

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 53 OF 2015

MUHUGU LIMITED.....APPLICANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

RULING

1. The Appellant filed a Notice of Motion under Certificate of Urgency dated the 10th day of February 2020 under a Certificate of Urgency.
2. The said application seeks the following orders;
 - a. That this application be certified as urgent and the same be heard ex-parte in the first instance.
 - b. That the Appeal to be reinstated.
3. The Appellant's application is pegged on the grounds that;
 - a. By order of Agency Notice dated 11th August 2014, the Respondent declared Kenya Commercial Bank to be the agent of pay him Kshs. 34,984,524.00 being income tax due.
 - b. Through a charge notification of (Notification of Sale of Property L.R. No. 584218) dated 22nd November 2016, the Respondent requires the full payment of the outstanding tax. The Respondent

intends to sell by auction the said property for non-payment of the estimated tax arrears of Kshs. 59,640,304.00.

- c. By a letter dated 17th February 2014 the Respondent confirmed to the Applicant to issue estimated assessment of Kshs. 45,979,660.00 and advised the Applicant to object within thirty (30) days after the date of service.
 - d. By a letter dated 18th September 2013, the Respondent demanded tax of Kshs. 17,443,446.00 already enforced as per the agency notice and the notification of Sale of Property L.R. No. 584218.
 - e. The Respondent's letter dated 22nd November 2016 notified the Land Register by directing him to register the property, L.R. No. 584218 as security for unpaid tax amounting to Kshs. 59,640,304.00.
 - f. The Applicant raised an objection to the charge on the property No. 584218 but the Respondent has failed to respond to the same.
 - g. The Agency Notice and the caveat on the property is still in force. The Appellant is thus apprehensive that unless the orders sought herein are granted promptly, the violation of his rights under article 40 of the Constitution on the right of property.
4. The Respondent is opposed to the Applicant's application for reinstatement dated 16th January 2020. According to the Respondent, the Applicant having made an application for withdrawal of its Appeal and the Honorable Tribunal having so ordered, there is no Appeal capable of being reinstated.

5. That the certificate of urgency filed on the 12th of February 2020 does not raise any urgent issues that warrant any immediate orders by the Tribunal. Furthermore, the annexure 6 of the Application, the Applicant's letter dated 21st February 2017, is misleading to the Tribunal in as far as they purport to pass the impression that the Appeal is still pending before the Tribunal/ Local Committee,
6. The Respondent further avers that the Notification of Charge on L.R. No. 584218 was lawfully issued as the Appeal was withdrawn by the Applicant's tax agent.
7. That it is evidently clear that the application is brought in bad faith and solely because of the Respondent's quest for taxes that are otherwise due and owing from the Applicant.

ANALYSIS

8. The Tribunal having carefully considered this application, the Affidavit in support thereof and the Grounds of opposition thereto is of the respectful view that the only issues available for its determination is whether the Applicant's prayer for reinstatement of its previous Appeal, Tax Appeal No. 53 of 2015, should be granted.
9. A cursory perusal of the record before us indicates that the Applicant filed an Appeal with the Local Committee on 28th April 2014. The Coram sheet of the Tribunal dated 15th March 2016 and the subsequent order by the Tribunal indicate the Applicant had withdrawn its appeal. Fast forward to 12th February 2020, the Applicant filed a certificate of urgency for reinstatement of the Appeal.

10. In light of the foregoing facts, the Tribunal will now turn to the relevant law herein, to wit Section 27 (1) of the Tax Appeal Tribunal, 2013 which stipulates thus;

“(1) An appellant may, by notice in writing, withdraw the appeal.”

11. In our understanding, the only conclusion that can be drawn from the above mentioned set of facts is that the Applicant herein exercised its rights under Section 27 of the Tax Appeals Tribunal Act, which right we note is absolute and untrammelled. Now, the question that we must ask ourselves is, can a matter that had been withdrawn be reinstated? We must determine the juridical implications of a withdrawal first before considering the prayers sought by the Applicant herein.

12. Accordingly, we find ourselves borrowing from the analogy adopted by the higher courts in interpreting Order 25 (1) of the Civil Procedure Rules 2010, which is principally pari material to Section 27 of the Tax Appeals Tribunal Act. In *Bahati Shee Mwafundi v. Elijah Wambua [2015]eKLR*, the High Court held;

“...Notice to discontinue takes effect and brings the proceedings to an end as against each defendant, on the date it is served upon the defendant.”

“...In this case the Respondent had Notice to withdrawal or discontinuous of this Appeal before seeking to set aside the consent before Kwale Court. That Notice of the Withdraw or discontinuous had the effect of terminating this appeal. The appeal having terminated it cannot in my humble view be reinstated or resuscitated. On that

ground the Appellant's Notice of Motion is unmerited and misconceived. It is dismissed with costs to the Respondent”.

13. A similar position was taken by the High Court of Allahabad in ***Smt Raisa Sultana Begam & others vs. Abdul Qadir & others AIR(1966 ALL 318)*** wherein it was held;

“Either it is done or not done; there is nothing like its being incompletely or ineffectively. The consequence of an act of withdrawal is that the Plaintiff ceases to be a Plaintiff before the Court. If he is the only Plaintiff and withdraws the whole of the suit, the suit comes to an end and nothing remains pending before the Court; if he is only one of several Plaintiffs, he ceases to be a party and the suit of only the other Plaintiffs continues. If he withdraws only a part of the suit that part goes out of jurisdiction of the court and it is left with only the other part. This is the natural consequence of the act; a further consequence imposed by Sub-rule (3) is that he cannot institute any fresh suit in respect of the subject matter. He becomes subject to this bar as soon as he withdraws the suit. It follows as a corollary that he cannot revoke or withdraw the act of withdrawal. If he is absolutely barred from instituting a fresh suit, it means that he is absolutely barred from reviving his status as a Plaintiff before the Court. The bar on his instituting a fresh suit would be meaningless if he were permitted to revoke the withdrawal and get himself restored to the status of a Plaintiff in respect of the withdrawn suit. There is no provision allowing revocation of the withdrawal”.

14. This Honorable Tribunal has little difficulty accepting the juridical implications of a withdrawal as advanced by the High Court in the above

decision, which needless to say is binding on us. Once the Applicant herein moved the Tribunal on the 15th March 2016 for a withdrawal and the Tribunal in turn issued an order for discontinuance, the withdrawal was complete and effective. The Applicant, then an Appellant, for all intents and purposes ceased to be an Appellant before the Tribunal. The Appeal, Tax Appeal No. 53 of 2015, came to an end and nothing remained pending before the Tribunal.

15. Even if the Applicant herein had advanced compellingly cogent grounds for reinstatement, which we note it has not, entertaining this application and its prayers would imply that there was some element of Appeal No. 53 of 2015 that was pending before us. We are clear in our minds and from the record, that indeed nothing deserving of reinstatement remained before the Tribunal.
16. That being said, we feel obligated to point out, in the interest of justice that it is not all doom and gloom for the Applicant. A withdrawal of suit does not bar one from instituting a matter afresh in the future. The Applicant has the option of instituting the matter a fresh, if only to exercise its right to be heard.
17. In view of the foregoing, the order that commends itself to the Tribunal is that the application dated 12th February 2020 has no merits and the same is hereby dismissed
18. There will be no orders as to costs.

DATED and DELIVERED at NAIROBI on this 4th day of September, 2020.

MAHAT SOMANE
CHAIRPERSON

PATRICIA MAGIRI
MEMBER

TIMOTHY CHESIRE
MEMBER

WAMBUI NAMU
MEMBER