



Commissioner of Domestic Taxes v Dimension Data Solutions Limited (Income Tax Appeal E013 of 2022) [2023] KEHC 17791 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17791 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E013 OF 2022**

A MABEYA, J

MAY 26, 2023

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

DIMENSION DATA SOLUTIONS LIMITED RESPONDENT

RULING

1. Before Court are two applications. The appellants Notice of Motion dated 1/11/2022 for leave to serve the Memorandum and Record of Appeal out of time and the respondent's application dated 30/5/2022 seeking to strike out the appeal.

Application dated 1/11/2022

2. The Motion was made pursuant to Article 159 of the *Constitution* of Kenya 2010, Order 50 and 51 Rule 4 of the *Civil Procedure Rules* 2010 and Section 1A, 1B&3A of the *Civil Procedure Act*. The application sought leave to serve Memorandum of appeal out of time.
3. The Motion was supported by the affidavit of Charles Kamonji sworn on 31/10/2022. The appellant contended that the at the time the he filed the appeal, the audit firm representing the respondent was not served. That failure to serve the respondents was not malicious but an inadvertent mistake on the part of the applicant.
4. That when the appellant was granted leave to file a supplementary record of appeal, he realized that he had not served the primary record of appeal. That the mistake of counsel ought not to be visited on the client and the respondent would not suffer any prejudice if leave was granted by the Court.
5. The respondent opposed the application by grounds of opposition dated 22/11/2022 and a replying affidavit sworn by Moreen Mutuma on 22/11/2022. She deposed that failure to serve the appeal was



not in good faith as the application for striking out the appeal was filed on 30/5/2022 but the appellant even then did not take any action to serve the appeal or file an application to extend time.

6. That the appeal was served on 13/10/2022 before this application for extension of time. That failure to comply with the statutory timelines could not automatically be cured by Article 159 of the Constitution of Kenya.

Application dated 30/5/2022

7. The respondent's motion was made pursuant to Rule 3 of the Tax Appeals Tribunals (Appeals to the High court) Rules 2015 and the inherent power of the Court. It sought the striking out of the appeal. It was supported by the affidavit of Moreen Mutuma sworn on 30/5/2022.
8. The respondent's case was that the appellant had failed to serve the Memorandum of Appeal within the time required by law. That the respondent became aware of the appeal after being served with a supplementary record of appeal 51 days after it was required to have served the appeal. That the respondent had believed that there was no appeal and was prejudiced as it was unable to prepare its statement of facts.
9. The appellant opposed the application by a replying affidavit of Lilian Nyaringita sworn on 24/6//2022. She averred that the appeal was filed within the legal timelines however the court clerk failed to serve the Memorandum of Appeal on the firm of Deloitte & Touche who were representing the respondent.
10. That the respondent did not willfully refuse to serve the Memorandum of Appeal as the mistake was an honest one. It was contended that dismissing the appeal would prejudice the appellant as it would be driven away from seat of justice. That justice should not be impeded by regard to procedural technicalities.
11. The appellant submitted that the court was required to administer justice without due regard to technicalities of procedure. That failing to serve the memorandum of appeal only amounted to a procedural technicality. That striking out the appeal was a drastic measure which ought to be resorted to in the clearest of cases. That the appeal raised triable issues and there were no defects in the appeal to warrant its striking out.
12. The cases of Kenya Ports Authority v Kenya Power & Lighting Co. Ltd [2012] Eklr, James Murithi Ngotho & 4 Others v JSC [2012] eKLR and Zacharia Okoth Obado v Edward Akong'o Oyugi & Others [2014] eKLR among others were cited in support of those submissions.
13. On the other hand, the respondent submitted that under section 32(2) of the Tax Appeals Tribunal, the appellant ought to have filed and served the appeal within 30 days, that is by 20/2/2022. That the appellant ought to have complied with the statutory limitations of time as the requirement for serving an appeal was a mandatory procedure which could not be cured by Article 159 of the Constitution of Kenya.
14. That the infraction of the appellant went to jurisdiction and that rules of procedure are devised for public interest. The cases of Commissioner of Domestic Taxes v Africa Oil BV [2020] Eklr, Kissi Petroleum Products Ltd v Kobil Petroleum Ltd & 2 Others [2006] Eklr, Commissioner of Domestic Taxes v Local Productions (K) Ltd [2020] Eklr and many others were relied on in support of those submissions.
15. I have considered the two applications together with the submissions on record. The issue for determination is whether the appellant should be granted leave to serve the appeal out of time or the



same should be struck out. The principles applicable are, the length of the delay, the reason for the delay and the prejudice, if any to be suffered by the opposite party.

16. Section 32 of the [Tax Appeals Tribunal](#) provides: -

- 1) A party to proceedings before the tribunal may, within thirty days after being notified of the decision or such further period as the high court may allow, appeal to the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party.
- 1A) A party that has appealed against the decision of the tribunal in subsection (1) shall within two days of lodging a notice of appeal serve a copy of the notice on the other party.
1. The High Court shall hear appeals made under this section in accordance with the rules set out by the Chief Justice.”

17. Rules 3 and 4 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015 (“the Rules”) provide: -

- “3. The appellant shall, within thirty days, after the date of service of a notice of appeal under section 32(1), file a memorandum of appeal with the Registrar and service a copy on the respondent.
4. The Court may extend the time specified in rule 3 if the Court is satisfied that, owing to absence from Kenya, sickness, or other reasonable cause, the appellant was unable to file the memorandum of appeal within that period and that there has been no unreasonable delay on the part of the appellant.”

18. From the foregoing, it is clear that the law provides when time can be extended for filing of appeals only and not the service thereof. While the law restricts the reason for extension of time for filing to absence of an applicant from Kenya, it does not do so as regards service of the appeal. In this regard, it is left to the discretion of the Court to extend the time for service. That discretion has to be exercised judiciously and not capriciously.

19. In [Fabim Yasin Twaha v Timamy Issa Abdalla & 2 Others](#) [2015] eKLR, the Supreme Court of Kenya held: -

“As regards extension of time, this Court has already laid down certain guiding principles. In the Nick Salat case, it was thus held: -

“... 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.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;
2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;



3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
 4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
 5. whether there will be any prejudice suffered by the respondents, if extension is granted;
 6. whether the application has been brought without undue delay; and
 7. whether in certain cases, like election petitions, public interest should be a consideration for extending time”.
20. In the present case, the appeal was filed within time. It was supposed to have been served by 20/2/2022. It was only served on 13/10/2022 way out of time. That was about 8 months after. That was inordinate delay.
21. The reasons advanced were that it was as a result of an inadvertent mistake which was not deliberate. That the Court Clerk who was instructed to file and serve the appeal forgot to do so and the appellant only realized after it had obtained leave to file and serve a supplementary record of appeal.
22. My take is that such an eventuality is possible. That it is likely that the appellant made an honest mistake in failing to serve the record of appeal. That it was not deliberate. That notwithstanding however, I find that the delay in filing the application after being served with the application to strike out the appeal way back in June, 2022 is unacceptable and the applicant must be penalized for it.
23. I note that the respondent did not show how it would be prejudiced were the extension sought were to be granted. It only stated that it was not able to file its statement of facts. That can be done at any time rather than drive the appellant from the seat of justice. The prejudice in any event can be atoned by an order for costs.
24. In the upshot, I allow the Motion dated 1/11/2022 and dismiss the one dated 30/5/2022. The memorandum of appeal is hereby deemed to have been duly served with leave. The appellant shall pay the costs of the application assessed at Kshs 15,000/-.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 2023.

A. MABEYA, FCIArb

JUDGE

