

REPUBLIC OF KENYA

IN THE TAX APPEALS TRIBUNAL AT NAIROBI

TAX APPEAL NUMBER 150 OF 2015

(Originally filed as CEAT No. 2 OF 2012)

BIDCO OIL REFINERIES LIMITED.....APPELLANT

VERSUS

THE COMMISSIONER OF CUSTOM SERVICES.....RESPONDENT

RULING

1. The Tribunal on the 9th day of December, 2015 ordered with the consent of the parties that, inter alia, the parties do file and serve on either party Witness Statements of a single expert on or before the 11th day of January, 2016.
2. The Respondent filed a Witness Statement of one **John Gathatwa** on the 28th day of January, 2016 and served the same upon the Appellant on the morning of 29th day of January, 2016 just before the matter was called out for hearing.
3. The Appellant raised objection to the non-compliance with the clear order of the Tribunal in regard to the filing and service of the expert Witness Statement on the part of the Respondent and more particularly to the statement of **John Gathatwa** who was not listed on the List of Expert Witnesses filed before the Tribunal by the Respondent on the 12th day of May, 2015.
4. The Respondent following the objection on the part of the Appellant offered reasons for late filing of the Witness Statement that were found wanting by the Tribunal considering the fact that **Mr. John Gathatwa** whose Statement was filed late is an employee of Kenya Revenue Authority who was all along available and the Tribunal noted the casual manner in which the Respondent purported subsequent to the objection to seek for leave of the Tribunal to have the Witness Statement admitted out of time.
5. The Tribunal upheld the objection of the Appellant in regard to the Witness Statement of **Mr. John Gathatwa** filed without leave of the Tribunal as to the enlargement of time for filing of the Witness Statement and introduction of a new expert witness. The Tribunal accordingly proceeded to order for the Witness Statement of **Mr. John Gathatwa** to be expunged from the record and for the matter to proceed to hearing.
6. The Tribunal while upholding the objection of the Appellant and in expunging the Witness Statement of **Mr. John Gathatwa** noted with the concession of the Counsel for the Respondent that non-compliance of the Tribunal's Orders made on the 9th day of December, 2015 with the consent of the parties was not a technicality as envisaged

under Article 159 of the Constitution of Kenya 2010 with regard to determination of matters without undue regard to technicalities.

7. The Respondent was aggrieved by the said decision of the Tribunal made on the 29th day of January, 2016 and proceeded to lodge an appeal against the decision to the High Court of Kenya at Nairobi vide Civil Appeal No. 33 of 2016. The Respondent is now before the Tribunal seeking an interlocutory relief by its Notice of Motion dated the 5th day of February, 2016 seeking a substantive order of:-

“2. THAT this Honourable Tribunal be pleased to grant an order to stay the proceedings in this Tax Appeal pending the hearing and determination of the High Court Appeal No. 33 of 2016 challenging the Tribunal’s Ruling and Order made on the 29th January, 2016”.

8. The application is based on the grounds in the body of the application as well as the Supporting Affidavit and the Further Affidavit of **David Ontweka** filed with the application before the Tribunal on the 5th day of February, 2016 and subsequently on the 4th day of March, 2016 respectively. In summary, the Respondent avers that further proceedings and hearing of the appeal before the Tribunal will impede the Respondent’s Constitutional right to access to justice and a fair hearing on the basis that the Respondent will be denied an opportunity to adduce evidence of a witness which is relevant, admissible and crucial to the determination of the appeal. The Respondent contends that unless the further proceedings are stayed the appeal lodged to the High Court will be rendered nugatory and merely academic.
9. The Appellant opposed the application through a Replying Affidavit sworn by **James Ochieng’ Oduol Advocate** on the 22nd day of February, 2016 and filed before the Tribunal on the 23rd day of February, 2016. In summary the purport of the opposition of the Appellant to the application is that the Respondent did not show sufficient cause as to why it was unable to file and serve the witness statement to **Mr. John Gathatwa** on time and that it is in the interest of the public that this appeal be expeditiously determined with due regard to the fact that the Appellant is one of the biggest tax payers and an employer to a large number of Kenyans. The Appellant is of the view that the application is not made in good faith.
10. The Tribunal directed the parties to file Written Submissions in respect of the application and both parties duly complied. The Respondent filed its Written Submissions on the 4th day of March, 2016 while the Appellant filed its Written Submissions in reply on the 14th day of March, 2016. The Counsels for the parties highlighted orally on the Written Submissions before the Tribunal on the 23rd day of March, 2016.
11. The Tax Appeals Tribunal Act No. 40 of 2013 and the Tax Appeals Tribunal (Procedure) Rules 2015 are silent as to the procedure and guidelines to be employed by the Tribunal in determining applications of the nature filed by the Respondent and the Tribunal is in the circumstances persuaded to adopt the test laid down for granting a stay of proceedings pending the determination of an appeal against the decision of the Tribunal. The Tribunal is guided by the decision in *Patel Lalji Ravji & Another Vs=*

National Land Commission & 20 Others (2015) eKLR in which Gacheru, J held that the Court's discretion in determining whether or not to grant stay of proceedings must be guided by any of the following three main principles;-

- a) Whether the applicant has established a prima facie arguable case/appeal;
- b) Whether the application was filed expeditiously; and
- c) Whether the applicant has established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought.

12. The Tribunal shall consider the facts placed before it and the entire submissions by both parties under the foregoing guidelines separately as follows;-

a) Whether the Respondent has established prima facie arguable case/appeal?

13. The Respondent in its Memorandum of Appeal filed before the High Court of Kenya at Nairobi as Civil Appeal Number 33 of 2016 has raised 9 grounds of appeal as against the Ruling and/or order of the Tribunal delivered on the 29th January, 2016.

The Respondent seeks in the appeal for orders that:-

- “ a) this appeal be allowed*
- b) The ruling and order of the Tax Appeal Tribunal delivered on the 29th January, 2016 be set aside;*
 - c) The Appellant's expert witness statement signed by John Gathatwa and filed on the 28th January, 2016 be deemed as properly on record and the witness be allowed to testify before the Tribunal;*
 - d) Costs of this appeal be awarded to the Appellant;*
 - e) In the alternative to the above this Honourable Court be pleased to make such further orders as it may deem necessary.”*

14. The Respondent clearly seeks for the complete and drastic reversal of the orders made by the Tribunal on the 29th day of January, 2016. The Tribunal in recognition of and in upholding the Respondent's right to appeal against its decision granted to the Respondent leave to appeal immediately subsequent to the delivery of its ruling at the instance of an application therefor on the part of the Respondent.

15. It is not appropriate and available to the Tribunal to determine the merits of the appeal lodged against its decision by the Respondent and it is sufficient for the Tribunal at this instance to note and recognize that the Respondent in exercise of its rights has appealed against the decision of the Tribunal. The High Court of Kenya shall have the unfettered opportunity to determine the merits of the appeal. This particular guideline is more appropriate when the application of this nature is filed before the Court dealing with the appeal lodged against the decision of the Tribunal otherwise the Tribunal may be seen as purporting to sit in appeal on its own decision if it were to consider whether the appeal raises a prima facie arguable appeal.

16. It is however necessary in spite of the foregoing to clearly point out that Ground No. 8 in the Memorandum of Appeal is completely misleading and in a most unfortunate manner imputes bad intent on the part of the Tribunal. For the clearance of the record it

is important to point out that at no material time was it brought to the attention of the Tribunal prior to the delivery of its Ruling on the 29th day of January, 2016 that there was non-compliance of the Order on the filing and service of witness statement on the part of the Appellant and the Tribunal did not condone any infraction of its orders on the part of any of the parties.

b) Whether the application was filed expeditiously?

17. The Respondent filed the application under consideration before the Tribunal on the 5th day of February, 2016 and the application was in the circumstances filed expeditiously and without any undue delay on the part of the Respondent. If this was the substantive guideline for consideration in the determination of the application before the Tribunal then the Respondent is without fault on this.

c) Whether the Respondent has established sufficient cause to the satisfaction of the Tribunal that it is in the interest of justice to grant the orders sought?

18. This remains the foremost guideline in determining such applications before the Tribunal to the extent that it seeks to address the material issue as to whether the application has merit.

19. The Respondent contends both through its written Submissions and the oral Submissions tendered before the Tribunal on the 23rd March, 2016 by its Learned Counsel Mr. Waweru Gatonye that the said **Mr. John Gathatwa** is a crucial expert witness who served in a Team of Technical Experts (TTE) constituted in September, 2009 following an agreement of the parties for the purposes of looking into the dispute and interpret the statutory regime and parameters of determination of the value of assessment as provided for under the East African Community Customs Management Act 2004. That his evidence is crucial in the just determination of the case and that further proceedings and hearing of the appeal will deny the Respondent an opportunity to adduce the testimony and evidence of such a critical witness to its case.

20. **Mr. Waweru Gatonye**, the Learned Counsel for the Respondent was emphatic as to the fact that the amounts of taxes in dispute were in the sum of **Kshs. 1,377,505,229/=** which is a colossal amount for which the collection thereof is a matter of great public interest. That it is crucial for the Tribunal to do all it can to achieve a fair and a meritorious determination of the dispute.

21. The Respondent urged the Tribunal to consider and follow the precedent set out in past decisions in *Anastacia Agoro (T/a Sada Health Clinic) =Vs= Josephat Njuguna & 2 Others (2014) eKLR* where Justice Waweru, allowed the application seeking for stay of proceedings following the refusal of the Business Premises Rent Tribunal to allow a tenant to adjourn the hearing for the purposes of calling a valuer. The decision was cited with approval by Justice Kasango, L.J in *Joshua Njau =Vs= Madzuya Omari Mwamashango & Another (2014) eKLR* when the court allowed an application for stay of proceedings in an appeal challenging the refusal of the Lower Court to re-open the case and adduce extra evidence.

22. The Respondent urged the Tribunal to allow the relief sought in the application on the grounds that the Respondent has satisfied all the prerequisites necessary for allowing the application for stay of proceedings pending the hearing and determination of the appeal lodged to challenge the Tribunal's Order expunging the witness statement of **Mr. John Gathatwa** from the record.
23. The Appellant through its Written Submissions and the oral Submissions tendered on its part by its counsel Mr. Ouma on the 23rd day of March, 2016 contends that the application is as a consequence of the Respondent's consistent failure to comply with the directions of the Tribunal and that the filing of the Witness Statement of **Mr. John Gathatwa** was in contempt and disregard of the Order of the Tribunal and was without adherence to procedure before the Tribunal. The Appellant finds the application without merit and an abuse of the process of the Tribunal with the witness statement of **Mr. John Gathatwa** having been casually introduced without leave of the Tribunal as regards the introduction of a new Witness and filing of a witness statement out of time as Ordered by the Tribunal.
24. The Appellant referred the Tribunal to various legal authorities and/or judicial decisions the purport of which was the emphasis on due compliance with Court Orders and the fact that the rules of procedure ought to be applied equally to both parties to the appeal noting that every person is equal before the law and has the right to equal protection and equal right of the law.
25. The Tribunal has duly considered both the written and oral submissions tendered on the part of both parties as regards the merit of the Respondent's application for stay of further proceedings and hearing pending the determination of the Civil Appeal No. 33 of 2016 filed before the High Court of Kenya at Nairobi and has made the following material observations:-
- a) Both parties had prior to the Orders made by the Tribunal with the consent of the parties on the 9th December, 2015 as regards filing of expert witness statements duly filed their separate Lists of Experts Witnesses to be called to testify in this appeal.
 - b) The name of the Respondent's witness to wit **Mr. John Gathatwa** was not on the List of expert witness statement filed by the Respondent on the 12th day of May, 2016 and this was inspite of the fact that **Mr. John Gathatwa** like the rest of the witnesses whose names were on the list filed before the Tribunal an employee of the Kenya Revenue Authority and his role in the Team of Technical Experts (TTE) was clearly within the knowledge of the Respondent at the time of filing of the list of its expert witnesses.
 - c) That when the matter came up for hearing before the Tribunal on the 29th day of January, 2016 the Respondent in most casual manner introduced the Witness Statement of **Mr. John Gathatwa** without in any manner seeking for leave of the Tribunal to introduce a new witness and to have the Witness statement admitted out of the time

ordered by the Tribunal for filing and service of the witness statements on either part of the parties to the appeal.

- d) That following an objection on the part of the Appellant as to the filing of the Witness Statement of **Mr. John Gathatwa** the Respondent attempted an explanation for the late filing of the Witness Statement as having been caused by bureaucracies involved in the procurement process for external expert witnesses and yet **Mr. John Gathatwa** was an employee of the Kenya Revenue Authority and therefore he was easily accessible for any desired witness statement and no explanation was given for the abandonment of the filed expert witnesses in favour of **Mr. John Gathatwa**.

26. The Tribunal finds the failure of the Respondent to comply with the Orders made by the Tribunal with the consent of the parties to be completely inexcusable and cites with approval the holding in the case of *Susan Chepatet LoKwangi =Vs= Paron Lekwangi Komolmoi & Another (2015)eKLR* that:

“If parties were to be allowed to file documents any time they wish or file statements as they wish and without leave then there is no need for having the rules. Rules have to be followed. The court can duly excuse a party for example in failure to serve a document within the days required but it cannot excuse a party who files documents without leave of Court and too late in the day. It was made in an unprocedural manner. The same cannot be allowed. The list of witness and witness statement are hereby expunged from the Court record”.

27. The Respondent is expected in pursuant to **Article 232 (2)** as read together with **Article 232(1)** of the Constitution of Kenya, 2010 to demonstrate high standards of ethics and to provide timely and accurate information. The misrepresentation on the part of the Respondent as to the reason for the delay in the filing of the Witness Statement of **Mr. John Gathatwa** deserved a reprimand from the Tribunal and completely makes the Respondent undeserving of any exercise of discretion in its favour as regards the non-compliance with clear and express orders of the Tribunal.
28. The Tribunal in pursuant to the provisions of **Section 13(7)** of the Tax Appeals Tribunal Act No. 40 of 2013, is to hear and determine appeals filed before it within Ninety (90) days of the date of filing of the appeal and to that extent time is of great essence to the determination of the appeals lodged with the Tribunal and this is a fact that ought to be well within the knowledge of the parties hereto and ought to have been addressed by the Respondent as relates to its application before the Tribunal.
29. With regard to the public interest issue raised by the Respondent as relates to the collection of substantive amount of tax in dispute in this appeal the Tribunal finds that there is a public duty upon the Respondent to ensure the expeditious determination of the appeal through upholding the values and principles imposed on state corporations and organs under Article 232 of the Constitution of Kenya, 2010 in efficient, effective, prompt and responsive discharge of its functions and mandate at all material times.

The Respondent has breached its public duty and offended public interest by its failure to timeously comply with the directions and orders of the Tribunal and by frustrating the expeditious determination of the appeal.. The public interest is expected to be assuaged by the Respondent's vigilance in obeying and complying with the orders of the Tribunal and not otherwise howsoever.


30. The tribunal has considered the authorities cited by the Respondent and finds the same distinguishable to the extent that the appeals lodged were as against orders made that did not involve elements of disregard of previous orders made by the Court with the consent of the parties. In this appeal the Respondent disregarded obvious Court Orders and did not offer appropriate amends. There were equally no clear timelines for the determination of the proceedings being stayed before the Tribunal and the Subordinate Courts.

31. The Tribunal finds the application of the Respondent to be devoid of any merit and there is absolutely no sufficient cause for the Tribunal to exercise its discretion in favour of the Respondent in respect of the application before the Tribunal.

The Tribunal in the foregoing circumstances proceeds to dismiss the Respondent's application with costs to the Appellant.

THESE ARE THE ORDERS OF THIS HONORABLE TRIBUNAL.

DATED AND DELIVERED AT NAIROBI THIS 28th DAY OF JUNE 2016


JOSEPHINE K. MAANGI
CHAIRPERSON OF THE PANEL


ERIC NYONGESA WAFULA.....MEMBER


PONANGIPALLI V.R. RAO.....MEMBER


JOLAWI O. OBONDO.....MEMBER


JOSEPH M. WACHIURI.....MEMBER