

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**MISC. APP. 143 OF 2021**

**HUMBLE ENTERPRISES.....APPLICANT**

**-VERSUS-**

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

**RULING**

1. The Applicant filed a Notice of Motion application dated 15<sup>th</sup> November 2021 under a certificate of urgency which was supported by an affidavit of John Chege Wanyoike seeking the following orders:
  - i. That this application be certified urgent and in view of the urgency, service in the first instance be dispensed with.
  - ii. That the Honourable Tribunal to grant leave to the Appellant to file the appeal out of time.
  - iii. That the Honourable Tribunal to be pleased to allow the Appellant to file Memorandum of Appeal and accompanying documents thereafter.
  - iv. That the Honourable Tribunal to grant any other order deemed just.
  
2. The application was based on the following grounds:
  - i. That the Appellant was involved in an accident where he was bed ridden for one year.

- ii. That the Applicant contracted Covid-19 & Diabetes.
  - iii. That the Objection Decision was not sent to the Appellant email neither was it sent to the shareholders by the Commissioner.
3. In its written submission filed on 27<sup>th</sup> January 2022, the Applicant further offered the following arguments:
  - a) That the Commissioner raised the assessments on 9<sup>th</sup> November 2020 and rendered the Objection Decision on 15<sup>th</sup> January 2020. This implied that the Objection Decision was rendered before the assessment was issued which was wrong. From the record, the Appellant objection is dated 17<sup>th</sup> November 2020 meaning the objection was done on time as required by law.
  - b) That the Commissioner did not send the Objection Decision to the Appellant email.
  - c) That the Appellant had clearly illustrated that due to having been involved in an accident, contracted Covid 19 and having Diabetes he was bedridden and could not appeal, and issue of the Objection Decision that was not sent to their email.
4. In opposition to the application for extension of time, the Respondent offered the following grounds:
  - a. That the application offends the mandatory provisions of Rule 10(2) of the Tax Appeals Tribunal (Procedure) Rules (2015).
  - b. That the application lacks merit, is misconceived, fatally defective and ought to be struck out.

- c. That the Applicant has not satisfied the criteria for grant of an extension of time and does not therefore warrant an extension under Rule 10(3) of the Tax Appeals Tribunal (Procedure) Rules (2015).
  - d. That the Applicant has not demonstrated that it will suffer irreparable harm if the application is not granted.
  - e. That the Applicant was properly served in accordance with Section 74 of the Tax Procedures Act.
5. In its submission filed on 25<sup>th</sup> January 2022, the Respondent further offered the following arguments in opposition:
- a. That it should be noted that the Objection Decision was rendered on 15<sup>th</sup> January 2020, the present application was filed on 15<sup>th</sup> November 2021.
  - b. The Respondent submitted that the Applicant had not demonstrated how Covid-19 and/or Diabetes prevented them from filing their appeal for more than a year, or indeed how the illness of diabetes was such an inconvenience that prevented them from filing their appeal. That this was undue delay and clearly offends the provisions of Section 13(4) of the Tax Procedures Act.
  - c. The Respondent stated that the discretion of the Tribunal in extending time is not a function that can be exercised in a manner that clearly offends the reasons timeliness are established within the Act. The Tribunal does not have unfettered discretion and has a duty to protect itself from abuse of its processes.
  - d. The Respondent further submitted that the Applicant was being disingenuous when blaming Covid 19 as being the reason for his inordinate

delay, since the documents attached proved that the assessments were carried out prior to the said period of Covid-19, and the Applicant lodged their objection to the assessment during the same period without any qualms.

- e. That the rules of equity dictate that equity will aid the vigilant and not the indolent. The Applicant has been indolent and as such cannot be aided by equity in regularizing its late appeal.
- f. The Respondent averred that the Applicant had simply made a blanket claim of having been bedridden, thereafter because of Covid 19 they were unable to file its appeal. This brings to question how the cited explanations affected its capacity to lodge an appeal. In addition, the Applicant had not demonstrated by way of evidence how the other shareholders were unable to discharge his duties during his absence.
- g. It was the Respondent's submission that the Tribunal was bound to uphold the strict statutory timelines provided by law to any party.

## **Analysis and Findings**

6. 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.

7. 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.”*

8. 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.*

9. 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:

- 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.

### **Merits of the Complained action**

10. 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.
11. 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.”*

12. 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.”*

13. 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 affirmed 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.*

14. The Respondent’s Objection Decision was dated 15<sup>th</sup> January 2020. The Applicant avers that this was prior to issuance of the assessment which was dated 9<sup>th</sup> November 2020. The Appellant further stated that the Objection Decision was neither sent to its nor their director’s email. Looking at the arguments as raised in this application and the Applicant’s submissions, the Tribunal noted that the Applicant raised two grounds for appeal. The Tribunal was therefore 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.
15. Consequently, based on the existence of these grounds of appeal the Tribunal finds that the Applicant had an arguable case and therefore merited.

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

16. 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...”*

17. The test, therefore, as set out in the case above is whether the Respondent will suffer irreparable prejudice if the application is granted.
18. Although the Respondent contended that the Applicant had not demonstrated that it will suffer irreparable harm if the application is not granted, it was the view of the Tribunal that the Appellant’s recourse to justice lies in an appeal to the Tribunal. That the Appellant would therefore suffer prejudice if it is not granted leave to file its appeal since it had already demonstrated that it had sufficient grounds for appeal.
19. On the other hand, the Respondent did not demonstrate that it would suffer irreparable loss if the Applicant was granted leave to appeal out of time. In any event, the Respondent would still collect the taxes inclusive of penalties and interest should it be found to be due and payable.
20. The Tribunal therefore finds that the Respondent will not suffer prejudice if the extension is granted, and the appeal is heard on merit.

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

21. 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.”*

22. In the instant case the Applicant submitted that the delay in seeking filing of the appeal was due to illness. That the director was involved in an accident and was bedridden from the year 2018 to late 2019, thereafter before fully recovering he contracted Covid-19 and diabetes.
23. The Respondent on its part contended that the Applicant had not demonstrated how Covid-19 and/or Diabetes prevented them to file their appeal for more than a year, or indeed how the illness of diabetes was such an inconvenience that prevented them from filing their appeal. That this was undue delay and clearly offends the provisions of Section 13(4) of the TAT Act.
24. The Tribunal noted that the Objection Decision was issued on 15<sup>th</sup> January 2020. The Appellant therefore ought to have issued a Notice of Appeal on or before 14<sup>th</sup> February 2020. This application has been filed on 16<sup>th</sup> November 2021 which is approximately 1 year 9 months late.
25. The Applicant cited illness as the cause of delay. The Tribunal perused through the submissions and documents attached by the Applicant and noted medical documents indicating that the Applicant contracted Covid 19 and diabetes and was admitted to hospital in January 2021. In a sworn affidavit the Applicant had stated that prior to this he had been bed ridden due to an accident.

Although the Tribunal could not ascertain the level of incapacity suffered after hospitalization in 2021, it was persuaded that the director of the Applicant was indeed ill for the better part of the period of delay.


26. Consequently, the Tribunal finds the reasons advanced by the Applicant to sufficiently explain the cause of delay.

## ORDERS

27. 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 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 to the appeal within the statutory period upon being served.
- iv. No orders as to costs.

DATED and DELIVERED at NAIROBI on this 25<sup>th</sup> day of March, 2022.




ERIC N. WAFULA  
CHAIRMAN



CATHERINE N. MUTAVA  
MEMBER



GABRIEL M. KITENGA  
MEMBER



ABRAHAM K. KIPROTICH  
MEMBER



ELISHAH NJERU  
MEMBER

