



**Commissioner of Legal Services and Board Coordination v
Temenos East Africa Limited (Income Tax Appeal E136 of 2024)
[2024] KEHC 16713 (KLR) (Commercial and Tax) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16713 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E136 OF 2024
BM MUSYOKI, J
DECEMBER 20, 2024**

BETWEEN

**COMMISSIONER OF LEGAL SERVICES AND BOARD
COORDINATION APPELLANT**

AND

TEMENOS EAST AFRICA LIMITED RESPONDENT

RULING

1. The appellant preferred this appeal on 5th June 2024 against the decision of the Tax Appeals Tribunal dated 5-04-2024. On 12-07-2024, the respondent filed a notice of motion dated the same day which sought the following orders;
 1. The application be certified urgent and be heard ex-parte in the first instance.
 2. The memorandum of appeal filed on 5th June 2024 and served on the respondent on 12th June 2024 be struck out.
 3. The costs of the appeal be borne by the appellants.
2. The grounds on which the notice of motion was based revolved around the fact that the appeal was filed out of time and without the leave of the court. The application is supported by affidavit of Kelvin Bett sworn on 12th July 2024. Kelvin depones that the appellant lodged a notice of appeal on 6th May 2024 and therefore the appeal filed on 12th June 2024 was filed out of time and it was also served out of time. He adds that the record of appeal has documents which were expunged by the tribunal and some documents which are not related to its case and for this reason, the record of appeal is defective making the appeal incompetent and improper.



3. In reply to the application, the appellant filed an affidavit sworn by Faith Onyango on 29-07-2024. In the said affidavit, the applicant admits that the notice of appeal was filed a day late and the memorandum of appeal two days late. It goes on to explain the reasons for the delay which are primarily that the counsel for the appellant was indisposed and that the instructions from the client came late and urges the court to disallow the application and instead allow its application dated 19-07-2024 which seeks to have the appeal and the notice of appeal deemed to have been filed in time.
4. In what I see as a further reaction to the appellant's application for striking out, the respondent filed a notice of motion dated 29th July 2024 which seeks the following orders;
 1. The application be certified as urgent and be dispensed with at first instance.
 2. The court be pleased to extend time within which to file Notice of Appeal and Memorandum of Appeal against the judgment of the tribunal delivered on 5th April 2024 in TAT appeal no E022 of 2023.
 3. The applicant's Notice of Appeal dated 30th April 2024 and filed on 6th May 2024 and Memorandum of Appeal dated 6th May 2024 and filed and served on 6th June 2024 be deemed to have properly been filed.
 4. The costs of the application be in the cause.
5. This application is opposed by the respondent through affidavit of Kelvin Bett sworn on 7th August 2023. The respondent avers that there are no good reasons advanced to justify granting of the application. According to the respondent, the appellant was not diligent enough and the appeal was an afterthought. The respondent also states that it will be highly prejudiced if the application is allowed as it had made commitments and business decisions on the basis that there was no appeal after the time for filing the same lapsed.
6. I have read the above applications and affidavits together with the appellant's submissions dated 26th August 2024 and those of the respondent dated 16th August 2024. It is not disputed that the appeal herein was filed out of time without the leave of the court. It is trite and I take the position that any pleadings or documents filed outside the timelines given by the law are incompetent and the court lacks jurisdiction to entertain the same. The Supreme Court of Kenya restated this position in the case of *County Executive of Kisumu v County Government of Kisumu & 8 Others* (2017) KESC 16 (KLR) where it held that;

‘No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court.’
7. The Supreme Court's decision aforesaid is binding on this court and unless the appellant is able to distinguish this case from the circumstances of the case before the Supreme Court, I have no option but to abide by the decision. The circumstances of this case are similar to the cited case in all fours. In the cited case, the appellant had after realising that it had filed appeal out of time, just as in this case, applied to have the same admitted out of time. In answering the plea by the appellant, the Supreme Court held that;

‘By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court



to remedy an illegality. This, the Court cannot do. To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate.’

8. The appellant in this matter prays that the appeal which was filed out of time be deemed to have been filed in time and properly on record. Whereas this court has jurisdiction to grant an application for leave as couched by the appellant, the same cannot be done within an incompetent cause. The appellant should seek the leave of the court first then file an appropriate appeal.
9. For reasons given, I find that the application by the appellant is incompetent and I don’t have to consider the reasons given for filing the appeal out of time. The said application is declined.
10. The consequence of the above is that the application by the respondent dated 12th June 2024 is allowed. This appeal is struck out with costs to the respondent.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Ruling delivered in presence of Miss Onyango for the appellant and Mr. James Kimani of the respondent.

