



**Commissioner of Customs and Border Control v Coffee
Management Services Limited (Income Tax Appeal E086 of 2024)
[2025] KEHC 6726 (KLR) (Commercial and Tax) (23 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6726 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E086 OF 2024**

RC RUTTO, J

MAY 23, 2025

BETWEEN

**THE COMMISSIONER OF CUSTOMS AND BORDER
CONTROL APPELLANT**

AND

COFFEE MANAGEMENT SERVICES LIMITED RESPONDENT

RULING

1. The Respondent herein moved Court by way of a Notice of Motion application seeking that this Court be pleased to strike out the entire appeal on grounds that the Memorandum of Appeal filed fails to comply with the mandatory requirements of Rules 3 as read together with Rule 5 of Tax Appeal Tribunal (Appeals to the Highth October 2024 by Martin Ngare and on grounds that, the appeal was filed out of time and no leave was sought hence the appeal is time barred and incompetent. Court) Rules (herein after referred to as the Rules). The application is supported by the affidavit sworn on 13
2. The application is opposed by filing of a Replying Affidavit sworn on 7th November 2024 by Benard Odhiambo Oyicho. He deponed that: the tribunal delivered its impugned judgment on 23rd February 2024; on 15th March, 2024 the Appellant lodged its Notice of Appeal; on 14th April 2024 it lodged its memorandum of Appeal; on 3rd October 2024 during mention of the appeal, they sought leave to file, and leave was granted to file a record of appeal.
3. The Appellant further deponed that failure to comply with Rule 3 of the Rules was an inadvertent mistake on the part of the advocates on record given the large volume of matters handled across various



courts. They sought to rely upon Article 159(2)(d) of *the Constitution* that procedural technicalities shall not be used to bypass the interest of justice.

4. The application was heard by way of oral submissions where counsel for the Respondent submitted that the requirements of Rules 3 and 5 of the Rules are mandatory in nature for it uses the term 'shall'. That this provision requires that a memorandum of appeal be filed within 30 days. Further that Article 159 of *the Constitution* is not a panacea to all procedural ills. They sought to rely upon the Supreme Court decision in *Law Society of Kenya v Centre for Human Rights & Democracy & 12 others* [2014] eKLR.
5. It was their submissions that the Appellant is misleading the Court as no leave was sought on 3rd October 2024 as alleged. They prayed that the appeal be dismissed with costs.
6. In response, the Appellant submitted that on 3rd October 2024, they appeared before the Deputy Registrar where leave was granted for them to file the Record of Appeal within 3 days. That on the same day, the Respondent was granted time to file the statement of facts. They stated that they complied with the directions.
7. The Respondent further contented that the judgment was delivered on 23rd February 2024, it filed its Notice of Appeal on 15th March 2024, 22 days after judgment, and the Memorandum of Appeal was served on 12th April 2024 within 30 days as per the statutory timeline. That it is the Record of Appeal that was filed on 3rd October 2024 after leave was granted. It was their submission that the Deputy Registrar has jurisdiction to grant leave, since it is their mandate to certify a matter ready for hearing. That no prejudice will be occasioned to the Respondent since they were aware of this appeal. They urged the Court to find that this application is an afterthought aimed at delaying the tax collection. Thus, they urged that the same should be dismissed with costs and appeal allowed to proceed.
8. This Court has been moved on ground that the Appellant is in breach of Rule 3 as read together with Rule 5 of the Rules. Rule 3 provides for time for filing of Memorandum of Appeal as follows:

The appellant shall within thirty days, after the date of service of a notice of appeal under Rule 32(1) file a Memorandum of Appeal with the Registrar and serve a copy on the respondent.
9. Rule 4 provides for extension of time for filing Memorandum of Appeal as follows:

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 or that there has been no unreasonable delay on the part of the appellant'.
10. Rule 5 provides for a Memorandum of Appeal as follows:

A memorandum of appeal shall;

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



- (e) accompanied by a copy of the decision of the tribunal and the Notice of Appeal.
11. The issue for determination therefore is whether the appeal as filed complied with the provisions of Rule 3 as read with Rule 5 of the Tax Appeals Tribunal (Appeals to the High Court Rules). In this instance, and from the record before me, the Tax Appeals Tribunal rendered its judgment on 23rd February 2024. Aggrieved by the decision, the Appellant filed its Notice of Appeal on 15th March, 2024. Upon filing the Notice of Appeal, the Appellant ought to have filed the Memorandum of Appeal within 30 days. According to the Appellant it filed its Memorandum of Appeal on 12th April 2024 within the statutory timeline.
 12. The Applicant/Respondent contends that what was filed and deemed as a Memorandum of Appeal, dated 12th April 2024 did not contain the mandatory documents provided and listed under Rule 5 of the Rules. That the Appellant has sought to file a Record of Appeal dated 9th October 2024 which contains the documents which as per the Tax Appeals Tribunal (Appeals to the High Court) Rules ought to have been filed as Memorandum of Appeal.
 13. Section 32 of the Tax Appeal Tribunal Act provides for Appeals to the High Court of decisions of the tribunal. Section 32 (2) provides that: “the High Court shall hear appeals under this Section in accordance with the Rules set out by Chief Justice”. These Rules are the Tax Appeals Tribunal (Appeals of the High Court) Rules that guide the process of filing appeal from the Tax Appeal Tribunal to the High Court.
 14. A plain reading of the Rules shows that Rule 3 provides for filing of Memorandum of Appeal, while Rule 5 provides for what should be contained in the Memorandum of Appeal. In this instance what was filed by the Appellant on 12th April 2024 complied with parts a, b and c of Rule 5 of the Rules. It does not contain all the requisite information as provided for under Rule 5 as such it does not qualify as a Memorandum of Appeal as contemplated under Rule 5 of the Rules.
 15. This Court also notes that what was filed by the Appellant as a Record of Appeal dated 7th October 2024 is what contains all the information that ought to have been contained in Memorandum of Appeal as per Rule 5. Notably the Rules do not provide for filing of a Record of Appeal.
 16. Consequently, guided by the above provision of the Tax Appeals Tribunal (Appeals of the High Court) Rules, the ‘record of appeal’ filed dated 7th October 2024 remains a document unknown before this Court and presuming that it was intended to be the Memorandum of Appeal contemplated under Rules 3 and 5 of the Rules, then the same was filed out of time.
 17. Rule 5 requires the Memorandum of Appeal to contain all the components listed as (a) to (e). Thus, the Memorandum of Appeal filed on 12th April, 2024 did not comply with the requirements of Rule 5 of the Rules. This Court has taken note of the Appellant’s assertion that on 3rd October 2024 while appearing before the Deputy Registrar, leave was granted for them to file a Record of Appeal.
 18. I have perused the Court file record of proceedings and note that indeed on 3rd October, 2024, the parties herein appeared before the Deputy Registrar. During that session, counsel for the Appellant informed the Deputy Registrar that parties had received typed proceedings and the certified judgment. They prayed for 3 days to file and serve the Record of Appeal. Following this, the Deputy Registrar directed that the Record of Appeal be filed within 3 days and the Respondent was directed to file its statement of fact within 14 days.
 19. This Court finds that the issuance of the directions on 3rd October 2024 does not amount to leave or extension of time to file a document. Notably, Rule 4 of the Rules provides instances that may



occasion delay in filing the memorandum of appearance within the timeframe provided under Rule 3. It provides that the courts can extend time for filing of a memorandum of appeal under Rule 3.

20. It therefore follows that there to be an extension of time, the Court needs to be moved under the provisions of Rule 4 substantively. One has to give a satisfactory reason to court explaining the delay. Thereafter, the Court may grant the leave. Extension of time is not a procedural act to be ‘casually’ made before the Deputy Registrar during mentions for directions. It is a substantive matter to be determined by the Court itself. Consequently, the Appellant not having moved the Court under Rule 4 and there being no such prayer seeking extension of time, this Court finds that the appeal herein is for striking out for non-compliance with the Rules, particularly there being no competent Memorandum of Appeal filed, and/or no leave having been sought and/or granted to file a Memorandum of Appeal out of time.

21. I draw further guidance from the Supreme Court decision in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR where the Court held as follows:

“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. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court’s Registry. This is irregular as that document is unknown in law and the same should be struck out.

22. The upshot of the above is that the appeal herein is struck out with costs.

23. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 23RD DAY OF MAY, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....for Appellant

.....fro Respondent

Sam Court Assistant

