



REPUBLIC OF KENYA



**KENYA LAW**  
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**Commissioner of Domestic Taxes v Katsran Limited (Income Tax Appeal E066 of 2022)  
[2023] KEHC 26590 (KLR) (Commercial and Tax) (24 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 26590 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E066 OF 2022  
DO CHEPKWONY, J  
AUGUST 24, 2023**

**BETWEEN**

**COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT**

**AND**

**KATSRAN LIMITED ..... RESPONDENT**

**RULING**

1. Before the court is Notice of Motion dated 18<sup>th</sup> July, 2022 filed by the Respondent/Applicant “the Company” against the Appellant “KRA”. It seeks the following orders:-
  - a. The Honorable Court be pleased to strike out the entire Notice of Appeal dated 10th May, 2022 in respect to Nairobi Tax Appeals Tribunal Case Number 188 of 2021, *Katsran Limited Versus Commissioner of Domestic Taxes*.
  - b. Consequent to grant of 1 above, this Honourable Court be pleased to strike out the Record of Appeal dated 9<sup>th</sup> June, 2022 and the Supplementary Record of Appeal dated 8th July, 2022 both in respect to Milimani High Court Commercial Tax Appeal Number E066 of 2022, *Commissioner Of Domestic Taxes Versus Katsran Limited*
  - c. The entire Appeal, Milimani Commercial Tax Appeal No. E066 of 2022, *Commissioner Of Domestic Taxes Versus Katsran Limited* be dismissed.
  - d. Cost of the Application be provided for.
2. The Application is based on the grounds on the face of it and the Supporting Affidavit of Peter Opiyo sworn on 18<sup>th</sup> July, 2022. The Applicant holds that the Tribunal delivered its decision on the 14th April, 2022 through email of respective parties. That it is until on 10<sup>th</sup> June, 2022 when it learnt there was an appeal against the decision of the Tribunal by KRA after being served with a Record of Appeal



dated 9<sup>th</sup> June, 2022 in this appeal. The Company avers that it was not served with the Notice of Appeal as required by Section 32(1A) of the Tax Appeals Tribunal Act “TATA”. That lodging at the subject Notice of Appeal it refers to emanate from Tribunal Case Number 188 of 2021 which is nonexistent hence such irregularity should warrant the dismissal of the appeal pursuant to Sections 32(1A) of the Tax Appeals Tribunal Act “TATA and Sections 53 of the Tax Procedures Act “TPA”

3. The argues that the omission by KRA extinguished the jurisdiction of this court in the matter and therefore the court should allow its application and dismiss the Appeal.
4. The Respondent/Applicant filed its response to the application through the Replying Affidavit sworn on 28<sup>th</sup> July, 2022 by Charles Kamonji an officer of Defendant working at the process service unit within legal services and board coordination Department sworn on 28<sup>th</sup> July 2022. He states that he received the Notice of Appeal dated 10<sup>th</sup> May 2022 drawn by KRA to file it at the Tax Appeals Tribunal and thereafter serve it upon by the Company. That he indeed filed and served the same vide email on 5<sup>th</sup> May, 2022 at 2.41 p.m. to Peter Opiyo through opiyouper@opmassociates.co.ke which was the email address used by the Company in all the pleadings.
5. According to the Respondent, service by email is a recognized form of service pursuant to Order 5 Rule 22 B of the Civil Procedure Amendment Rules 2020 and therefore the application by the Company is misguided and should be dismissed with costs.
6. The Company filed Further Affidavit sworn on 7<sup>th</sup> October, 2022 reiterating its averments that it was not served with the Notice of Appeal since the said Notice of Appeal bears his email address as opiyouper426@gmail.com which is his official email used for service and conduct of proceedings at the Tax Appeals Tribunal. He states that there was no proper service of the Notice of Appeal by KRA and the Appeal should be dismissed.
7. The Application was disposed off by way of written submissions. The Company’s submissions are dated 21<sup>st</sup> December, 2022 whereas KRA’s submissions are dated 1<sup>st</sup> February 2023. The parties raised the following same issues for determination.
  - i. Whether the Notice of Appeal was properly served upon the Company.
  - ii. Whether the Notice of Appeal is defective.
  - iii. Whether the Appeal is properly before the court.
  - iv. Who should bear the costs of the application.

### **Analysis and Determination**

8. The main issues for determination are whether the service of the Notice of Appeal was proper. The law on service of Notice of Appeal under TATA is provided under Section 321A of the TATA which states as follows:-

“ A party that has appealed against the decision of the Tribunal in subsection (1) shall within two days of lodging a notice of appeal, serve a copy of the notice on the other party.”

9. In this case the Notice of Appeal is dated 10<sup>th</sup> May, 2022 and from the annexure in the Replying Affidavit of KRA the same was served on the same 10<sup>th</sup> May, 2022 at 2.41pm and the same is indicated as 5<sup>th</sup> October, 2022 at 2.41 p.m. due to the format of dates which can either be mm/dd/yy, dd/mm/yy or even yy/dd/mm or any other which are all acceptable and recognized systems.



10. It is trite law that service by email is accepted and recognized under the *Civil Procedure Amendment Rules* under Order 5 Rule 22B which provides as follows,
1. Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used E-mail address.
  2. Service shall be deemed to have been effected when the Sender receives a delivery receipt.
  3. Summons shall be deemed to have been served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.
  4. An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.
11. In this case, the Company disputed service of the Notice of Appeal on the basis that the email address used was not the official email but the email address of opiyopeter426@gmail.com which appears even in the disputed Notice of Appeal. The Respondent submits that the email address used to serve the Company being opiyopeter@opmassociates.co.ke was used by the Company in the pleadings filed at the Tribunal but has not annexed any such document or pleading. The court has similarly perused the Record of Appeal and has not seen any pleading that bears the email address of opiyopeter@opmassociates.co.ke.
12. It is trite law that the burden of proof lies on the process server to prove service was effected and in the proper lawful ways. Under Order Rule 22B (2) by electronic means shall be deemed as served when the sender receives a delivery receipt and under Order Rule 22B (4) the process server shall file an Affidavit of service and attach the electronic mail service delivery receipt confirming service. In this case there is no delivery receipt filed in the case and therefore from the face of it, there is no proof of service. In the circumstances I find that since the Notice of Appeal was not served properly the alleged appeal is impugned under the provisions of *Tax Procedures Act* "TPA" beyond cure even under Article 159 of the *Constitution*.
13. Having found that the appeal is irregular owing to improper services, it will be a futile exercise to address the other issues raised by the parties. I therefore allow the Notice of Motion dated 18<sup>th</sup> July, 2022 and strike out the Notice of Appeal dated 10<sup>th</sup> May, 2022 as well as the appeal. The Respondent/ Applicant shall have costs of the suit.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 24<sup>TH</sup> DAY OF AUGUST 2023.**

**D. O. CHEPKWONY**

**JUDGE**

