IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: MUGASHA, J.A., WAMBALI, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 117 OF 2019

VODACOM TANZANIA PUBLIC LIMITED COMPANY (Formerly Vodacom Tanzania Limited) ..... APPELLANT

VERSUS

COMMISSIONER GENERAL TANZANIA REVENUE AUTHORITY..... RESPONDENT

(Appeal from the Judgment and Decree of the Tax Revenue Appeals Tribunal at Dar es Salaam)

(Fauz Twaib- Chairman)

dated the 10th day of November, 2017
in
Tax Appeal No. 22 of 2015

RULING OF THE COURT

8th & 14th July, 2020

MUGASHA, J.A.:

The appellant is a Telecommunication Network and Wireless Services provider registered in Tanzania. The appellant entered into an agreement with the software supplier, Siemens Telecommunications (PTY) Ltd for purchase of software in order to enable the appellant operate the software in accordance with his requirements. The respondent conducted tax audit in respect of the appellant's business affairs for the period covering the year 2001 to 2004.

On 10th November 2006 the respondent served the appellant with preliminary audit findings. In the wake of the appellant being discontented with the tax audit, a meeting was convened between the parties following which, on 24th April 2007 the respondent prepared and issued the revised preliminary audit findings. As the appellant was still not happy with the tax audit results, two more meetings were convened between the parties but yielded no positive results as the appellant was not yet satisfied with the revised preliminary audit findings. Ultimately, on 21/8/2008 the respondent issued to the appellant demand notices for withholding tax and penalties with respect to the services and royalty amounting to TZS. 1,028,644,778.87 and TZS. 1,917,171,792.00 respectively.

The appellant being dissatisfied with the assessment filed an appeal to the Tax Revenue Appeals Board (the Board) vide Tax Appeal No. 20 of 2014. The Board dismissed the appeal in its decision, handed down on 21/8/2015. Aggrieved with that decision, the appellant unsuccessfully appealed to the Tax Revenue Appeals Tribunal (the Tribunal) vide Tax Appeal No. 22 of 2015 hence the present appeal to the Court. In the Memorandum of Appeal, the appellant has fronted five grounds of complaint as follows:

1. *The Honourable Tax Revenue Appeals Tribunal grossly misdirected itself and erred in law in holding that payments for the right to use software should attract royalty;*

2. *The Honourable Tax Revenue Appeals Tribunal erred in law in arriving at its decision by holding that the Tax Revenue Appeals Board had determined and well settled that payments for the right to use the software constituted a royalty;*

3. *The Honourable Tax Revenue Appeals Tribunal erred in law in holding that payments for the right to use the software are chargeable to tax in the form of withholding tax under section 34(1) (c) of the Income Tax Act, 1973;*

4. *The Honourable Tax Revenue Appeals Tribunal erred in law by its failure to give effect to the correct interpretation of the word 'royalty' as used under section 3 of the Income Tax Act, 1973; and*

5. *The Honourable Tax Revenue Appeals Tribunal erred in law by its failure to strictly interpret a taxing provision contrary to the cardinal principle governing interpretation of taxing statutes."*

When the appeal was called on for hearing, the appellant was represented by Ms. Hadija Kinyaka and Dr. Erasmo Nyika, learned counsel whereas the respondent had the services of Messrs. Harold Gugami, Marcel Busegano, Juma Kisongo and Hospis Maswanyia, all learned State Attorneys from the respondent's office.

In order to satisfy ourselves on the propriety of the appeal which is accompanied by two different certificates of delay, we invited learned counsel for the parties to address us on the matter.

Apart from conceding that on record there are two certificates of delay, Ms. Kinyaka was quick to shift the blame to the Registrar of the Tribunal claiming that she issued a second certificate of delay without withdrawing the initial certificate of delay. She added that, although the appellant made written correspondences on the matter, that was not acknowledged by the Registrar. On the way forward, the learned counsel urged the Court to ignore the initial certificate of delay and consider the appeal to be competent on the basis of the subsequent certificate of delay and proceed to hear the appeal or in the alternative, strike out the appeal with no order as to costs so as to enable the appellant to bring a proper appeal.

On the other hand, Mr. Gigami the respondent's counsel submitted that, the subsequent certificate of delay is inconsequential and it cannot be acted upon by the Court because the first certificate of delay was not withdrawn by the Registrar of the Tribunal (the Registrar). As such, he argued that, on the basis of the first certificate of delay the appeal is not competent as it was filed beyond 60 days

from the date of period excluded for the preparation of the certified copies of the proceedings, judgment and decree of the impugned Tribunal's decision. He thus urged the Court to strike out the incompetent appeal with costs for being time barred.

Having considered the submissions of the learned counsel for the parties, the issue for our consideration is the propriety or otherwise of the appeal before us.

On 6/12/2018 the Registrar issued a certificate of delay excluding the period from 15/11/2017 to 28/11/2018 to have been utilised for the preparation and delivery of the certified copies of the judgment, decree and proceedings of the impugned decision of the Tribunal. After expiry of 55 days that is on 22/1/2019 the appellant's counsel vide letter Ref. FK/CF/VTL/Tax Appeal No. 22 of 2015 as seen at page 574 of the record of appeal, requested to be supplied with certified copies of judgment decree and proceedings on ground that the initially supplied copies were not signed by the Vice Chairman and Members of the Board. However, on the record there is no evidence that the Registrar did acknowledge or make any response to the appellant's letter. Instead, on record at page 580 there is a letter Ref. FK/CF/VTL/App.NO.22 OF 2015 dated 12/3/2019 whereby the

appellant's counsel sought a second certificate of delay which is reflected at page 583 of the record now excluding the period between 15/11/2007 to 11/3/2019 to have been utilised for the preparation and delivery of the proceedings, judgment and decree of the impugned decision of the Tribunal.

The Court in the past has dealt with the issue surrounding the status of an appeal which is accompanied by two certificates of delay in the cases of **MANENO MENGI LIMITED AND THREE OTHERS VS FARIDA SAID NYAMACHUMBE AND THE REGISTRAR OF COMPANIES** [2004] TLR 391 and **OMARY SHABAN S. NYAMBU,** as Administrator of Estate of the late **IDDI MOHA VS CAPITAL DEVELOPMENT AUTHORITY AND TWO OTHERS,** Civil Appeal No, 256 of 2017. In the latter case the Court held:

> *"There cannot be two certificates of delay concurrently applicable in respect of the same matter; in this case the certificate of 8th June, 2003 was the valid one and the second certificate of 8th July, 2003 was of no legal consequence as it amounted to extending the time within which to file appeal, something the Registrar had no power to do. It was also wrong for the Registrar to issue a second certificate while the first one had not been withdrawn; if the intention was to withdraw the first certificate, then the Registrar would have indicated so when issuing the second certificate."*

What transpired above is similar to the matter under scrutiny. Thus, being guided by the stated position of the law, since the first certificate was not withdrawn, and considering that the two certificates of delay cannot co-exist in one appeal, the appellant cannot rely on the second certificate which is in our view inconsequential. In this regard, the first certificate of delay which was a valid one and in terms of the proviso to Rule 90 (1) of the Tanzania Court of Appeal Rules, 2009, the appeal ought to have been filed not later than 27/1/2019. However, it was filed 162 days after the expiry of the excluded period and beyond the prescribed period. As earlier stated, the second certificate of delay was of no legal consequence as it constructively extended time within which to file an appeal which is not the mandate of the Registrar. Moreover, it was improper for the Registrar to issue a second certificate of delay without having withdrawn the first one. If the intention was to withdraw the first certificate of delay, then the Registrar should have indicated so when issuing the second certificate of delay.

We also find that, the appellant's counsel shares the blame in what has befallen this appeal. We say so because after being supplied with the requisite documents by the Registrar, she took no action and remained with the irregular documents for 55 days which was close to

expiry of the period within which to lodge an appeal, without seeking the indulgence of the Registrar to have the documents rectified. This was not a demonstration of diligence on the part of the appellant's counsel.

In view of what we have endeavored to demonstrate there is no gainsaying that the appeal is time barred and we accordingly strike it out. We make no order as to costs since the anomaly has been raised by the Court *suo motu.*

DATED at **DAR-ES-SALAAM** this 13th day of July, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered on this 14th day of July, 2020 in the presence of Ms. Regina Moyo, learned counsel for the appellant and Mr. Amandus Ndayeza, learned Senior State Attorney for the respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

G. H. Herbert
DEPUTY REGISTRAR
COURT OF APPEAL