

REPUBLIC OF KENYA

**IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 85 OF 2015**

BETWEEN

**THE EAST AFRICAN MARINE LIMITED.....APPELLANT
-AND-
THE COMMISSIONER OF DOMESTIC TAXES..... RESPONDENT**

RULING

When this matter came up for hearing on 27th January 2016, the appellant applied to the Tribunal to allow its appeal as the respondent had not filed any documentations in response to the said appeal.

The respondent sought an adjournment in order to regularize its position by filing statement of facts which application was granted subject to payment of adjournment costs to appellant.

The Tribunal ordered the parties to address it on the quantum of costs when the matter came up for further hearing.

The appeal then came up for hearing on 22nd February 2016.

Mr. Martin Kisuu, for the appellant, requested Mr. Karanja Kamotho to present the appellant's arguments on the quantum of the adjournment costs.

The Tribunal required the parties to address it on the issue of the said costs as it is cognizant of the fact that, though **Section 31** of the Tax Appeals Tribunal Act 2013 (The Act) donates to the Tribunal the power to order payment of costs, there is no schedule provided for either under the Act or any other law that sets out the costs payable to either party in case of an adjournment.

Mr. Kamotho presented to the Tribunal a bill of costs in the sum of Ksh 4,025,200/= which bill of costs was purportedly based on the Advocates Remuneration Order.

The Tribunal noted at the onset that both Mr. Kisuu and Mr. Kamotho are not Advocates, and the Advocates remuneration order has no schedule for specific costs applicable to this Tribunal. The Tribunal understood the reliance of the advocate's remuneration order as a mere guide to the quantum of costs that it may order.

The respondent vehemently opposed the application for the reasons that the sum claimed was exorbitant, the proceedings took a very short time and that the appeal was only prosecuted by one person, namely Mr. Kisuu.

The Tribunal faulted Mr. Kamotho's argument when he urged the Tribunal to order payment of the enormous costs on the basis of;

- The nature and importance of the proceedings
- The complexity of the matter
- The amount or value of the subject matter
- The time expended by the advocate
- And the number and importance of the documents prepared or perused,

as the above factors normally refer to a consideration in assessing the instruction fees payable to an advocate, and are not considered in determining the amount to be paid for adjournment cost.

In the absence of express provisions of the law as to the amount payable for adjournment costs, the award of such costs is at the discretion of the Tribunal. Having weighed careful the arguments by both parties and taking into account the fact the proceedings leading to the adjournment did not take more than thirty minutes, we award costs of Ksh 5000/= to the appellant as its adjournment costs.

The respondent is further order to pay a sum of Ksh 5000/= to the Tribunal as adjournment costs. Both these costs should be paid within fourteen days from the date of this order.

On the 22nd February 2016 the respondent withdrew its application for extension of time within which to file its documents in opposition to the appeal.

The Tribunal then ordered that the respondent documents which were part of the Tribunal record be expunged.

At that point Mr. Kisuu orally applied for the appeal to be allowed without further ado on the ground that in the absence of any documents by the respondent, the appellant did not need to do anything else and was entitled to judgment in its favor on its appeal.

The Tribunal however made a ruling allowing the respondent to interrogate the appellant's case orally. Even after the said Tribunal's ruling, Mr. Kisuu, quite unprocedurally and unprofessionally orally applied again for the Tribunal to review and or vary its given ruling. The Tribunal dismissed this application and undertook to give its considered reasons at a later date.

These are the Tribunal reasons for its said ruling;

The Tribunal drew the attention of the appellant to the provision of **Section 30** of the Act on the burden of proof that the law imposes on an appellant. The said section states as follows;

In a proceeding before the Tribunal, the appellant has the burden of proving-

- (a) where an appeal relates to an assessment, that the assessment is excessive; or**
- (b) in any other case, that the tax decision should not have been made or should have been made differently.**

For the avoidance of doubt, **Section 38(b)** of the Act reiterates and reinforces the said provision as it states as follows;

38(b) the burden of proving that any tax has been paid or that any goods or services are exempt from payment of tax shall lie on the person liable to pay the tax or claiming

that the tax has been paid or that the goods or services are exempt from payment of tax;

In requiring the appellant to proceed with its case even in the absence of documents filed by the respondent, the Tribunal was acting in obedience to the above provisions. It merely required and asked the appellant to discharge the burden of proof imposed upon it by the law.

The Tribunal further drew the attention of the parties to the general tenor of the Act and the rules made hereunder to the effect that it has unfettered discretion in the procedure it adopts in conducting proceedings before it.

In fact **Section 14** of the Act expressly states that the Tribunal is not to be fettered by the provisions of the **Civil Procedure Act** in conducting proceedings before it.

It is our considered view that once the Tribunal has pronounced itself on the direction that the proceedings should take to wit that the appellant proceed with its case, with the respondent answering thereto orally, it was not open to the appellant to insist on its appeal being allowed contrary to the Tribunal's ruling as this will be in breach of **Section of 27(3)** which states as follows;

27(3) If an appellant fails without reasonable cause to proceed with the appeal or comply with a direction by the Tribunal, the Tribunal may dismiss the appeal.

Upon the appellant electing not to discharge its burden as demonstrated above, the Tribunal ordered the respondent to interrogate the appellant's case orally. The respondent faithfully commenced prosecuting its case and the matter was adjourned partly heard.

It is not for the Tribunal to order the appellant to conduct its case in any particular way as that is its remit. However should the appellant proceed in a recalcitrant way as it has done this far, the consequences are obvious.

Orders accordingly

DATED THIS 22ND DAY OF FEBRUARY, 2016

ISSUED THIS.....15th.....DAY OF.....March.....2016

AGN KAMAU (CHAIRMAN)

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GEOFFREY K. C. KATSOLEH

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PHILOMENA N. KIROKEN

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WILFRED N. GICHUKI

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