

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
CIVIL APPEAL No. 0006 OF 2021
(Arising from Tax Appeal No. 0185 of 2020)

FARID MEGHANI**APPELLANT**

VERSUS

UGANDA REVENUE AUTHORITY **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a) The procedural history:

On or about the 6th of August, 2019 the appellant purchased residential property comprised in LRV 629 Folio 11 Plot 41 Lake Drive sat Nakawa, from M/s Lamba Enterprises Limited at the price of US \$ 600,000. Consequently, he was on 20th December, 2019 issued with an Administrative Tax Default Assessment in the sum of shs. 133,200,000/= payable by 3rd January, 2020, for withholding tax chargeable on the said transaction. On 27th December, 2019 the appellant filed an objection to that assessment. On 24th March, 2020 the respondent notified the appellant of its decision on that objection, disallowing the objection on account of the appellant’s “failure to withhold account for tax on purchase of a business asset,” as required by section 118 (B) 2 of *The Income Tax Act*.

On 11th December, 2020 the appellant filed an application seeking leave to appeal that decision out of time, on grounds that he was prevented from appealing within the six months’ period provided for by the law, by reason on the Presidential Directives on Covid19 which took effect on 18th March, 2020 that imposed a nationwide lockdown, initially involving 32 days’ suspension of mass gathering until 18th April 2020, which restricted the movement of persons alongside 34 other restrictions, which period was thereafter from time to time extended on multiple occasions, including pronouncements made on 30th March, 2020 of extension initially by an extra 14 days and eventually by an extra 21 days until 5th May, 2020.

The appellant’s submissions before the Tax Appeals Tribunal:

Counsel for the appellant submitted that under rule 11 (1) of *The Tax Appeals Tribunal (Procedure) Rules* the Tribunal has powers to extend time for reasonable cause. The appellant was incapacitated by the nationwide

Covid19 lockdown that was pronounced on 18th March, 2020. He was notified by the respondent, of the decision on the objection on 24th March, 2020 while that lockdown was still in force. The period was from time to time extended over the next three months, exceeding the thirty days within which the appellant should have filed an application for review. Being a person of advanced age and in light of the post-surgical condition of his back, the appellant was in the high risk category, and had to remain at home as extra precaution against the risk of contracting the virus. The intended application for review is meritorious in so far as the seller did not receive any financial benefit since the money paid by the appellant as the agreed purchase price was paid directly to the sellers' bank in settlement of outstanding sums on a mortgage. The application ought to be allowed.

b) The respondent's submissions before the Tax Appeals Tribunal;

Counsel for the respondent submitted that the restrictions on movement were eventually lifted on 2nd June, 2020 by virtue of rule 7 (4) of *The Public Health (Control of Covid19) (No.2) (Amendment No. 3) Rules, 2020*. This was long before expiry of the six month period provided for by the law for the lodgement of applications for review. The application for extension of time was filed on 11th December, 2020 which was way beyond the time allowed for filing such applications. The appellant's delay from 2nd June, 2020 to 11th December, 2020 remained unexplained, yet it could not be attributed to the Covid19 restrictions. The appellant had not furnished any reasonable cause to justify an extension of time. The application ought to be dismissed.

c) Ruling of the Tax Appeals Tribunal.

In its ruling delivered on 29th January, 2021 the Tax Appeals Tribunal found that under section 16 (1) (c) of *The Tax Appeals Tribunal Act* the appellant had thirty (30) days within which to apply for a review of that decision. Similarly under section 16 (7) of the Act he had sixty (60) days within which to file the application. Whereas under rule 11 (6) of *The Tax Appeals Tribunal (Procedure) Rules* the Tribunal is empowered to extend time within which such an application may be lodged, the discretion is exercised on basis of reasonable cause. Such cause must relate to the inability to file the application within the prescribed time. The appellant was on 24th March, 2020 that the appellant was notified of the decision to his objection. He had up to 24th April, 2020 to file the application for review, failure of which he could have taken advantage of the six months' period provided for by section 16 (7) of *The Tax Appeals Tribunal Act*, hence up to 24th September, 2020, to file an application for extension of time. The Tribunal can only exercise its discretion where an

application for extension of time is filed within six months after notification of the taxation decision. The application was filed on 11th December, 2020 outside the six months period. The lockdown was finally lifted on 22nd June, 2020 and from then up to 24th September, 2020 the appellant could have filed his application. The length of delay was outside that within which the Tribunal can exercise its discretion. There was no explanation for the delay that occurred after 22nd June, 2020 to justify the grant of the application. The application was accordingly dismissed with costs.

d) The grounds of appeal:

The appellant was dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The learned members of the Tribunal erred in law when they misapplied the provisions of section 16 (1) (c), (2) and (7) of *The Tax Appeals Tribunal Act* in MA No. 185 of 2020 in respect of time within which to apply for extension of time.
2. The learned members of the Tribunal erred in law when they wrongly applied the provisions of section 16 (1) (c), (2) and (7) of *The Tax Appeals Tribunal Act* in computing the time in which to apply for extension of time in MA No. 185 of 2020.
3. The learned members of the Tribunal erred in law when they did not apply Rule 161 (6) (b) and (c) of *The Tax Appeals Tribunal (Procedure) Rules* when determining in MA No. 185 of 2020.
4. The learned members of the Tribunal erred in law when they failed to take into consideration Government directives having the force of law on the provisions of section 16 (1) (c), (2) and (7) of *The Tax Appeals Tribunal Act* in MA No. 185 of 2020.

It is on that account that the appellant seeks an order extending time within which to lodge his application for review of the respondent's objection decision issued on 24th March, 2020.

e) The submissions of counsel for the appellant:

Counsel for the appellant M/s Kimara Advocates and Consultants submitted that the first two grounds are that the tribunal imported limitation period within which to apply for extension of time under section 16 (1) (2) (c) of *The Tax Appeals Tribunal Act* for review of taxation of 30 days the Act in section 16 (2), yet it was six months under section 16 (7) in case of failure to notify. A tax assessment was raised on the appellant but it

November, 2019 the appellant objected to it. The objection decision was delivered during the first nationwide lockdown. It was communicated by email on 24th March, 2020; four days after the nationwide lockdown was announced. The 30 days elapsed on 23rd April, 2020 during the lockdown. The time was reckoned from 24th March, 2020. They could not interpret by importing. If the Legislature had intended to impose a limitation on time for seeking leave, they would have said so explicitly. The Tribunal found that their discretionary powers are limited to the six months period. The considerations under rule 11 (6) (b) and (c) of *The Tax Appeals Tribunal Regulations*. They never applied the principles to the facts. They did not consider the effect of the lockdown. The tribunal should have acted equitably. The regulations of the lock down even suspended some rights. The appellant had undergone back surgery and his movement was restricted.

f) The submissions of counsel for the respondent;

Counsel for the respondent from the respondent's Legal Services and Board Affairs Department, submitted that the application was outside the six months. There was no proof of back surgery. Section 27 (2) of *The Tax Appeals Tribunal Act* provides for the mode, it is bay way notice of appeal. The appeal is against a proper exercise of discretion and should fail.

g) The decision;

The decision appealed is one reached by pure exercise of discretion by the Tax Appeal Tribunal under rule 11 (6) (b) and (c) of *The Tax Appeals Tribunal Regulations* when it rejected the appellant's application for extension of time within which to apply for the review of a decision of the respondent on a tax objection rendered on 24th March, 2020. Discretion is the faculty of determining in accordance with the circumstances what seems just, fair, right, equitable and reasonable. "Discretion" cases involve either the management of the trial and the pre-trial process; or where the principle of law governing the case makes many factors relevant, and requires the decision-maker to weigh and balance them. Just as the factors for consideration could never be absolute, there could never be a gauge to measure the accuracy of such decisions. Unless the exercise of discretion is obviously perverse, an appellate court should be slow to set aside discretionary orders of courts below.

Because these assessments call for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, identification of error in the Tribunal's

exercise of discretion is the basis upon which the court will uphold the appeal. It would be wrong to determine the parties' rights by reference to a mere preference for a different result over that favoured by the Tribunal at first instance, in the absence of error on its part. If the Tribunal acted upon a wrong principle, or allowed extraneous or irrelevant matters to guide or affect it, if it mistook the facts, if it did not take into account some material consideration, or where it is not evident how it reached the result embodied in its order, or where upon the facts the order is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the Tribunal thus his or her determination should be reviewed

The general rules governing appeals from such orders seem well settled. Courts in Uganda have, as a matter of judicial policy, exercised considerable restraint in intervening in decisions characterised as involving the exercise of a discretion (see *Banco Arabe Espanol v. Bank of Uganda, S. C. Civil Appeal No. 8 of 1998*). Where the decision challenged involves the exercise of a discretion, broadly described to include states of satisfaction and value judgments, the appellant must identify either specific error of fact or law or inferred error (e.g. where the decision is unreasonable or clearly unjust). The appellate court will not interfere with the exercise of discretion unless there has been a failure to exercise discretion, or failure to take into account a material consideration, or an error in principle. It should not interfere with the exercise of discretion unless it is satisfied that the Tribunal in exercising its discretion misdirected itself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Tribunal has been clearly wrong in the exercise of its discretion and that as a result there has been injustice (see *Mbogo and another v. Shah [1968] 1 EA 93*).

It is trite that an appellate court is not to interfere with the exercise of discretion by a Tribunal unless satisfied that in exercising that discretion, the Tribunal misdirected itself in some matter and as a result came to wrong decision, or unless manifest from case as whole, the Tribunal was clearly wrong in exercise of discretion and injustice resulted (see *National Insurance Corporation v. Mugenyi and Company Advocates [1987] HCB 28; Wasswa J. Hannington and another v. Ochola Maria Onyango and three Others [1992-93] HCB 103; Devji v. Jinabhai (1934) 1 EACA 89; Mbogo and another v. Shah [1968] E.A. 93; H.K. Shah and another v. Osman Allu (1974) 14 EACA 45; Patel v. R. Gottfried (1963) 20 EACA, 81; and Haji Nadin Matovu v. Ben Kiwanuka,*

S. C. Civil Application No. 12 of 1991). A Court on appeal should not interfere with the exercise of the discretion of a Tribunal merely because of a difference of opinion between it and the Tribunal as to the proper

order to make. There must be shown to be an unjudicial exercise of discretion at which no court could reasonably arrive whereby injustice has been done to the party complaining.

The appellate court will intervene where the Tribunal acted un-judicially or on wrong principles; where there has been an error in principle (see *Sheikh Jama v. Dubat Farah* [1959] 1 EA 789; *Hussein Janmohamed and Sons v. Twentsche Overseas Trading Co Ltd* [1967] 1 EA 287; *Banco Arabe Espanol v. Bank of Uganda, S. C. Civil Appeal No. 8 of 1998* and *Thomas James Arthur v. Nyeri Electricity Undertaking* [1961] 1 EA 492). As such, the Tribunal is entitled to deference in the absence of an error in law or principle, a palpable and overriding error of fact, or unless the decision is so clearly wrong as to amount to an injustice. Generally, appellate courts will only interfere with exercise of discretion by a Tribunal where the Tribunal has incorrectly applied a legal principle or the decision is so clearly wrong that it amounts to an injustice. Although there is a presumption in favour of judicial discretion being rightly exercised, an appellate court may look at the facts to ascertain if discretion has been rightly exercised.

The formulation and application of the above rule reflects an inherent tension where legislation both confers a power on a judicial officer to make a subjective choice and also provides a right of appeal from that choice. An appeal of this nature requires the appellate court to exercise judgment as to the appropriateness of its intervention, while deferring to the exercise of discretion by the Tribunal, in light of the nature of the appeal, the issues of fact and law involved, the primary facts and inferences presented to the Tribunal, the level of satisfaction, the value judgments involved, rule-application, reasonableness of the decision, proportionality and rationality of the decision, in particular as to whether its decision will provide a more just outcome.

Therefore, allowing an appeal from a discretionary order is predicated on proof of: (i) “specific error,” i.e. an error of law (including acting upon a wrong principle), a mistake as to the facts, relying upon an irrelevant consideration or ignoring a relevant consideration, or (exceptionally) giving inappropriate weight to such considerations (relevancy grounds); and (ii) “inferred error,” i.e. where, in the absence of identification of specific error, the decision is regarded as unreasonable or clearly unjust. Where inferred error is found, this will have been brought about by some unidentifiable specific error.

The central theme in all four grounds of the appeal, and as per the submissions of counsel for the applicant, is that the Tribunal erred when it found that the exercise of its discretionary powers to extend time is limited to applications made within six months of the notification of the decision on a taxation objection. Furthermore,

that in light of the considerations under rule 11 (6) (b) and (c) of *The Tax Appeals Tribunal Regulations*, the Tribunal erred when it failed to apply those principles to the facts, by its failure to consider the effect of the lockdown upon the appellant. Lastly, that the tribunal should have acted equitably in light of the merits of the intended application for review. The appeal therefore raises two key issues, that is; (i) whether the powers of the Tribunal to extend time within which to apply for review are limited to applications filed within six months of the notification of a taxation decision; and (ii) whether the Tribunal erred when it dismissed the application.

First issue; whether the powers of the Tribunal to extend time within which to apply for review are limited to applications filed within six months of the notification of a taxation decision.

According to section 16 (1) (c) of *The Tax Appeals Tribunals Act*, an application to a tribunal for review of a taxation decision must be lodged with the tribunal within thirty (30) days after the person making the application has been served with notice of the decision. Similarly, section 25 (1) of *The Tax Procedures Code Act, 14 of 2014* provides that a person dissatisfied with an objection decision may, within thirty (30) days after being served with a notice of the objection decision, lodge an application with the Tax Appeals Tribunal for review of the objection decision. However, section 16 (7) of *The Tax Appeals Tribunals Act* provides that an application for review of a taxation decision has to be made within six (6) months after the date of the taxation decision. The two sets of statutory provisions clearly specify two different time periods for undertaking the same act, i.e. the filing an application to a tribunal for review of a taxation decision, yet courts are required to construe statutes to avoid unreasonable results, and further to presume that the Legislature does not intend to enact useless or meaningless legislation. As a general rule, courts should construe statutes to avoid unreasonable results and should presume that the Legislature does not intend to enact useless or meaningless legislation.

One of the cardinal rules of statutory interpretation is that statutes are to be read as a whole, in context, and, if possible, the court is to give effect to every word of the statute. The court is bound to give consistent, harmonious, and sensible effect to all of the parts of a statute, to the extent possible. Thus, in cases involving statutory construction, courts are not permitted to consider only a certain isolated part or parts of an act, but are required to consider and construe together all parts thereof in *pari materia*. It is the duty of the court, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and

sensible.

Certainty in law is the cornerstone of the state governed by the rule of law and the principle of certainty of taxation is the ideological basis of all modern tax systems. Certainty has several benefits; it lessens transaction costs to the taxpayer and the taxing authority, it facilitates predictability and lets everybody plan his or her financial transactions, and it promotes faith in the system. Therefore when faced with conflicting provisions or interpretations in tax legislation, the law is that such provisions should be interpreted in favour of the taxpayer. This is due to a number of reasons. Firstly, tax law significantly restricts the rights of private actors and, primarily, property rights. Tax law includes a large number of coercive components, which requires preciseness in establishing the rights and duties of all relevant actors, as well as clearly established tax procedures. Secondly, tax law is excessively complex.

From the position of legal certainty, legal rules must accurately fix the requirements that are imposed on people's behaviour. In this context, tax relations require the most precise regulation and control by the state. Effective functioning of the tax system is impossible when the will of the state aimed at regulating tax relations is not strictly defined and equally understood by all addressees of tax norm. Certainty of a tax rule guarantees its correct understanding, interpretation, and application.

In the instant case, in section 16 (1) (c) of *The Tax Appeals Tribunals Act* and section 25 (1) of *The Tax Procedures Code Act, 14 of 2014* the period of thirty (30) days is reckoned "from the time the applicant is served with notice of the decision," while in section 16 (7) the period of six (6) months is reckoned "from the date of the taxation decision." On the other hand, by implication, rule 11 (a) of *The Tax Appeals Tribunals (Procedure) Rules, SI 50 of 2012* requires the filing of applications for review within forty five (45) days from "the date the applicant was served with a notice of the taxation decision." The question arises as to which of these provisions prevails in the determination of the period specified for the filing an application to a tribunal for review of a taxation decision. To this end, it is the duty of the court, as far as practicable, to reconcile the three provisions so as to make them consistent, harmonious, and sensible.

Firstly, the law is that a general provision should yield to special provision, therefore special statutes which limit the time in which particular procedural steps can be taken prevail over general statutes limiting such time. Alternatively, it can be said that where a Statute contains both a general provision limiting time as well as specific provision, with the latter treating the common subject matter more specifically or minutely than the

former, the latter must prevail. Where a general provision and a specific one in a statute relating to the same subject matter cannot be reconciled, the special or specific provision ordinarily will control. The provision more specifically directed to the matter at issue prevails as an exception to or qualification of the provision which is more general in nature, provided that the specific or special provision clearly includes the matter in controversy. The rule adopted and applied is one of harmonious construction whereby the general provision, to the extent dealt with by the special provision, is impliedly repealed. This rule has application in construction of taxing statutes along with the proposition that the provisions must be given the most beneficial interpretation.

A consistent, harmonious, and sensible interpretation would thus require that both section 16 (1) (c) of *The Tax Appeals Tribunals Act* and section 25 (1) of *The Tax Procedures Code Act, 14 of 2014* being contained in special statutes, apply in all cases in which the decision is formally communicated to the applicant, while section 16 (7) of *The Tax Appeals Tribunals Act* applies to those situations where the decision is not formally communicated to the applicant, who somehow later gets to know of its existence. As regards rule 11 (a) of *The Tax Appeals Tribunals (Procedure) Rules, SI 50 of 2012*, according to section 14 (4) of *The Interpretation Act*, any provision of a statutory instrument which is inconsistent with any provision of the Act under which the instrument was made is void to the extent of the inconsistency. Since these rules were made under section 22 (3) of the *Tax Appeals Tribunals Act*, section 16 (1) (c) whereof specifies a period of thirty (30) days, rather than the forty five (45) days stated in the rules, that provision is void to the extent of that inconsistency. The time limit is thirty (30) days “from the time the applicant is served with notice of the decision.”

When a period of limitation is stated in days or a unit of time, the day of the event that triggers the period is excluded. Every day thereafter is counted, including intermediate Saturdays, Sundays, and legal holidays, the last day of the period and include. But if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday (see section 34 of *The Interpretation Act*). Therefore, since the decision was communicated to the appellant by email on Tuesday 24th March, 2020, the 30 days elapsed on Thursday 23rd April, 2020.

However Section 16 (2) of *The Tax Appeals Tribunals Act*, provides that a tribunal may, upon application in writing, extend the time for the making of an application to the tribunal for a review of a taxation decision. Similarly, rule 11 (1) of *The Tax Appeals Tribunals (Procedure) Rules, SI 50 of 2012* provides that the

Tribunal may, in its discretion, upon the application of the applicant in writing, extend the time for making an application. In none of the two provisos is a time limit imposed for the consideration of an application for extension of time. To the contrary, applications for extension of time may be made before the expiration of a limited time, after the expiration of a limited time, before an act is done or after an act is done. Such provisions ordinarily envisage four scenarios in which extension of time may be granted, namely; (a) before expiration of the limited time; (b) after expiration of the limited time; (c) before the application is filed; (d) after the application is filed (see *Crane Finance Co. Ltd v. Makerere Properties Ltd, S. C. Civil Appeal No. 1 of 2007*). The Tribunal therefore misdirected itself when it misconstrued section 16 (7) of *The Tax Appeals Tribunals Act* as limiting the period within which an application for extension to time may be filed. This though did not materially affect the justice of the case.

Second issue; whether the Tribunal erred when it dismissed the application.

It is trite that other than in cases in respect of which its rules specify a fixed period which may not be extended, the duration of time limits provided for in the rules of any court or tribunal or time limits set by such court or tribunal, may be extended on application. In that regard, rule 11 (2) of *The Tax Appeals Tribunals (Procedure) Rules, SI 50 of 2012* requires an application for extension of time to be in writing supported by an affidavit stating reasons why the applicant was unable to file an application against the Commissioner General in time. The considerations for such extension are specified in rule 11 (6) as; - (a) absence from Uganda; (b) illness; or (c) any other reasonable cause. Just like “sufficient reason,” “any other reasonable cause” must relate to the inability or failure to take a particular step in time. A motion to extend must set forth with particularity, the facts said to constitute reasonable cause for the requested extension; mere conclusory allegations lacking in factual detail are not sufficient.

The Court takes judicial notice of the fact that by reason on the Presidential Directives on Covid19 which took effect on 18th March, 2020 a nationwide lockdown was imposed, initially for 32 days thereby suspending mass gathering until 18th April 2020, which restricted the movement of persons alongside 34 other restrictions, which period was thereafter from time to time extended on multiple occasions, including pronouncements made on 30th March, 2020 of extension initially by an extra 14 days and eventually by an extra 21 days until 5th May, 2020. It is only on 4th May, 2020 when limited measures of opening-up in the first phase were announced that permitted travel for whole sellers, hardware shops, repair workshops (garages), metal and wood workshops, insurance providers, a quota of 30 lawyers at any one time to provide urgent legal

services to the different businesses and to handle urgent criminal matters, restaurants could only be allowed to provide take-away services, and warehouses, but travelling only by; (i) buses (either owned or hired by the employer); (ii) cycling to the work place by bicycle; or (iii) walking to the work place. The ban on public and private passenger vehicles continued.

It was during the pronouncements of 1st June, 2020 that members of the public were permitted to use private vehicles from 2nd June, 2020 so long as no more than three people were in the vehicle at one time. Following the issuance of face masks, public transport would be permitted to resume at half capacity from Saturday, 4th June, 2020 except in districts located along border crossings with South Sudan, the Democratic Republic of Congo, Kenya, and Tanzania. Shops, hotels, and restaurants were to resume operations from 26th May, 2020 in accordance with social distancing guidelines. Gyms, bars, and salons remained closed. Meanwhile, the nationwide curfew, remained in place from 19:00 to 06:30 through 8th June, 2020.

It is at the address of 20th September, 2020 that schools were re-opened for the candidate classes of P-7, S-4, S-6, finalists in tertiary colleges and finalists in universities (however this was later to change when it was announced that the schools would be opened in January, 2021 and the rest of the economy would be opened in the same month), the international airport and land borders were opened for tourists, coming in and going out, provided they tested negative 72 hours before arrival in Uganda and provided the tour operators ensured that the tourists did not mix with the Ugandans, restrictions on movements on border districts were lifted, places of worship were reopened with specified precautions, open air activities of sports were re-opened provided there were no spectators and the players were tested for Covid-19, 72 hours before, mass gatherings were still prohibited and so were mobile markets, monthly cattle auction and produce markets, bars, casinos, gaming centres and cinemas.

It is trite that whereas a person is required to perform an act, the environment may create an overwhelming barrier that limits action. Whereas “disability” primarily means want of capacity of the legal qualification to act, sometimes inability may constitute disability. “Inability” means want of physical power or facility to act. Inability assumes that the litigant is fully capable of taking the necessary action in that there is no personal incapacity but some extraneous circumstances render the litigant unable to take the required procedural action. Therefore when a litigant is under a disability, time limits which were due to expire during that period are ordinarily suspended for such a duration as statute may provide, or may be suspended for the period of that disability, or in the alternative, the required step may be taken within a reasonable time from the date

when the person ceased to be under a disability, in any event not exceeding six months, notwithstanding that the period of limitation has expired. Suspending or extending a time limit is applicable only to situations where the prescribed time lapses before termination of the disability, meaning that in such situations time is tolled or suspended by the number of days that the disability continued, which period does not count against the time remaining for taking the required step.

Although there is no express provision in law to extend the time for a person who is unable to take a required time bound procedural step apart from his or her disability arising from want of capacity or the legal qualification to act, the expression has been liberally construed to include inability due to extraneous circumstances which make taking the required time bound procedural step more difficult, even if it does not make it impossible, such as imprisonment on a criminal charge, or in execution under order of court (see *Siya John v. The Attorney General* [1972] HCB 86; *Mungecha FredM. v. Attorney General* [1981] HCB 34 and *Sempa James v. Attorney General* [1981] HCB 32), and absence from jurisdiction. A condition that is limiting must be beyond the control of the litigant and defined as problematic by the standard of a reasonable person for it to become a disability. It is in that regard that the 18th March, 2020 to 2nd June, 2020 nationwide lockdown imposed in mitigation of the spread of covid 19, should be construed as having created a situation of disability, since its violation constituted a criminal offence under rule 17 of *The Public Health (Control of COVID-19) Rules, 2020*, and rule 9 of *The Public Health (Control of CO VID - 19) (No. 2) Rules, 2020*. Since the decision was communicated to the appellant by email on 24th March, 2020, four days after the nationwide lockdown was announced, and the 30 days elapsed on 23rd April, 2020 during the lockdown, the global pandemic was, in my judgment, a good and sufficient cause justifying the appellant's inactivity up to 2nd June, 2020.

When a litigant misses a deadline, it might seem obvious that it resulted from "negligence," by reason of the fact that little or no attention was given to the matter or it was left undone or unattended through carelessness. Where a decision not to act is made, there is no negligence, but there is a range of possible explanations for a failure to comply with a filing deadline, from being prevented from doing so by forces beyond a party's control to cases where a party may choose to miss a deadline for a very good reason due to inadvertence, miscalculation or negligence in between..

The focus in the procedural context of an extension of time to file a pleading is on the reason for delay and whether it was within the control of the applicant as outweighing the other considerations. A finding of

excusable delay involves an equitable determination that should incorporate all relevant factors, including; - (i) the length of delay and its potential impact on the proceedings; (ii) the reasons for the delay, including whether it was within the reasonable control of the applicant; and (iii) the danger of prejudice to the other party (see *Phelps v. Button* [2016] EWHC 3185). The application will not be granted where, from lapse of time or other cause, the exercise of that discretion would involve serious hardship or prejudice to the other party.

The question then is whether the appellant showed, to the satisfaction of the Tribunal, that upon the lifting of the lockdown on 2nd June, 2020, he acted with all due diligence and expedition, or that there was need for the extension due to some other good and sufficient cause, in respect of which the Tribunal ought to have exercised its discretion to extend the time limit. All due expedition means the expedition appropriate in the circumstances. The Tribunal may properly extend a time limit even where the applicant had not acted with all due diligence, if the applicant's failure is not itself a cause for the required extension. The most persuasive reason that he can show is that the delay has not been caused or contributed to by dilatory conduct on his own part, but

there are other reasons and these are all matters of degree (see *Shanti v. Hindocha and others* [1973] EA 207). Where there are serious issues to be reviewed, the Tribunal ought to grant the application (see *Sango Bay Estates Ltd v. Dresdmer Bank* [1971] EA 17 and *G M Combined (U) Limited v. A. K. Detergents (U) Limited* S.C Civil Appeal No. 34 of 1995).

In his affidavit, the appellant did not offer any explanation as to what prevented him from filing the application between the lifting of the lockdown on 2nd June, 2020 and when he finally did so on 11th December, 2020, a period of over six months. He obliquely raised the post-surgical condition of his back as an explanation, but there was nothing to show that he was so seriously ill throughout that period that he could not file the application in time. His medical condition was neither sudden nor a debilitating illness. Just as the respondent's decision was readily electronically issued and served upon him while he was under lockdown, there was no indication of a lack of basic computer and internet access to enable him before or after 2nd June, 2020 instruct his advocate remotely, even if he was confined to his home during the entire period. I therefore find that upon the lifting of the lockdown on 2nd June, 2020, the filing was within the appellant's control and could have been accomplished timely. Unexplained delay in coming to the Tribunal is considered as bar in obtaining relief in discretionary

remedies. Delay defeats equity and the longer the aggrieved person sleeps over his or her rights without any reasonable excuse, the more his or her chances of success in applications for extension of time dwindle as the Tribunal may reject the application on the ground of unexplained delay.

There are no hard and fast rules in determining what constitutes “any other reasonable cause” The Tribunal has to make a broad judgment having regard to all relevant circumstances and the justice of the case. The relevant circumstances may include the weakness of the underlying claim, even if it is not so weak as to have no real prospects. Although counsel for the appellant argued that there was merit to the intended application for review in so far as the respondent’s interpretation and application of section 118 (B) 2 of *The Income Tax Act* would have the undesirable effect of dissuading members of the public from purchasing mortgaged properties at public auctions, because of the tax implications involved, the Tribunal in exercise of its discretion was unmoved by that argument. Since that has not been shown to be an unjudicial exercise of discretion, leading to a decision at which no Tribunal could reasonably arrive, whereby injustice has been done to the appellant, this Court cannot interfere merely because of a difference of opinion between it and the Tribunal as to the proper decision to make.

The appellant has not proved that the Tribunal made any material specific error, i.e. an error of law, a mistake as to the facts, relying upon an irrelevant consideration or ignoring a relevant consideration, or that it gave inappropriate weight to such considerations. The decision cannot be regarded as unreasonable or clearly unjust so as to attract the inferred conclusion that it was erroneously made. For all the foregoing reasons, the appeal fails and it is accordingly dismissed with costs to the respondent.

10

Delivered electronically this 12th day of July, 2022

<Stephei/v
Mizbiriz.
Stephen Mubiru
Judge,
12th July, 2022.



15