



**Boniface v Commissioner of Domestic Taxes (Miscellaneous Application
27 of 2022) [2023] KETAT 240 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KETAT 240 (KLR)

**REPUBLIC OF KENYA
IN THE TAX APPEAL TRIBUNAL
MISCELLANEOUS APPLICATION 27 OF 2022
RM MUTUMA, CHAIR, RO OLUOCH, EN NJERU,
D.K NGALA & EK CHELUGET, MEMBERS
MARCH 31, 2023**

BETWEEN

AKUSALA BONIFACE APPLICANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

RULING

1. The Applicant filed a Notice of Motion dated January 28, 2022 under certificate of urgency on the same date and which is supported by an Affidavit sworn by the Applicant on the even date seeking for the following orders ;
 - i. That this matter be certified as urgent, and heard *ex parte* in the first instance.
 - ii. That the Appellant be granted leave to file an Appeal out of time before this Tribunal.
 - iii. That pending the hearing and determination of this application and appeal, the court gives an order granting the Applicant access to his Bank Account No 01503131403500 held at National Bank of Kenya.
 - iv. That costs of the application be borne by the Respondent.
2. The Notice of Motion application is based on the following grounds as stated in the Supporting Affidavit and in the written submissions filed by the Applicant on February 11, 2022 ;
 - i. The Respondent has caused the Appellant 's Bank account to be frozen and this is the Applicant 's salary account, and if it continues , the Applicant will be unable to discharge his mandate as a member of the Co-operative Tribunal, as the Applicant's salary and Daily Sustenance Allowance for circuit hearings passes through the same account.



- ii. The foregoing is due to an unfair administrative action, where the Respondent made inaccurate findings and conclusions, with the resultant effect of inflating the Applicant's tax obligations by exorbitant amounts in the assessment of the Applicant's tax.
- iii. The Applicant objected to these assessments on March 15, 2021. However, the Respondent did not give the Applicant any feedback thereto within the statutory 60 days period.
- iv. The Applicant having the legitimate expectation that the position of the objection stands, started to prepare to take advantage of the Voluntary Disclosure Programme in order to rectify any issues with the Respondent.
- v. That however, the Respondent issued a rejection to the objection on May 31, 2021, well after the statutory period, and issued another demand notice dated June 9, 2021 for payment of the same amount that were impugned in the first place.
- vi. That the said objection decision was issued out of time, and the Respondent did not offer any reasons for the rejection, thus breaching the rights owed to the Applicant.
- vii. That the Respondent proceeded to cause the freezing of the Applicant's accounts, which information was not even communicated to the Applicant. The Applicant only learnt about the same when he went to the Bank thinking there is a problem with his mobile phone application. It is at this point that the Applicant was issued with the Respondent's letter to the Bank, which was never issued to the Applicant.
- viii. That the Respondent is threatening to drain the funds of the Applicant, whereas the amounts are inaccurate and inflated, which will cause the Applicant even more inconveniences, pain and further tribulations.
- ix. That the Applicant attempted to engage with the Respondent, who have been taking the Applicant in circles, to the point that the time for the appeal has elapsed.
- x. That the Applicant avers that the intended appeal is merited and is not intended to waste the Tribunal's time, and has been brought in good faith, without undue delay, and the same is not vexatious, frivolous or a waste of the court's time.

3. The Respondent has opposed the Applicant's Notice of Motion application through Grounds of Opposition dated and filed on February 2, 2022 in which it stated as follows:-

- a. That the grounds for filing an appeal out of time are well set out in the *Tax Appeals Tribunal Act* and the Applicant has not invoked or demonstrated the conditions/reasons set therein to warrant grant of the prayers sought.
- b. That there is inordinate delay of over 7 months in bringing this application and filing the appeal and no sufficient reason has been given to warrant such delay.
- c. That no Notice of Appeal was ever filed by the Applicant.
- d. That further to grounds (a) and (b) and (c) above, the prayer for lifting agency notice is not merited.
- e. That the application thus has no merit, is misconceived, bad in law and ought to be struck out.

4. The Respondent vide its written submissions filed on February 11, 2022 submits that:-



- a. The Respondent submits that the legal threshold for a party seeking to be allowed to file an appeal out of time is premised on section 13 (3&4) of the TAT Act . That the Honourable Tribunal vide the section is granted the powers to allow an appeal to be filed out of time on application by a party seeking the same . That the grant is however subject to a satisfaction of certain conditions precedent that have to be met for the Honourable Tribunal to grant the leave.
- b. The Respondent submits further that while the Applicant has a legal basis for request for allowance to be allowed to file an appeal out of time, the powers for grant of the same is one that is issued on satisfaction of the conditions precedent found in section 13(4) of the TAT Act.
- c. Further , the Respondent submits that the powers to grant such prayers by the Honourable Tribunal is of a discretionary nature and need to be applied in consideration of the reasons for delay as have been given by a party before the leave is granted.
- d. The Respondent further submits that courts have over time enumerated the considerations to be taken into account before an application for the enlargement of time can be allowed. That in *Leo Sila Mutiso vs Hellen Wangari Mwangi* CA No 255 of 1997 it was stated:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled 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 reason for the delay , thirdly (possibly), the chances of the appeal succeeding if the application is granted .”

- 5. On the other hand, the Applicant in his submissions states that he had demonstrated that the circumstances to warrant orders to appeal out of time.
- 6. The Applicant avers that the TAT Act empowers the Tribunal to enlarge time for filing an appeal out of time, if the Applicant can satisfy two conditions, to wit;
 - a. An application made in writing [vide section 13(3) of the TAT Act,
 - b. The intended Appellant’s absence from Kenya, or sickness , or other reasonable cause, that may have prevented the applicant from filing the appeal.
- 7. The Appellant avers that his application for leave to appeal out of time has been formally filed before this Tribunal vide a Notice of Motion dated January 28, 2022 , which satisfies the first limb of the two conditions.
- 8. The Applicant submits that the second limb requires a plausible explanation that caused the delay in the filing of the appeal. The explanation needs to be reasonable, on a balance of probability. That in Nicholas Kiptoo Arap Salat -vs- IEBC and 7 others SCK App No 16 of 2014 [2014] eKLR , the Supreme court pronounced that:-

“A court or Tribunal has discretion to extend time for filing pleadings , and the court is enjoined to exercise the discretion to extend time , and such a discretion to be exercised on a case-by -case basis. Additionally , where there is a reasonable reason for the delay , the delay should be explained to the court . The court shall thereafter assess if there will be any prejudice suffered by the Respondents if the extension is granted.”



9. The Applicant avers that the Respondent sent an assessment and he duly objected to the assessment on March 15, 2021. The Respondent acknowledged the objection on March 25, 2021. However, the Respondent did not give the Applicant any feedback within the 60 days statutory period allowed for the Commissioner to make an objection decision .
10. The Applicant avers that he had a legitimate expectation that the position of the objection stands , and started preparing to take advantage of the voluntary Disclosure programme in order to rectify any outstanding issues with the Respondent.
11. The Applicant further avers that by May 25, 2021, his objection stood , and he did not anticipate any further enforcement measures from the Respondent , the period provided by the law having passed without a response.
12. That the Respondent issued an objection decision on May 31, 2021, well after the statutory period, and the Applicant only learnt of this late rejection after the Applicant was notified by the Bank that the Respondent had issued an agency notice, effectively freezing any drawings from the account of the Applicant.
13. The Applicant avers further that he attempted to engage with the Respondent, who has been taking him in circles further causing a delay in the filing of the appeal, the Applicant having honestly believed that the Respondent was capable of resolving the assessment issue administratively through internal mechanisms , as concerned a clear provision of the law in terms of time for making decisions under Section 51 (11) of the *Tax Procedures Act*.
14. The Applicant also submits that the balance of convenience favoured the Applicant, and there is no prejudice to be suffered upon the Respondent, should the Applicant be granted leave to file his appeal out of time for determination on its merits. The Respondent has not pleaded any prejudice if the appeal is to be admitted, while on the other hand disallowing the admission of the appeal would irretrievably deny the Applicant a chance to a fair administrative process, and condemn him unheard.
15. The Applicant asserted that the intended appeal is arguable with an overwhelming chance of success. He further states that the application herein is brought in good faith, and without any undue delay, and the same is not vexatious, frivolous, and is not likely to waste the court's time.
16. The Applicant therefore prays that the application be allowed in its entirety.

Analysis and Findings

17. The Tribunal having duly considered the submissions made by both parties makes the findings as hereunder ;
18. Section 51(2) and (3) (c) of the *Tax Procedures Act* provides ;

“A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing to the Commissioner within 30 days of being notified of the decision.

 - 3 A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if.....
 - d all the relevant documents relating to the objection have been submitted...”
19. The application before the Tribunal is a matter in which the Applicant is seeking leave for extension of time to file an appeal, against the Respondent's objection decision which was similarly issued outside the provided statutory period .



20. The Tribunal's jurisdiction for extension of time to file an appeal out of time is found in Section 13 of the TAT Act which provides ;

“3 The Tribunal may , upon application in writing , extend the time for submitting the documents referred in subsection (2).

4 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 giving notice of appeal within the specified period .”

21. The Tribunal is enjoined to determine the length and reason for the delay when considering an application for the extension of time to file appeal out of time. The power to extend time is discretionary and unfettered, but must be exercised judiciously and it is not a right to be granted to the applicant.

22. In determining such an application , guidance would be found in the case of *Joseph Ondiek Tumbo -vs- SONY Sugar Ltd* [2014] eKLR , where the Court cited the holding of Sir Thomas Bingham MR in Costellow -vs- Somerset County Council [1993] All ER 952, which summarizes the guiding principles for the court to consider as:-

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

b. Whether the application for extension of time has been brought without undue delay? ,

c. Whether the appeal is merited ?.

d. Whether there will be prejudice suffered by the Respondent if the extension is granted ?

23. On the criteria of the issues to be considered when granting an extension to appeal out of time , the Tribunal refers to the case of *Wasike vs Swala* [1984] KLR 591 , where the court laid a hierarchy of 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.

c. That the delay has not been inordinate.”

24. On whether there is a reasonable cause for the delay , the Tribunal considered what constitutes a reasonable reason for the delay , in the case of *Balwant Singh vs Jagdash Singh & others* [CA No 1166 OF 2006] , where it was held:-

“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 “.

25. The Applicant submitted that the delay in filing its appeal was occasioned by the act of the Respondent issuing its objection decision way past the 60 day statutory period allowed by the TPA , whilst the Applicant assumed the issue had been resolved by operation of the law , that the assessments no longer stood.



26. The Applicant submits that the Respondent, in addition to issuing the objection decision late, did not communicate the said decision to the Applicant. The Applicant avers that he only came to learn of the decision from his Bank when the Respondent enforced the same by placing agency notices on its bank accounts.
27. A perusal of the agency notice letter attached to the Supporting Affidavit confirms the same was addressed to the Applicant 's bank and received on December 29, 2021 . The Applicant has averred that he did not learn of this letter until January 2022 when he could not access his account ad he went to the Bank Branch to check what the problem was.
28. The Applicant further avers that when he learnt of the agency notice he made efforts to engage with the Respondent, and when they were not forthcoming he filed the application herein on January 28, 2022, within the same month of being seized of the information.
29. In view of the foregoing the Tribunal is satisfied that the Applicant had a reasonable cause for the delay , and has established a reasonable cause per the requirements of Section 13(4) of the TAT Act to justify enlargement of time.
30. The Tribunal having perused the Applicant's pleading and the submissions made is further satisfied that the Respondent's objection decision and demand was issued on June 9, 2021 , way past the 60-day statutory period allowed by Section 51(11) of the TPA ,which provides that the objection would be deemed to have been allowed by operation of the law . Without going to the merits and demerits of this submission, the Tribunal's view is that the Applicant has demonstrated on a balance of probability that his intended appeal has merit with a probability of success.
31. The Respondent has neither pleaded nor submitted on whether they may suffer prejudice if the application for leave is allowed, but the Applicant has pleaded that he stands to suffer loss and damage, and deny him an opportunity to fair administrative action by condemning him unheard, if the leave is not granted. The Tribunal is therefore satisfied that the balance of convenience tilts in favour of the Applicant.
32. The Tribunal having made the above conclusions deems it moot to delve into the other tests.
33. In view of the foregoing the Tribunal finds that the Applicant has met the statutory and judicially established threshold for the grant of an application for the enlargement of time to file an appeal out of time.

Disposition

34. Having carefully considered the submissions by both parties the Tribunal determines that the application has merit and consequently, the orders that commend themselves are as follows:-
 - a. The Applicant be and is hereby granted leave to file an appeal out of time.
 - b. The Applicant to file and serve the Notice of Appeal, Memorandum of Appeal, Statement of Facts and Tax decision within 15 days of the date of delivery of this Ruling.
 - c. The Respondent to file and serve its response to the appeal within the statutory period upon being served.
 - d. The agency notice issued against the Applicant's bank account at National Bank of Kenya be and is hereby unconditionally lifted.
 - e. No orders as to costs.



35. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2023.

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ROBERT M. MUTUMA

CHAIRPERSON

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RODNEY O. OLUOCH

MEMBER

.....
ELISHAH NJERU

MEMBER

.....
DELILAH K. NGALA

MEMBER

.....
EDWIN K. CHELUGET

MEMBER

