



**Commissioner of Domestic Taxes v Masai Rolling Mills Limited (Income Tax Appeal E040 of 2024) [2025] KEHC 2404 (KLR) (Commercial and Tax) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2404 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E040 OF 2024**

**MA OTIENO, J**

**MARCH 6, 2025**

**BETWEEN**

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

**AND**

**MASAI ROLLING MILLS LIMITED ..... RESPONDENT**

**RULING**

1. This Ruling determines the Respondent’s Preliminary Objection dated 6/3/2024 and the Appellant’s Notice of Motion Application dated 9/10/2024.
2. In its Preliminary Objection, the Respondent raised an objection as to the competence of the appeal. According to the Respondent, the appeal is incurably defective and incompetent since the memorandum of appeal was filed without accompanying documents, allegedly contravening rules 3, 5(d), and 5(6) of the *Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015*.
3. Specifically, the Respondent’s Preliminary Objection is expressed to be on the following grounds:
  - “ 1. This court lacks jurisdiction to hear and determine the appeal for the reason that the memorandum of appeal is incompetent, incurably defective, and ought to be struck out with costs to the respondent.
  2. The memorandum of appeal as filed and served upon the respondent is not a memorandum of appeal as provided for under the *Tax Appeals Tribunal (Appeals to the High Court) Rules* at rules 3,5(d) and (e).”
4. The Preliminary Objection by the Respondent is opposed vide the Appellant’s replying affidavit sworn on 9/10/2024 by Marion Gitau, an advocate practicing as such within the Appellant.



5. In the affidavit, Ms. Gitau averred that the Tax Appeals Tribunal (the Tribunal) rendered its judgment on 20/12/2023 allowing the Respondent's appeal thereat, and setting aside the Appellant's tax objection decision of 26/10/2022, and that the appellant filed a notice of appeal on 18/1/2024, followed by a memorandum of appeal on 16/2/2024.
6. It was further deponed by Ms. Gitau that the record of appeal, which included certified proceedings and judgment, was filed separately on 2/7/2024 after obtaining the necessary documents on 20/6/2024.
7. The appellant asserted that the memorandum of appeal was filed within the statutory 30-day period, and that the separate filing of the record of appeal was due to the delay in obtaining certified proceedings and was neither intentional nor prejudicial.
8. Further, the appellant contended that the omission to file all documents together is excusable and should not invalidate the appeal and that the appeal raises arguable issues with high chances of success.
9. The Appellant, therefore, urged this court to dismiss the Preliminary Objection, with costs in its favour and have the appeal heard on its merits.

#### **Appellant's Application dated 9/10/2024.**

10. The Appellant in its Notice of Motion Application dated 9/10/2024 prayed for an order to extend time within which to file the Memorandum of Appeal against the judgement of the Tribunal delivered on 20/12/2023, and an order to have the notice of appeal, memorandum of appeal, and record of appeal filed in this matter deemed as duly filed and served.
11. The grounds in support of the application are similar to those set out in the Appellant's replying affidavit, as discussed above. I will therefore not restate the same.
12. The Respondent opposed this application through a replying affidavit sworn on 12/11/2024 by James Mutambu, an accountant duly authorized by the Respondent.
13. He averred that the appellant's claim regarding the inability to file a record of appeal is misleading, as the *Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015* do not provide for such a document. Instead, a memorandum of appeal must be accompanied by an index of the documents relied upon, the decision of the Tribunal, and the notice of appeal.
14. Mr. Mutambu argued that the memorandum of appeal filed on 16/2/2024 was not accompanied by the requisite documents, contrary to the legal requirements, and that the decision of the Tribunal was made available immediately after delivery on 20/12/ 2023, yet it was not annexed to the appeal.
15. The Respondent maintained that the Appellant's memorandum of appeal filed on 16/2/2024 was defective and upon noticing the defect, the Respondent filed a Preliminary Objection on 6/3/2024, arguing that the memorandum of appeal was defective and non-compliant with the Tax Appeals Tribunal Rules, and that the Appellant failed to respond to this objection, but instead filed a second, properly formatted Memorandum of Appeal on 1/7/2024, without first seeking the leave of the court.
16. The Respondent argued that the Appellant only sought leave to extend the time after the issue of non-compliance was raised in the Preliminary Objection rather than applying for an extension before filing pleadings out of time. The Respondent asserted that such an approach is legally flawed and an attempt to validate an illegality.



17. The Respondent contended that this court lacks the jurisdiction to admit the Appellant’s pleadings as they were filed outside the statutory timelines without prior leave of the court, arguing that the failure to file within 30 days from 18/2/2024 rendered the appeal time-barred.

### **Submissions**

18. The Respondent filed its submissions dated 12/11/2024 in support of the Preliminary Objection. On its part, the Appellant filed two sets of submissions, one dated 6/11/2024 in opposition to the Preliminary Objection and the other dated 9/10/2024 in support of its Notice of Motion Application dated.
19. In their submissions, the Parties reiterated their respective positions regarding the appeal, with the Respondent objecting to the appeal on the basis that the memorandum of appeal was filed without accompanying documents, allegedly contravening rules 3, 5(d), and 5(6) of the [\*Tax Appeals Tribunal \(Appeals to the High Court\) Rules, 2015\*](#). The Appellant, on its part, argued the Court to allow the appeal to be heard on its merits.

### **Analysis and determination:**

20. The court has considered the pleadings and submissions made by the parties in support of their respective positions.
21. It is common ground between the parties that the Tribunal delivered its judgment on 20/12/2023 in favour of the respondent herein. The appellant was dissatisfied and preferred an appeal to this court, filing a notice of appeal on 18/1/2024.
22. Rule 3 of the [\*Tax Appeals Tribunal \(Appeals to the High Court\) Rules\*](#) (hereinafter ‘the Rules’) states:

“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.”

Rule 4 states:

“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 that period and that there has been no unreasonable delay on the part of the appellant.”

Rule 5 states:

“A memorandum of appeal shall—

- (a) be signed by the appellant;
- (b) set out concisely under consecutively numbered distinct heads, the grounds of appeal without any arguments or narrative;
- (c) contain an index of all documents supporting the appeal with the number of pages at which they appear; and
- (d) contain an index of all documents supporting the appeal with number of pages at which they appear; and



(e) accompanied by a copy of the decision of the Tribunal and the notice of appeal.”

23. In this case, the appellant filed a memorandum of appeal on 16/2/2024, which was served upon the respondent. However, the memorandum of appeal was not accompanied by the index of documents in support of the appeal, including a copy of the tribunal’s judgment as provided for by Rules 5 (d) and (e).
24. The respondent argued in its Preliminary Objection that this defect meant that the memorandum of appeal was incurably defective and ought to be struck out with costs.
25. The appellant’s case was that it filed a complete record of appeal on 2/7/2024. The Appellant’s Advocate argued that she believed that the record of appeal being filed late would not invalidate the memorandum of appeal, which was filed on time. Further, the delay in filing the appeal was because the appellant received the court proceedings and the tribunal’s judgment late.
26. In the Court of Appeal case of *Thuita Mwangi v Kenya Airways* [2003]e KLR, the court reiterated its decision in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Application No. Nairobi 255 of 1997 as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that generally the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent if the application is granted.”
27. The court concurs and is guided by the authority above. In this case, the appellant filed a notice of appeal on 18/1/2024 and a correct memorandum of appeal with all the required documents as stipulated under rule 5(d) (e) on 2/7/2024.
28. Although there was indeed a delay in filing the memorandum of appeal, I am of the view that the appellant’s advocate gave a reasonable explanation, that is, delays in obtaining the Tribunal’s proceedings and judgment.
29. It would have been prudent for the appellant’s advocate to first seek leave from the court to file the memorandum of appeal out of time, but I believe that the shortcomings of an advocate should not be visited upon his/her client.
30. Further, I am of the view that it is in the interest of justice and Article 159(d) of the Constitution that the appellant be given an opportunity to ventilate its appeal on merits before this Court.
31. Accordingly, I exercise my discretion in favour of the Appellant and grant an order to have the notice of appeal, memorandum of appeal, and record of appeal filed in this matter deemed as duly filed and served.
32. The upshot of the foregoing is that the Preliminary Objection by the Respondent is dismissed, while the Appellant’s application dated 9/10/2024 is allowed as prayed.
33. On costs, I direct that each party bears their own costs.
34. It is so ordered.

**SIGNED, DATED, AND DELIVERED IN VIRTUAL COURT THIS 6<sup>TH</sup> DAY OF MARCH 2025**



**ADO MOSES**

**JUDGE**

In the presence of:

Moses – Court Assistant

