*“.....an arguable case is a case which, on the material presented to the court, a Tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”*

25. In this dispute, the Applicant attached its Memorandum of Appeal which listed one ground of Appeal. It was the view of the Tribunal that the single ground was one that should be argued fully before the Tribunal and one which called for rebuttal from the Respondent. The Tribunal consequently determined that the Appellant had an arguable Appeal that deserved its day in court.

26. On whether there would be prejudice suffered by the Respondent if the application were granted. In common parlance the term “Prejudice” as used in civil matters refer to injury, loss, damnification or substantial loss. Thus, a party claiming that it would suffer prejudice must demonstrate the likelihood of suffering substantial loss, such a loss need not be in pecuniary terms.
27. In the case of **G. N. Muema p/a(sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] eKLR**, the court held as follows in relation to substantial loss:-

*“It was the considered view of this court **that substantial loss does not have to be a lot of money.** It was sufficient if an Applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a Respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful..” (emphasis added)*

28. The Court in **Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited [2020] eKLR** stated on prejudice suffered by the Respondent:

*“The degree of prejudice to the Respondent entails balancing the competing interests of the parties that is the injustice to the Applicant in denying him/her an extension, against the prejudice to the Respondent in granting an extension.”*

29. After weighing the degree of prejudice to be suffered by the Applicant if the application were not granted against that of the Respondent if the application was granted, the Tribunal found that the Respondent would not suffer any prejudice if the application was granted, and the intended Appeal proceeded to be heard on merit.

30. In considering whether there was inordinate delay, the attention of the Tribunal was drawn to the case of **Charo vs. Mwashetani & 3 Others (2014) KLR- SCK** where the Supreme Court stated that:

*“In the emerging jurisprudence, the concept of ‘timelines and timeliness’ is generally upheld, as a vital ingredient in the quest for efficient and effective governance under the Constitution. However, even as we take account of that context, we remain cognizant of the Court’s eternal mandate of responding appropriately to individual claims, as dictated by compelling considerations of justice.”*

31. One of the compelling considerations is whether an Applicant seeking condonation of delay by the Tribunal has demonstrated a reasonable cause for delay in filing its appeal within the statutory period. A reasonable cause for delay is ground for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect may be determined to be reasonable cause. Thus, the Tribunal must satisfy itself that the Applicant had taken all possible steps to timeously file the appeal and the delay was because of any factors which were beyond the control of the Applicant. Put differently, the Applicant must show that it exercised ordinary care, intelligence and prudence to ensure that the appeal was filed without unreasonable delay.

32. This was emphasized in **Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**, where the Supreme Court while capturing the circumstances to be considered in an application for extension of time. stated:

*“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the Applicant to explain the reasons for delay in making the application for extension and whether there are any*

*extenuating circumstances that can enable the Court to exercise its discretion in favour of the Applicant.”*

33. The gist of the foregoing is that it is not necessarily the length of time that the Applicant has been delinquent that determines whether the delay was inordinate. Rather it is the reason for the delay. To receive condonation of delay by the Tribunal, the Applicant must demonstrate that the delay, no matter how long, was not intentional and it occurred due to reasons beyond its control and not due to want of due care and diligence.
34. In this dispute, the Applicant tried to lodge the appeal in time severally but was unable to do so due to technical challenges in the Respondent's iTax system. The Tribunal also took note that engagements with the Respondent to resolve the challenges were hampered by Government measures to restrict movement between Nairobi and Mombasa during the COVID-19 pandemic.
35. In view of the foregoing, the Tribunal determined that the delay was caused by circumstances beyond the control of the Applicant and not due to want of due care and diligence.

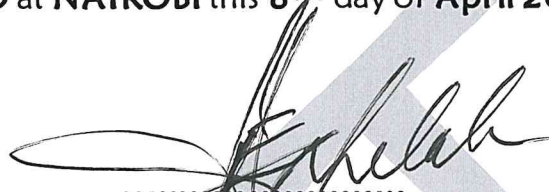
### **Disposition**

36. The Tribunal determined that the application has merit and therefore succeeds. The orders that consequently recommend themselves are as follows:
  - a. Leave be and is hereby granted for the Applicant to file an appeal out of time.
  - b. The Applicant to file and serve its Notice of Appeal, Memorandum of Appeal, Statement of Facts, and Tax decision within Fifteen days of the date of delivery of this Ruling.

- c. The Respondent to file and serve its response to the appeal within the statutory period upon being served with the appeal documents.
- d. No orders as to costs.

37. It is so ordered.

**DATED and DELIVERED at NAIROBI this 8<sup>TH</sup> day of April 2022.**

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

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

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

  
.....  
**ELISHA NJERU**  
**MEMBER**

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

