

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 331 OF 2020

BASIT PROPERTIES LIMITED.....APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXESRESPONDENT

RULING

Background

1. The Appellant is a limited liability company incorporated under the Companies Act, CAP 486 of the Laws of Kenya.
2. The Respondent is a principal officer appointed under the Kenya Revenue Act for purposes of collection and accounting of Government Revenue and related purposes.
3. The Respondent conducted compliance check on the Applicant's Income Tax and VAT returns for the years 2017 and 2018 and noted some anomalies relating to annual sales turnover in respect to Corporation Tax. The Respondent notified the Applicant vide a letter dated 25th October 2019.
4. The Respondent raised an additional assessment on 6th November 2019 and demanded taxes vide its letter dated 25th November 2019.

5. The Applicant raised an objection on 3rd December 2019 which was acknowledged by the Respondent on 16th December 2019. The Respondent confirmed the additional assessment on 1st February 2020.
6. The Applicant being dissatisfied with the Respondent's decision filed with the Tribunal this Notice of Motion application dated the 30th day of July, 2020 together with its Memorandum of Appeal and Statement of Facts. The Notice of Motion seeks the following orders:
 - a. THAT this application be certified as urgent and in view of the urgency, service be dispensed in the first instance.
 - b. THAT this Honourable Tribunal be pleased to enlarge time within which the Applicant is to file its Notice of Appeal, Memorandum of Appeal, Statement of Facts and Tax decision be deemed to have been properly filed within time.
 - c. THAT the Applicant be at liberty to apply for further orders and the Honourable Tribunal do give any and/or any directions it deems fit and just to grant in the circumstances.
 - d. The costs of this application be in the cause.

Grounds for Application

7. The Application was supported by an Affidavit sworn by Abdulaziz Mohamed Saleh Bawazir on the 30th day of July, 2020 and is premised on the following grounds:-

- a) THAT the statutory timelines within which the Applicant is supposed to have submitted its Notice of Appeal, Memorandum of Appeal, Statement of Facts and Tax Decision has since lapsed.
- b) THAT the Applicant/Appellant had objected to the additional assessment issued by the Respondent vide a correspondence to the Respondent dated 3rd December 2019 and an Objection Application Acknowledgement issued by the Respondent on 16th December 2019.
- c) THAT all this time the Applicant/Appellant who is resident of Mombasa believed that the Objection had been allowed.
- d) THAT the Country was hit by Covid-19 pandemic and in March 2020 the President issued a cessation of Movement in Mombasa County thereby communication was hampered.
- e) THAT it is not until the 24th July 2020 that the Applicant/Appellant received the Confirmation Assessment Notice dated the 1st February 2020.
- f) THAT failure to file a Notice of Appeal and Memorandum of Appeal within time was not occasioned on its part but was occasioned by lack of proper communication between the Applicant and the Respondent.
- g) THAT the cessation of movement having been lifted, the Applicant is logistically able to approach and consult its Tax agent, KRA offices and the Tax Appeals Tribunal with ease.

- h) THAT the Respondent will not suffer any prejudice if the orders sought herein are granted.
- i) THAT in the interest of justice, fairness, and fair play, it is only fit to grant the orders sought to allow the hearing and determination of the Appeal on merit.

Grounds for Opposition

- 8. The Respondent opposed the application by filing Grounds of Opposition dated the 14th day of August, 2020 citing the following grounds:
 - a) THAT the rule under which the application is drawn, that is Rule (10)(1) of Tax Appeals Tribunal (procedure rules) does not contemplate the orders sought.
 - b) THAT ground C of the Applicant's ground of opposition is vague as the period alleged is not discernible.
 - c) THAT by a letter dated 3rd December 2019 it is clear that the Applicant/and or his tax agent is conversant with electronic communication.
 - d) THAT as a consequence, paragraph (6) regarding Covid-19 in the supporting affidavit is of no value at all as no physical presence is required to file an Appeal.

- e) THAT it is common knowledge that the cessation of movement started towards the end of March 2020 whilst the decision sought to be appealed against is dated 1st February 2020.
- f) THAT no credible reason has been advanced by the Applicant to warrant extension of time.
- g) THAT the application of this nature requires an Applicant to prove his/her absence from Kenya, sickness, or other reasonable cause, none of which the Applicant has attempted to show.
- h) THAT equity cannot aid an indolent applicant
- i) THAT as a consequence the application dated 30th July 2020 is ripe for striking out.

Tribunal's Findings

9. 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 to be exercised judiciously and not a right to be granted to the Applicant.

10. 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.”

11. 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.

12. 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 the Application for extension has been brought without undue delay?
 - d. Whether there is a reasonable cause for the delay?
- a. The merits of the complained action**
13. Under this test, the Tribunal examined whether the matter being complained of was material to extent that it deserved a day before the Tribunal or whether it was a frivolous one that would lead to a waste of the Tribunal's time.
 14. The test is not whether the case is likely to succeed. Rather, it is whether the case is arguable. This was the finding 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.”
 15. This was further stated 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 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.”

16. The dispute involves a disputed tax liability related to Income Tax for the year 2018. What appears to be the main issue is how the Respondent tabulated and arrived at the amount of tax liability which the Applicant is disputing. The Tribunal finds that the dispute is not frivolous and should be heard on its merits.

b. Whether there 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.....”

The approach indicated in these two principles is modified to the stage which the relevant proceedings have reached. If for example, the procedural default is in relation to an interlocutory step in proceedings, such as a failure to serve a pleading or give discovery within the prescribed time limits, the court will, in the ordinary way and in the absence of special circumstances, grant an extension of time. Unless the delay has caused irreparable prejudice, to the other party, justice will usually favour the action proceeding to a full trial on the merits.”

18. The test, therefore, as set out in the case above is whether the Respondent will suffer irreparable prejudice if the application is granted. In the case at hand, the Respondent 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. On the other hand, the Appellant’s recourse to justice lies in an appeal to the Tribunal. Thus, the

Appellant would suffer extreme prejudice if it is not granted leave to file its appeal. It is the view of the Tribunal that the Respondent would still collect the taxes together with penalties and interest should the Applicant be found to be at fault.

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

c. Whether the Application for extension has been brought without undue delay?

20. The Objection Decision was issued on 1st February 2020. Thus, according to the provisions of the Tax Procedures Act, the Applicant ought to have filed an Appeal within 30 days.

21. The Tribunal takes judicial notice of the fact that a significant portion of the time that lapsed was within the period of cessation of movement in and out of Nairobi and Mombasa due to the Covid-19 pandemic. The Tribunal further takes judicial notice that most service providers were offering limited services during that time. We note that the application was submitted soon after the movement restrictions were relaxed. Consequently, the Tribunal finds that the delay in the filing of the application for extension was not inordinate.

d. Whether there is a reasonable cause for the delay?

22. The Respondent argued that there was no credible reason advanced by the Applicant to warrant extension of time. The Respondent further avers that an

application of this nature requires the Applicant to prove absence from Kenya, sickness, or other reasonable cause which the Applicant has not shown.

23. The Appellant in its part argued that due to the Covid-19 pandemic and the subsequent cessation of movement orders in Mombasa County it was not able to file its Appeal within time. The Appellant submitted that it received the Confirmation Assessment Notice on 24th July 2020. The Applicant further explained that upon lifting of the movement restriction they were now logistically able to approach and consult its Tax agent, KRA offices and the Tax Appeals Tribunal with ease.
24. The Tribunal notes that the Applicant ought to have filed his Notice of Appeal on or before 3rd March 2020 given that the Objection Decision was issued on 1st February 2020. The Applicant filed the Notice of Motion on 6th August 2020 which is five (5) months late. The Tribunal takes note that as averred by the Respondent, Kenya recorded its first Covid-19 case in the second week of March by which time the Applicant's window to file an appeal had already lapsed.
25. In considering what constitutes as a reasonable reason for delay, the court in **Balwant Singh v Jagdish Singh & Ors (Civil Appeal No.1166 of 2006)**, held that:

“The test is whether or not a cause is sufficient to see whether it could have been avoided by the party by the exercise of due care and attention”

26. The Tribunal notes that the Applicant gave two reasons for its failure to file its appeal on time. The first was the cessation of movement imposed as a result of the Covid-19 pandemic. In this regard, the Tribunal is inclined to agree with the Respondent. Indeed, the period within which the Applicant could file its appeal had already lapsed by the time the cessation of movement was imposed. Secondly, the Applicant averred that it did not see the Respondent's email until sometimes in July, 2020. Unfortunately, the Applicant has not provided any reasons for this. In the Tribunal's view, the Applicant ought to have provided evidence this delay in accessing its email was not occasioned by a failure on its part to exercise due care and attention. As it stands, the Applicant has merely averred this and has not provided any reason why this is the case.
27. Despite the failure to exercise due care, the Tribunal is of the view that denying the Applicant its day in court would deny it access to justice. In reaching this finding, the Tribunal is guided by the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010 which provides that justice should be administered without undue regard to procedural technicalities.
28. The Tribunal in exercise of its discretion therefore found for the Applicant and allowed its application to extend time in filing of the Appeal.

Orders of the Tribunal

29. After considering the submissions of both parties and the documents supporting the Notice of Motion and the opposition thereof and bearing in mind the Constitution which in Article 159 (2) (d) prescribes that: *"justice shall be administered without undue regard to procedural technicalities;"* the Tribunal Orders as follows:

- i. That leave be and is hereby granted for the Appellant to file its Notice of Appeal, Memorandum of Appeal, Statement of Facts and Tax decision out of time.
- ii. The Notice of Appeal, Memorandum of Appeal, Statement of Facts and the Tax decision filed before the Tribunal with the application on the 6th day of August 2020 are hereby deemed as duly filed.
- iii. The Respondent to file its Response within 30 days of the date of this Ruling.
- iv. Each party to bear its costs.

DATED and DELIVERED at NAIROBI this 11th day of September, 2020

**ERIC N. WAFULA
CHAIRMAN**

**NGINA MUTAVA
MEMBER**

**WILFRED N. GICHUKI
MEMBER**

**ABRAHAM K. KIPROTICH
MEMBER**

**GABRIEL M. KITENGA
MEMBER**