

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
MISC 4 OF 2022

KENYA STATIONERS LIMITED.....APPLICANT

-VERSUS-

THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

RULING

1. The Applicant filed this Notice of Motion application on 6th January 2022 which was supported by an Affidavit of Priyesh P Shah, a Director of the Applicant. The application sought the following Orders:
 - i. That the application be certified as urgent.
 - ii. That the Tribunal be pleased to grant leave for the Applicant to lodge the appeal against the notice made on 24th December 2021.
 - iii. That such other order or further discretion be made as this Tribunal may deem fit and just.
 - iv. That the costs if this application be provided.

2. The application was premised on the following grounds:
 - i. That the Appellant had supporting documents against the disputed tax of Kshs 185,635,512 issued in the notice dated 24th December 2021.
 - ii. That the intended application for appeal against the notice dated 24th December 2021 is meritorious with very high chances of success.

- iii. That it is in the interest of justice that leave be granted to lodge the appeal against the notice dated 24th December 2021.
 - iv. That the Appellant will suffer irreparably if the leave is not granted.
3. In a letter to the Tribunal dated 28th December 2021 and filed with the Notice of Motion application, the Applicant stated as follows;
 - i) That it did not receive the objection decision.
 - ii) That the email registered is no longer in use as the officer was laid off due to the ongoing pandemic.
 - iii) That the input that was disallowed was genuine and was incurred in furtherance of the company business.
 - iv) That the supporting documentation of the input disallowed was available and it would wish to be allowed to provide
4. In the supporting affidavit, the Applicant stated the delay in clarifying the amount was inadvertently occasioned by departure of the entire finance team of its business which was responsible for completing the clarifications.
5. The Applicant further stated that it undertakes to provide all supporting documents upon clarifications from KRA including the issuance of the corresponding ledgers for the accrued taxes. The Applicant further requested that the matter be handled by ADR department.
6. That the Appellant had consistently and diligently paid its taxes over the years on time, and that the demand to settle the disputed amount as per the notice would significantly disrupt its financial operations.

7. The Applicant further requested that a similar notice to its bankers be immediately lifted to ease its business operations even at it worked to close the matter.

Respondent's Grounds of Opposition

8. The Respondent in opposition to the Applicant's application for extension of time to file offered the following grounds of opposition:
 - a) That the application offends/flaunts the statutory provisions of Section 13 of the Tax Appeals Tribunal Act (TATA). The Act grants a party 30 days upon the decision of the Commissioner, to lodge a Notice of Appeal as against the objection decision.
 - b) That the application is misconceived as it does not meet the standards to warrant extension of time under Section 13(3) and (4) of the TATA.
 - c) That the Applicant has not satisfied the criteria for grant of an extension of time and does not therefore warrant an extension under Section 10(3) of the Tribunal (procedures) Rules 2015.
 - d) That no reasonable circumstances had been demonstrated to warrant an order for enlargement of time.
 - e) That the Applicant has not demonstrated that it will suffer irreparable/irremediable harm if the application is not granted.
9. In its submission filed on 10th February 2022, the Respondent further offered the following grounds of opposition:
 - a. 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.

- b. The Respondent urged the Tribunal to consider the law as set out. That for the Applicant to succeed, it must satisfy the Tribunal that owing to sickness or other reasonable cause, it was prevented from presenting its Memorandum of Appeal within the permitted period and there was no unreasonable delay on its part.
- c. It was the Respondent's contention that the Applicant had 30 days from the date of the Commissioner's decision, to file a Notice of Appeal. This, it did not do. That instead the Applicant waited until 6th January 2022, to move the Tribunal by an application under Certificate of Urgency, accompanied with a supporting affidavit as well as a Notice of Motion with an affidavit in support, seeking to extend time within which to file the Notice of Appeal.
- d. The Respondent submitted that the Applicant had sought to explain the delay on grounds that the email registered was no longer in use as the officer was laid off. The Respondent insisted that this argument cannot excuse such inordinate delay and therefore not a reasonable excuse not to comply with the law.
- e. According to the Respondent, both parties were communicating through email and to connote now that the email was no longer in use was just but an afterthought. To allow an intending Appellant who has inordinately and unreasonably delayed (almost 1 year) in moving the appeal process, to come to the Tribunal and claim that it had not seen the correspondence through an email address they were using, would be setting a negative precedent.

- f. That the intended appeal was an afterthought, and the Respondent urged the Tribunal to frown upon such conduct by denying the Appellant the discretionary orders sought.
- g. It was the Respondent's submission that the reason given by the Applicant was laughable since it was using the same email account to communicate with the Respondent. The Respondent added that equity aids the vigilant and not the indolent. That it was clear from the Applicant's application that it was only jolted by the raised assessment of taxes which was due and payable.
- h. That it was crystal clear that the Applicant at the time had no plan of settling its tax arrears and instituting these proceedings and the same was only necessitated by the demand for taxes which the Respondent submitted was a delaying mechanism tactic.
- i. It was the Respondent's contention that the law requires the party who seeks extension of time to file an application supported by an affidavit stating reasons why it was unable to submit documents on time.
- j. According to the Respondent the supporting affidavit reveals no averment at all of how the Applicant was unable to file its documents on time. To the contrary, the Applicant avers at paragraph 8 of its affidavit that *"the Applicant had not seen communication since the director was out of the country"*
- k. The Respondent stated that the supporting affidavit was fatal as it lacked the key requirements/ingredients as contemplated by rule 10 and therefore of no value at all to the Application. As such the application was ripe for striking out.

- l. Regarding whether the Applicant will suffer substantial loss, the Respondent submitted that no substantial loss will be occasioned to the Applicant in the event the orders being sought are not granted because the said issue was monetary and it had not been alleged or proved that in the event of recovery of taxes, the Respondent will be unable to refund the same.
- m. The Respondent further stated that the Applicant must establish other factors which show that the recovery of taxes will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal.
- n. The Respondent prayed that if the Tribunal was inclined to allow the Application, then it prays for a bank guarantee to be deposited as security so that the Respondent can enjoy the full fruits of judgement and not end up with paper judgement.

ANALYSIS AND FINDINGS

10. 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.

11. In determining whether the 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.”

12. 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.*

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

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

i. Whether there is a reasonable cause for the delay.

14. Section 13(1) of the Tax Appeals Tribunal Act provides as follows as regards to appeals to the Tribunal;
- “(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.”* (Emphasis added)
15. In the instant case the Tribunal noted that Respondent issued the Notice of Objection Invalidation (Tax Decision) on 5th March 2021. Therefore, the Applicant ought to have filed its Notice of Appeal on or before 4th April 2021. This Notice of Motion has been filed on 6th January 2022 which is more than nine months late.
16. 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.”*
17. It was the Applicant’s averment that it did not receive the Objection Decision since the email registered on itax is no longer in use as the officer was laid off due to the ongoing pandemic.
18. The Respondent on its part contended that both parties were communicating through email and to connote now that the email was no longer in use was just but an afterthought.

19. In **Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**, 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. (Emphasis added)

20. Accordingly, Tribunal is of the view that the Applicant ought to have demonstrated that the delay was not intentional, that the delay occurred due to reasons beyond its control, and that the delay did not occur due to lack of due care and diligence which in this case it hasn't.

21. In the present case, although the Applicant cited the issue of email as being no longer in use because its staff was laid off, it did not provide any document in support. It also did not state the date or how it was made aware of the Tax Decision. It was the view of the Tribunal that the Applicant did not demonstrate any reason that was beyond its control that prevented it from filing the Appeal within time.

22. Consequently, the Tribunal finds that there was no reasonable cause for delay advanced by the Applicant.

23. Having entered the above finding in regard to the cause for delay, the Tribunal did not delve into the other issues that fell for its determination as they had been rendered moot.

Disposition

24. In the circumstances the Tribunal finds that the application lacks merit and proceeds to make the following Orders:

- i. The application be and is hereby dismissed.
- ii. No orders as to costs.

DATED and DELIVERED at NAIROBI this 18th day March 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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ELISHAH NJERU
MEMBER


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GABRIEL M. KITENGA
MEMBER