



Commissioner of Customs and Border Control v L'Oreal East Africa Limited (Income Tax Appeal E018 of 2025) [2025] KEHC 12656 (KLR) (Commercial and Tax) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 12656 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E018 OF 2025**

F GIKONYO, J

JULY 31, 2025

BETWEEN

COMMISSIONER OF CUSTOMS AND BORDER CONTROL APPELLANT

AND

L'OREAL EAST AFRICA LIMITED RESPONDENT

RULING

Extension of time

1. The significant order sought in the appellant's notice of motion dated 24th January 2025 is extension of time within which to file the memorandum of appeal against the Judgement of the Tax Appeals Tribunal (the Tribunal) dated 21st November 2024.
2. The application is made under Rule 4 of Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015, Section 32 of the *Tax Appeals Tribunal Act*, Article 159 of *the Constitution* of Kenya 2010.
3. The application is supported by the annexed and further affidavits sworn on 24th January 2025 and 17th February 2025 by Victor Andambi Chabala, Advocate and Charles Kamonji, court process server, respectively. The applicant also filed two sets of written submissions dated 14th February 2025.
4. The applicant stated that the Tribunal delivered its unsigned judgement electronically vide email on 21st November 2024. Later, the Tribunal sent a revised copy of the Judgement vide email on 28th November 2024. A notice of appeal was filed on 20th December 2024 and served upon the respondent via email the same day. This was within the 30 days as prescribed under Section 32 of the *Tax Appeals Tribunal Act*.
5. The applicant averred that a certified copy of the Tribunal's judgement was availed vide the Court Tracking System (CTS). However, the CTS did not prompt it once the signed judgement was uploaded.



6. The applicant averred that for purposes of computing time to file the memorandum of appeal, it believed it had 30 days after receiving the certified copy of the judgment from the Tribunal, to file the record of appeal.
7. Therefore, the applicant submitted that the application is merited because the intended appeal is arguable and has high chances of success; the application has been filed without inordinate delay and no prejudice will be suffered by the respondent if time is enlarged.
8. The applicant relied on:-
 1. Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors (1969) EA 696
 2. Independent Electoral and Boundaries Commission vs Cheperenger and 2 Others (Civil Application 36 of 2014) [2015] KESC 2 (KLR) (15 December 2015) (Ruling)

Response

9. The respondent opposed the application through a preliminary objection (PO) dated 13th February 2025. It also filed replying and supplementary affidavits sworn by Toddy Thairu Mwangi, Advocate, on 6th and 25th February 2025, respectively. It further filed written submissions dated 24th February 2025.
10. The PO objects to the application due to the applicant's failure to serve the notice of appeal on the respondent as required by Section 32 (1) of the *Tax Appeals Tribunal Act* (TAT Act).
11. The respondent further argued, on without prejudice basis, that the application is not merited as it has not satisfied the required threshold.
12. The respondent relied on:-
 1. Commissioner of Domestic Taxes v Scania East Africa Limited [2020] eKLR
 2. Nyaigwa Farmers Co-operative Society Ltd v Ibrahim Nyambane & 3 others (2016) eKLR, the Court in Commissioner of Domestic Taxes v Shah T/A Symtiss Trading (Income Tax Appeal E068 of 2023) [2023] KEHC 26844 (KLR) (Commercial and Tax) (30 November 2023) (Ruling)
 3. Commissioner of Domestic Taxes v Shah T/A Symtiss Trading (Income Tax Appeal E068 of 2023) [2023] KEHC 26844 (KLR) (Commercial and Tax) (30 November 2023) (Ruling)
 4. Naomi Wangechi Gitonga & 3 others v Independent Electoral & Boundaries Commission & 17 others [2018] eKLR
 5. Wachira Karani v Bildad Wachira [2016] KEHC 6334 (KLR)
 6. Commissioner Customs & Border Control v Manufacturer Experts & Technical Services (Income Tax Appeal E175 of 2023) [2024] KEHC 11728 (KLR) (Commercial and Tax) (20 September 2024) (Ruling)
 7. Commissioner of Domestic Taxes v Gulf Badr Group (K) Limited (Income Tax Appeal E141 of 2023) [2023] KEHC 26391 (KLR) (Commercial and Tax) (30 November 2023) (Ruling)

Analysis and Determination

13. The issues before the court are:-
 1. Whether the PO is merited?



2. Whether the applicant has met the legal threshold for the extension of time to file its appeal.
14. A PO must be based on a pure point of law. Per Law JA in *Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Ltd.* [supra], Law JA “...for a preliminary objection to succeed, the facts pleaded by the other party are assumed to be correct, it must be a matter of law which is capable of disposing off the suit, it must not be blurred by factual details calling for evidence and it must not call upon the court to exercise discretion.”
15. The respondent’s PO raises the issue of whether the notice of appeal was served or not. This being a factual requiring the court to consider evidence, It ought to be evaluated within normal procedure that allows probing of evidence and explanatory arguments rather than strictly as a PO.

Service of the notice of appeal

16. The main issue is service of the notice of appeal. The applicant claimed that it filed and served the notice of appeal dated 20th December 2024. However, the respondent’s counsel disputed the claim. He indicated that he did not receive any email message forwarding the notice of appeal.
17. The court notes that the applicant’s officer and court process server exhibited a copy of an email sent on 20th December 2024. The email is addressed to tmwangi@asuteconsulting.co.ke.
18. According to the respondent’s counsel, the correct email is tmwangi@astuteconsulting.co.ke.
19. The court finds that the email forwarding the notice of appeal was not sent to the correct email address. There was a misspelling of the word astute. Therefore, service was not properly effected.
20. But has the error been explained to the satisfaction of the court?
21. Section 32 of the [Tax Appeals Tribunal Act](#) provides:-
 - “(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.”
22. Rule 3 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015, provides that:-
 - “3. 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.”
23. In *Daniel Nkirimpa Monirei v Sayialel Ole Koilel & 4 others* [2016] KECA 148 (KLR), the Court of Appeal observed that:-
 - “The purpose of service of a Notice of Appeal is to alert the parties being served that the case in question has not been concluded yet as the same has been escalated to another level. This enables the party to prepare and get ready for another fight, be it by way of gathering resources or just getting mentally prepared for defending the intended appeal. Failure to serve a party with a Notice of Appeal within the time prescribed by law gives a party false belief that the matter has been concluded, only to be ambushed later with the record of appeal in which the said notice is tucked away somewhere in the record. That



occasions prejudice to the ambushed party, and it is in our view a habit that should not be countenanced in any fair and just process.”

24. The Supreme Court in *Hamida Yaroi Shek Nuri v Faith Tumaini Kombe & 2 others* [2019] eKLR discussed the importance of the Notice of Appeal. It agreed with Kiage JA’s pronouncement in *Zacharia Okoth Obado v Edward Akong’o Oyugi & 2 others* [2014] eKLR to the effect that the oxygen principles were not meant to overthrow the rules of procedure.

25. It may be argued that the court has the discretion to extend time as it is not in all cases that a party should be shut out court for a lapse that could be explained to the satisfaction of the court. However, exercise of discretion is upon a basis being laid by the person applying. See the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others* (Sup. Ct Application No. 16 of 2014) [2014] eKLR, that:-

“Extension of time is not a right to a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;”

26. In *Commissioner of Domestic Taxes v Scania East Africa Limited* [supra], the late Majanja J., faced with similar circumstances, concluded that:-

“9. A reading of section 31(2) of TATA shows that service of the Notice of Appeal is what triggers the process of appeal. Without service of the Notice of Appeal, the right of appeal cannot be exercised. Service by its nature means to bring notice to the other party the process of appeal. Without actual notice, service is not effective hence service on the wrong address as admitted by the Respondent is not service.

10. The right of appeal is a creation of statute and its exercise is governed by statutory strictures governing the exercise of that right (see *Nyutu Agrovat Limited v Airtel Networks Kenya Limited*; *Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* SCK Pet. No. 12 of 2016 [2019] eKLR). The statutory provision governing exercise of the right of appeal is a jurisdictional issue as was held by the Court of Appeal *Patrick Kiruja Kithinji v Victor Mugira Marete* MRU CA Civil Appeal No. 48 of 2014 [2015] eKLR that:

It is our view, whether or not an appeal is filed on time goes to the jurisdiction of this Court. It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. Consequently, we find that an appeal filed out of time is not curable under Article 159.

11. Failure to comply with the condition precedent of exercising the right of appeal is not a mere technicality that can be cured by application of Article 159(2) (d) of *the Constitution* which provides that the courts shall administer justice without undue regard to technicalities. It goes to the competence of the appeal. Whether or not the failure to serve the Notice of Appeal at the proper address is excusable can only be addressed in an appropriate application which is not before the court.”



27. I do note that this is the appropriate application to consider whether failure to serve notice at the proper address is excusable. The notice was transmitted to the wrong address and the circumstances and nature of the error have been sufficiently explained. The error was not intentional or deliberate. It is excusable.
28. Accordingly, the notice of appeal dated 20th December 2024 be served immediately to the correct address, and parties to abide by the rules of procedure attendant to filing of appeal with effect from the date of this ruling.
29. In conclusion, the application dated 24th January 2025 is allowed in the above terms.

**DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE
APPLICATION THIS 31ST DAY OF JULY 2025**

F. GIKONYO M

JUDGE

In the presence of: -

1. Ms. Otieno for KRA
2. Thairu for respondents
3. CA Kinyua

