



REPUBLIC OF KENYA



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**Commissioner of Domestic Taxes v UDV (Kenya) Limited (Tax Appeal E134 of 2024)
[2025] KEHC 3361 (KLR) (Commercial and Tax) (17 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3361 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
TAX APPEAL E134 OF 2024
RC RUTTO, J
MARCH 17, 2025**

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

UDV (KENYA) LIMITED RESPONDENT

RULING

1. Before this court for determination is a Notice of Motion Application dated 4th September 2023 seeking: -
 - a. That the court be pleased to extend time within which to file the Memorandum of Appeal against the Ruling of the Tax Appeals Tribunal delivered on 29th June 2023.
 - b. That the Memorandum of Appeal marked “VAC-4” herein be deemed as duly filed and served.
2. The basis of the application is that the Tax Appeals Tribunal delivered its judgment on 29th June 2023 without notice to the Applicant. As a result, the Applicant was unable to comply with Section 32(1) of the *Tax Appeals Tribunal Act* and Rule 3 of the *Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015*, which govern the filing of a Notice of Appeal and a Memorandum of Appeal, respectively. The Applicant sent a tax amnesty letter to the Respondent on 14th September 2023, which went unanswered. Similarly, an email sent to the Tribunal on 4th March 2024, inquiring about the delivery of the judgment, did not receive a response. The Applicant only discovered that judgment in the matter had been delivered when counsel, came across a copy of the judgment on the Kenya law Reports website.
3. The Application was opposed by the Respondent through a Replying Affidavit sworn on 9th July 2024 by the Respondent’s Legal Counsel. In summary, she stated that the Applicant was aware of the



scheduled judgment delivery date, as the Tribunal had sent an email of notification to both parties. The Respondent's counsel argued that even if the judgment was not shared with the Applicant, they had prior knowledge of the delivery date and should have followed up accordingly. She further contended that inquiring about the judgment eight months after its delivery constituted undue delay and that the Applicant was guilty of laches. Additionally, the Respondent's counsel asserted that an appeal to the High Court must be preceded by a Notice of Appeal, and the Applicant's failure to file one rendered the appeal defective.

4. Pursuant to the directions issued by this Court, the Applicants filed their submissions dated 1st August 2024, while the Respondent's submissions are dated 22nd October 2024.

Appellant's Submissions

5. The Applicant addressed two key issues: whether there was inordinate delay on the part of the Applicant/Appellant in filing the appeal and whether the Applicant/Appellant should be allowed to file an appeal out of time, with the Memorandum of Appeal deemed as properly filed.
6. On the first issue, the Applicant relied on Article 47(1) and (2) of *the Constitution* of Kenya, as well as Sections 29(5), 29(8), and 29(9) of the *Tax Appeals Tribunal Act*, to argue that the Applicant was only made aware of the judgment after it had been made public. The Applicant contended that the Tribunal ought to have delivered the judgment to all parties via email, as it had previously notified them of the scheduled delivery. Furthermore, the Applicant submitted that they only became aware of the judgment upon accessing the Kenya Law website and that their follow-up inquiry with the Tribunal on 4th March 2024 went unanswered. The Applicant relied on the decisions in *Wachira Karani v Bildad Wachira* [2016] eKLR and *Patel v E.A. Cargo Handling Services Limited* [1974] eKLR to urge the Court to exercise its discretionary powers under Section 3A of the *Civil Procedure Act* and admit the appeal for hearing.
7. The Applicant further submitted that, while Section 32 of the *Tax Appeals Tribunal Act* requires the filing of a Notice of Appeal within 30 days of being notified of the judgment, compliance was impossible as the Applicant had not been notified or served with the judgment at the time it was recorded as delivered. As a result, the Applicant argued that they could not reasonably be expected to file a Notice of Appeal within 30 days of a judgment they were unaware of.
8. The Applicant further submitted that, as of the date of filing the submissions, they had not yet received certified copies of the proceedings and judgment from the Tribunal. Additionally, the Applicant stated that they filed the present application on 3rd June 2024, immediately after becoming aware of the judgment through the Kenya Law website. In support of this argument, the Applicant relied on HCITA No. E141 of 2023, *Commissioner of Domestic Taxes v Gulf Badr Group (K) Ltd*, to emphasize that a copy of the decision being appealed against is a crucial document for the sustenance of an appeal.
9. On the second issue, the Applicant acknowledged the provisions of Section 79G of the *Civil Procedure Act* and Order 50 Rule 6 of the Civil Procedure Rules, which grant the court discretion to admit an appeal out of time. Relying on the case of *Esther Wamaitha Njihia & 2 Others v Safaricom Limited* [2014] eKLR, the Applicant submitted that the exercise of judicial discretion is guided by two principles: first, that there are no strict limitations or restrictions on the court's discretion, and second, that such discretion is intended to prevent injustice or hardship resulting from accident, inadvertence, or excusable mistake or error. However, it is not meant to assist a party who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. The Applicant, maintaining



that there was no inordinate delay, urged the court to exercise its discretion and allow the instant application so that the appeal can be heard and determined on its merits.

Respondent's Submissions

10. The Respondent, in its submissions, identified two issues for determination: whether the Appellant has met the threshold for an extension of time and whether the Appellant was required to obtain leave of the court prior to filing the appeal.
11. The Respondent submitted that, pursuant to Rule 4 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, the court has discretion to extend the time for filing an appeal. However, the Appellant must demonstrate that there was no unreasonable delay in filing the appeal, which the Applicant failed to establish. Relying on the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 7 Others* [2014] eKLR, the Respondent outlined the principles governing the court's consideration of an application for an extension of time and argued that the Applicant had not met the required conditions.
12. The Respondent further contended that, regarding the length and reason for the delay, the Applicant ought to have filed the appeal by 28th July 2023 but failed to do so, instead filing it 11 months after the judgment was delivered, without providing a reasonable or excusable justification for the delay. The Respondent submitted that the explanation given by the Applicant was insufficient to warrant an extension of time. In support of this argument, the Respondent relied on the case of *Susan Ogutu Oloo, Lucia Abala Oloo alias Lucia Oloo Akinyi & Joyce Atieno Oloo alias Joyce Atieno Obunde v Doris Odindo Omollo* [2019] KECA 966 (KLR), asserting that the reasons advanced by the Applicant were unsatisfactory and failed to meet the legal threshold for granting an extension.
13. While relying on the cases of *Anaclet Kalia Musau (Suing on behalf of the Estate of Vincent Mangalo Kalia) versus Attorney General & 2 others* [2015] eKLR, *Boss Freight Terminal Limited versus Commissioner of Domestic Taxes* [2017] eKLR, *APA Insurance Company versus Vincent Nthuka* [2018] eKLR the respondent submitted that the statutory timelines are not mere technicalities but are fundamental to the jurisdiction of the court and therefore Article 159 (2) (d) cannot cure the Applicant's failure to file its appeal within time.
14. The Respondent submitted that it stands to suffer great prejudice if the extension is granted, as it would necessitate revisiting previously concluded financial matters, create uncertainty in its financial statements, and expose it to potential liabilities. This, in turn, would result in substantial additional costs due to renewed litigation and possible tax penalties or interest. In support of this argument, the Respondent relied on the case of *Attorney General v Fanuek Inzira Misango* [2019] KEHC 454 (KLR).
15. The Respondent further submitted that the Appellant has failed to demonstrate that the intended appeal has any prospects of success. Citing the case of *County Executive of Kisumu v County Government of Kisumu & 8 Others*, the Respondent submitted that the mere arguability of an appeal is insufficient to justify the court's discretion in extending time.
16. Additionally, the Respondent contended that the appeal arises from a tax demand for the period between November 2021 and December 2022, which was based on [Legal Notice No. 217 of 2021](#). However, the High Court had stayed the legal notice through status quo orders issued on 19th November 2021, pending its approval or rejection by the National Assembly. As a result, the reliance on the Legal Notice before its approval was legally untenable. The Respondent emphasized that the approval granted on 24th November 2022 meant that the Legal Notice had a proper legal basis, and any tax demand issued before this approval was improper, a position upheld by the Tribunal. To support its



argument, the Respondent relied on the cases of Commissioner of Domestic Taxes v Excel Chemicals Limited [2024] KEHC 2440 (KLR) and Tax Appeal No. 668 of 2022 Kenya Breweries Limited v Commissioner of Domestic Taxes. The Respondent concluded that the grounds of appeal are devoid of merit and are unlikely to succeed.

17. On the second issue, the Respondent submitted that the Appellant prematurely filed the Memorandum of Appeal and Record of Appeal without first obtaining leave of the court, rendering the appeal a nullity. Citing the cases of Nairobi Bottlers Limited v Ndung'u & Another (Application E030, E034 & E038 of 2023 (Consolidated) [2023] KESC 96 (KLR) (10 November 2023) (Ruling) and Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR, the Respondent submitted that no subsequent grant of leave can retrospectively validate an appeal that was filed in clear contravention of statutory requirements.
18. The Respondent concluded by asserting that the Appellant's request to deem the appeal as properly filed is fundamentally flawed and, therefore, urged the court to strike out the present application.

Analysis and Determination

19. I have carefully considered the present application, the affidavit in support and opposition of the said application as well as the parties respective submissions and the only issue for determination arising is, whether the court should extend time for filing of the Memorandum of Appeal and if so, whether the power may be exercised retroactively to validate the appeal.
20. The timelines and procedure of filing appeals from the Tribunal is governed by Section 32(1) of the Tax Appeal Tribunal Act which provides as follows:
 - 32(1) A party to proceedings before the Tribunal may, within thirty days after being notified of the decision or within such further period as the High Court may allow, appeal to the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party.
21. Further, Rule 3 of the Tax Appeals Tribunal (Appeals to the High Court) Rules provides that:

“The appellant shall, within thirty days, after the date of service of a notice of appeal under Section 32(1), file a memorandum of appeal with the Registrar and serve a copy on the respondent.”
22. Further, Rule 4 of the Rules grants the court discretion to extend the time specified in Rule 3 in respect of the Memorandum of Appeal as follows:
 4. Extension of time for filing memorandum of appeal

The Court may extend the time specified in rule 3 if the Court is satisfied that owing to absence from Kenya, sickness, or other reasonable cause, the appellant was unable to file the memorandum of appeal within the period and that there has been no unreasonable delay on the part of the appellant.
23. From the above the procedure for filing an appeal requires that a Notice of Appeal be filed first. This Notice must be filed within 30 days of receiving notification of the decision, after serving the Notice of Appeal, the Appellant has 30 days to file a Memorandum of Appeal. However, the High Court may allow the filling of a Notice of Appeal beyond this period as the case may be.
24. This case, it is undisputed that the parties were informed by the Tribunal that judgment would be delivered on 29th June 2023. The Judgment was indeed delivered on that date via email. Later on 4th March 2024, the Appellant sent an email inquiry to the Tribunal regarding the delivery of the judgment



but received no response. It is also not contested that the appellant failed to file the notice of appeal and the memorandum of appeal within the required timeframe leading to this application. The Applicant on 3rd June 2024 filed its Memorandum of Appeal and vide a letter dated 31st May 2024, requested for certified copies of the proceedings, judgment and order for purpose of filing an appeal.

25. The Appellant has submitted that due to its lack of knowledge regarding the delivery of the judgment on 29th June 2023, they delayed in filing an appeal and, consequently, could not comply with Section 32(1) of the [Tax Appeals Tribunal Act](#).
26. This court has reviewed the supporting documents attached to the Appellant's Affidavit in support of this Application, specifically VAC2, together with the email correspondence attached to the Respondent's affidavit in response to the present application (KMG-1), I note that while the parties were notified of the judgment's delivery by close of business on 29th June 2023, the email forwarding the judgment did not include the Appellant's designated email addresses, that is, legalservices@kra.go.ke and lsbc litigation@kra.go.ke. Thus, it is evident that the Applicants were not notified and did not receive a copy of the judgment through their official emails.
27. Under Rule 4 of the Rules, the court must be satisfied that there is reasonable cause to grant an extension of time. The Appellant has explained that the reason for filing the Memorandum of Appeal approximately 11 months after the judgment was delivered was the lack of knowledge that the judgment had been delivered.
28. The respondent submitted that the delay was unreasonable, inexcusable and unjustifiable and that the threshold set out in the Nicholas Salat Case (Supra) had not been met. The respondent also submitted that they will be prejudiced if the extension is granted, as it would necessitate revisiting previously concluded financial matters, create uncertainty in its financial statements, and expose it to potential liabilities.
29. This court finds the appellant's explanation to be reasonable and excusable, particularly because the email forwarding the judgment did not include their email address. This appears to be an error on the part of the Tribunal and it would be unjust for the appellant to bear the consequences. Additionally, the appellant's effort to inquire about the status of the judgment from the Tribunal demonstrates diligence and good faith confirming that they indeed did not receive the email.
30. Given these circumstances I find that the discretion would favour allowing the application and grant the appellant an extension of time to file the appeal.
31. Based on the above the Court would have been persuaded and inclined to allow the application and extend time for the Applicant to file its memorandum of appeal out of time. However, the Respondent raised a pertinent issue in its replying affidavit, which this Court cannot ignore, that is the intended appeal was defective as it was not preceded by a Notice of appeal. Though, the Respondent made no submission on the issue the Applicant on its part only submitted that it was impossible to file the Notice of Appeal within the requisite period as they had not been notified or served with the judgement.
32. Notably, while the Applicant concedes to not filing the Notice of Appeal within time in their application before this Court they have only sought prayers to extent time to file the Memorandum of Appeal as follows:
 - a) That the court be pleased to extend time within which to file the Memorandum of Appeal against the Ruling of the Tax Appeals Tribunal delivered on 29th June 2023,
 - b) That the Memorandum of Appeal marked "VAC-4" herein be deemed as duly filed and served.



- 33. There is no prayer seeking extension of time to file and serve the Notice of Appeal out of time. Consequently, given the jurisdictional importance of a Notice of Appeal as stated in the Nicholas Salat case (Supra) this motion for extension of time to file the memorandum of appeal out of time is an act in futility. This is because Section 32(1) of the Tax Appeal Act require a party intending to appeal the decision of the Tribunal to file a Notice of Appeal within 30days after being notified of the decision or such as period as the High Court may allow to be filed and served a notice of appeal to the other party. Thus, even if the Court allows for filing of the memorandum of appeal there will be no foundation upon which it would be premised.
- 34. For the reasons stated above, the Notice of Motion Application dated May 31, 2024 is hereby struck out with costs to the Respondent.
- 35. Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 17TH DAY OF MARCH, 2025.

RHODA RUTTO

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 17TH DAY OF MARCH, 2025.

In the presence of;

-Appellant
-Defendant
-Court Assistant

