



Commissioner of Customs & Border Control v Choice Nutrition (Customs Tax Appeal E032 of 2024) [2025] KEHC 9856 (KLR) (Commercial and Tax) (7 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9856 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CUSTOMS TAX APPEAL E032 OF 2024**

PJO OTIENO, J

JULY 7, 2025

BETWEEN

COMMISSIONER OF CUSTOMS & BORDER CONTROL APPLICANT

AND

CHOICE NUTRITION RESPONDENT

(Being an Appeal against the judgement of the Tax Appeals Tribunal delivered on 12th July 2024 in TAT Appeal No. E384 of 2023 between Choice Nutrition versus Commissioner of Customs & Border Control)

RULING

1. Each of the parties has filed a Notice of Motion Applications seeking different and opposed orders. The motions by the Respondent and Applicant are dated 20th May 2025 and 9th June 2025 respectively. The first application seeks striking out of the appeal while the second seeks extension of time to lodge the appeal and the deeming of the same to have been duly filed. The court views the two applications to be two flip sides of the same coin. A determination of one by success will yield the opposite result for the other. For that reason, the court shall seek to consider the application for extension of time and let that determination impact on the application for striking out.
2. For clarity and brevity purposes, the Commissioner of Customs & Border Control shall hence forth be referred to as the 'Appellant/Applicant' while Choice Nutrition shall remain the 'Respondent'.
3. The genesis of the appeal and the two applications stems from a dispute determined by the Tax Appeals Tribunal (TAT), dated 12.7.2024, in TAT Appeal No. E384 of 2023. The Respondent had appealed against the commissioner's review decision and a subsequent tax assessment. The Tax Appeals Tribunal found in favor of Respondent by allowing the appeal in its entirety. Aggrieved by



the Tribunal's judgement, the Applicant filed the current appeal before the Court. The Appeal was lodged by Memorandum and Record of Appeal both dated 19th September 2024 on the same date.

4. Because the judgement was delivered on the 12th July, 2024, the appeal ought to have been lodged not later than 12th of September, 2024. It is that apparent late filing and failure to serve in accordance with the rules which provoked the respondent's application for striking out. When faced with the prospects of striking out, the appellant then sought the extension of time.
5. The determination of the application dated 9th June 2025 seeking extension of time will dictate what outcome awaits the application for striking out. The court thus designs that it shall first address the application for extension of time and let the determination influence that for striking out.

Notice of Motion dated 9th June 2025.

6. The Application seeks two principal orders being; an order for extension of time within which to file a Notice of Appeal and also an order deeming the Notice and Memorandum of Appeal dated 19th September 2024 as duly filed and served.
7. The grounds disclosed to found the application on in its face and further reiterated in the Supporting Affidavit of its counsel, Maren Masai, are that the delay in lodging the appeal was a mere 7-day lateness, which it terms far from being inordinate but excusable as it was occasioned by factors outside the control of counsel.
8. One significant reason cited for the delay is that the counsel previously handling the matter at the Tribunal, Mr. Wayne Nyandieka, commenced a six-month leave of absence effective 1st September 2024 which resulted in delayed handover and reassignment of his cases to other counsel. The deponent and the advocate to whom the matter was subsequently reassigned, states that coincidentally, she was equally forced out of the office on 12th September 2024, being the deadline date for filing the Appeal, for being indisposed.
9. She further depones that she had requested a colleague to assist with the filing of the documents, and therefore operated under the belief that the documents were filed within the prescribed timelines, only to be awoken by the application for striking out.
10. In arguing for the appeal's validation and its deeming to have been duly filed, the Applicant presents that the 7-day delay is not inordinate or unreasonable and the Court should exercise its discretion in its favour. The Applicant asserts that it acted with haste and timeously to regularize the late appeal immediately after discovering the lapse. The Appeal is argued to be of high chances of success being the issues involved such as the classification of animal feeds remains matters of public interest.
11. It is the additionally urged that by granting the extension sought, the Respondent would not be prejudiced in any way as it will still have an ample opportunity to present its case. Conversely, the Applicant posits that it would suffer significant prejudice including loss of revenue and being denied a chance to be heard if the extension is not granted.
12. In conclusion, the Applicant emphasizes that it is in the broader interest of justice, good governance and public interest to allow it to fully ventilate its case on its merits stressing that Court wields unfettered discretion to grant extension of time, and that mistakes made by a legal advisor is no bar to such an extension.
13. The application was opposed by the respondent by the grounds of opposition dated 18.6.2025. by the grounds the respondent terms the application as belated, an afterthought, misconceived, vexatious and abuse of the court process for having been brought after lapse of a period spanning 11 months and



that even though the Notice and Record of appeal were filed on 19th September 2024, the same were never served till the 9.5.2025.

14. That the counsel was indisposed was discounted on the basis that the respondent is expected to have a pool of counsel it being stressed that parties and counsel are expected to comply with the law and Rules of procedure. It was then underscored that there was no explanation for the delay for 12 months and the applicant was accused of having fallen into a slumber only to be woken up by the application for striking out.
15. Those grounds were reiterated in the Replying Affidavit sworn by Simon Mbutia Gatitu sworn on the 18.6.2025 with a stress that the applicant's deponent of the affidavit in support had committed perjury by falsely asserting service that never was. That the notice and record of appeal were filed out of time on the 19.6.2025 was reiterated together with the fact of failure to serve same within the legal timelines. The reason for delay being sickness was disputed as more of an excuse than a reason for delay.
16. The respondent also filed the Notice of Motion dated 20th May 2025 seeking orders to strike out the Applicant's for having been filed out of time without leave.
17. The grounds in support of the Application ascribed on its face and further reiterated in the Supporting Affidavit of George M. Waruiru are that neither the Respondent nor its advocates were ever notified or served by the Applicant of its intention to appeal by way of a Notice of Appeal within the statutory 30-day period from the date of the Tribunal's judgment.
18. The Respondent further avers that no leave was sought by the Applicant to lodge the appeal outside the 30-day statutory time limit for filing a Notice of Appeal. It is presented that while the Applicant's Memorandum and Record of Appeal were dated 19th September 2024, they were only served on the Respondent's advocates via email on 9th May 2025, more than 10 months from the date of judgment and in contravention of statutory timelines.
19. To the Respondent the failure in filling the Notice of Appeal, coupled with the unexplained and inexcusable delay in service of the appeal documents, amounts to an ambush and an abuse of the court process. It is contended that this appeal is an afterthought, fatally defective, incompetent, frivolous, vexatious and a travesty of justice designed to frustrate a lawful and law-abiding taxpayer. Finally, the Respondent asserts that the intended appeal does not raise any arguable issues and by allowing the extension, it would be subjected to extreme prejudice and injustice.
20. The application was directed to be canvassed by way of written submissions which directions were heeded by both counsel. In the submissions, the counsel have addressed both applications. The court has read both and only summarises the same as below.
21. The Applicant's written submissions are dated 9th June 2025 and heavily relies on the general principles governing the exercise of discretion in applications for extension of time, as articulated by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* (2014) eKLR.
22. The Applicant further cites the case of *Imperial Bank Ltd (in receivership) and Another v Alnasir Popat and 18 Others* (2018) eKLR which stresses considerations to be the length of the delay, the reason(s) for the delay, the possible prejudice to either party, the conduct of the parties, the need to balance the interests of a party with a favorable decision against a party's right of appeal, the need to protect a party's opportunity to agitate its dispute and whether the intended appeal has prima facie chances of success or is frivolous. Further reference has been made in the case of *Edith Gichugu Koine vs Stephen*



- Njagi Thoithi (2014) eKLR where the court reiterated the importance of considering the period of delay, reasons for delay, degree of prejudice, and public importance.
23. On the period of delay, the Applicant submits that the appeal was lodged on 19th September 2024 while the Tribunal's judgment was delivered on 12th July 2024 discloses a 7-day lateness. The Applicant then contends that the 7-day period is not inordinate nor inexcusable and cites the case of Cecilia Wanja Waweru vs Jackson Wainaina Muiruri & another (2014) eKLR where the court held that there is no set rule for what constitutes inordinate delay which depends on the circumstances of each case.
 24. On the reasons for delay, the Applicant reiterates that the delay was due to an oversight on the part of the Counsel's colleague who omitted to file the Notice and Memorandum of Appeal within statutory timelines. It is further submitted that the delay was occasioned by circumstances outside the Appellant's Counsel's control then refers to the case of Hamam Singh & Others vs Mistri (1971) EA 122 where it was held that mistakes of a legal advisor may amount to sufficient cause for delay as long as it is not inordinate delay on the advisor's part. The Applicant additionally cites the case of Nicholas Kiptoo Arap Korir Salat on the necessity and the duty explain reasons for delay and extenuating circumstances to enable the Court to exercise its discretion. The applicant adds that it discovered the appeal was lodged outside timelines only on 20th May 2025 and moved within reasonable time to follow up on the matter and instructed counsel to file the instant application without unreasonable delay.
 25. On the issue of prejudice and public interest, the Applicant argues that the Respondent will not suffer any prejudice if the extension is granted as it will have full opportunity to present its case. Conversely, the Applicant contends that it would suffer significant prejudice if the application is denied as it would be denied a chance to be heard and stands to lose revenue. The Applicant submits that its appeal is arguable, citing the Tribunal's alleged failure to adhere to Section 229 of the East African Community Customs Management Act as a plausible ground.
 26. The Applicant further invokes the broader interest of justice and public interest principles, citing the case of Kamlesh Mansukhalal Damji Pattni vs Director of Public Prosecutions & 3 others (2015) eKLR which underscores the fundamental purpose of courts to dispense justice and uphold human rights by ensuring fairness and public confidence in the justice system. The Applicant submits that a reasonable or plausible explanation of the delay is what unlocks the court's flow of discretionary favour.
 27. It is the Applicant's submission that the Memorandum and Record of Appeal, despite being filed without prior leave, should be deemed as duly filed and served then supports the argument by citing the case of Charles Karanja Kiiru Vs Charles Githinji Muigwa (2017) eKLR which supports deeming applications duly filed when leave is subsequently granted.
 28. For the Respondent the position taken in the written submissions goes that there is every need strict adherence to procedural rules and that the inordinate delay in this matter is not excusable but demonstrates abuse of court process by the Applicant. It is stressed that the failure to serve the Notice of Appeal affronts the mandatory stipulation of Section 32(1) & (1A) of the *Tax Appeals Tribunal Act* as read with Rule 3 of the Tax Appeals Tribunal (Appeals to The High Court) Rules, 2015 which is submitted to be fatal to the appeal.
 29. It is hen argued that the Applicant's failure to serve the Notice of Appeal within the prescribed time created in the mind and view of the respondent the false belief that the matter had been concluded, leading to an ambush when the appeal documents were eventually served. This, it is argued, occasions prejudice and should not be countenanced. The decision in *Ali v Grain Industries Limited (Civil Application E066 of 2023)* (2024) KECA 400 (KLR) and *Daniel Nkirimpa Monirei v Sayialel ole Koilel & 4 others* (2016) eKLR. is cited to emphasize the need for strict timelines to achieve timely, just, efficient, proportionate and cost-effective dispute resolution.



30. The Memorandum of Appeal is tagged incompetent because no Notice of Appeal was served prior to its filing neither was leave sought to file it out of time. The procedural defect, the Respondent argues, goes to the very jurisdiction of the Court. Patrick Kiruja Kithinji v Victor Mugira Marete (2024) KECA 872 (KLR) is cited for the holding that an appeal filed out of time without leave affects the Court's jurisdiction and is not curable under Article 159 of *the Constitution*. The Respondent further illustrates the proper appeal process by referencing Commissioner of Domestic Taxes v Africa Oil BV (2024) KEHC 10036 (KLR).
31. The delay in lodging the appeal late and serving it more than 11 months from date of judgment is viewed as inexcusable, inordinate and unjustifiable. The Respondent stresses that the Applicant has failed to satisfactorily explain the whole period of delay then relies on the decision of the Supreme Court case of County Executive of Kisumu v County Government of Kisumu & 8 others, SC. Civil Appl. No. 3 of 2016; (2024) eKLR for the proposition that the whole period of delay must be disclosed and explained.
32. For failure to explain the delay as reasonable and not inordinate, the motion is seen as an afterthought, frivolous, vexatious and an abuse of the court process. The Respondent then disputes the admissibility of the Applicant's Exhibit KRA-1, the email regarding re-allocation of matters, arguing that it contravenes Section 106 (B) (4) of the *Evidence Act* which requires a certificate identifying the electronic record, describing its production, providing particulars of any device involved and purporting to be signed by a person in a responsible position, none of which is stated to have been provided.
33. The claim of a 2-day sick leave, from 11th to 13th September 2024, is deemed insufficient justification for the long delay it being pointed out that there is total lack of explanation for the next 6 days. The decision in Olivia Wamuhu Kinyanjui v Margaret Njeri Ndirangu (2024) KEHC 886 KLR was cited to support the position that the court has discretion to decline request for extension of time where there is unexplained inordinate delay. The Respondent further argues that the Applicant, as a central government authority, is expected to possess endless human resources to manage its legal matters, rendering the explanations for delay inexcusable and unjustified.
34. It is the Respondent's submissions that the grounds raised in the Applicant's Memorandum of Appeal do not present any arguable issues, as no evidence has been adduced to demonstrate the appeal's chances of success. The Respondent asserts that allowing the Applicant's motion would subject Choice Nutrition to unforeseen litigation because of the complacency, unseriousness and omission on the part of the intended Appellant causing grave prejudice.
35. The Respondent concludes by urging the Court to allow its motion dated 20th May 2025 to strike out the appeal and dismiss the Applicant's motion dated 9th June 2025 for extension of time. It further prays for an award of costs for both applications on a full indemnity basis, in line with Section 27 of the *Civil Procedure Act* that costs follow the event, and citing Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others KESC 31 (KLR).

Analysis Determination.

36. The court has anxiously considered the application and the corresponding affidavits as well as the parties' written submissions, and identifies the single issue for its determination to be whether Applicant has laid a sufficient basis for the grant of an extension of time to file its Notice of Appeal and for its Memorandum and Record of Appeal to be deemed as duly filed and served.



37. Whether to extend time is a matter that sits at the discretion of the court based on the well-established legal principles applicable. It is equally trite that extension of time is never a right but an equitable remedy requiring the Applicant to lay a satisfactory basis. Guided and duly bound by the principles established in the above cited case of *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 others* [2014] eKLR, the court in exercising such discretion is bound to consider inter alia, the length of delay, the reasons for delay, the prejudice to the Respondent if the extension is granted and whether the application was brought without undue delay. For clarity and flow of reason, the court proceeds to examine each of the considerations.

Length of delay

38. It is common ground the Tax Appeals Tribunal delivered its judgment on 12th July 2024. Section 32(1) of the *Tax Appeals Tribunal Act* and Section 53 of the Tax Procedure Act require a party desiring to appeal to do so by filing a Notice of appeal within thirty days (30) of being notified of the decision or such further period as the High Court may allow. Such a party is then mandated to serve a copy of the notice of appeal on the other party. Rule 3 of the Tax Appeals Tribunal (Appeals to The High Court) Rules, 2015, further mandates that the appellant shall, within thirty days after the date of service of a notice of appeal, file a memorandum of appeal.
39. The Applicant concedes that its Memorandum and Record of Appeal were simultaneously filed on 19th September 2024. The duration aggregates at 69 days from the date of the date the judgment of the Tribunal was rendered. While the applicant reckons that the delay is a mere 7-day of the court's calculation gives a delay of 39 days. That is however not all there is on delay. Having so filed out of time, the applicant wholly refuses to acknowledge that it had the duty to timeously remedy default by filling the current application withing a reasonable time. It is content to assert, even during oral highlight of submissions when asked by the court, that the period between 19.9.2024 and date of filing its application did not matter as a period of delay to be explained. The court views that a monumental misapprehension of the law.
40. It is equally unacceptable that the applicant hopes to convince the court that its counsel could not appreciate that the matter was filed out of time and that it could only take the application for striking out for the realization to dawn.
41. When the law says that the application is to be brought without inordinate delay, the period for consideration is that between the date the appeal was due for lodgment and the date the application for extension was filed. In the court's calculation, the appeal here was due for initiation on or about the 12th of August 2024. The period between that date and the date of the application comes to about 10 months. Because the applicant opted to reckon only with the period up to 19th September, a period of about 9 months has not been explained. To this court failure to explain delay to the satisfaction of the court deprives the court of any material to base a discretion upon. It remains the law that judicial discretion must be based upon reasons and that where a decision is devoid of reason it takes the character of a whim or just caprice.
42. Moreover, the fact that the Applicant's Memorandum and Record of Appeal dated 19th September 2024 were only served upon the Respondent's advocates via email on 9th May 2025 constitutes a further unexplained and inordinate delay of nearly ten months.
43. The court finds that the Applicant's initial assertion that service occurred on 19th September 2024 is demonstrably false on the face of the evidence of the email service of 9th May 2025 exhibited by the Applicant itself. Notably, this factual inconsistency in the court's view further undermines the Applicant's credibility and the reliability in its explanations for the delay. The true period of inaction



by the Applicant, particularly after filing the appeal documents is far more extensive than initially presented by the Applicant. The court finds that delay not only inordinate but equally unexplained.

Reasons for delay.

44. The Applicant attributes the delay to several factors including, sickness of counsel and oversight by a colleague who omitted to file documents within statutory timelines. It is said that the previous counsel, Mr. Wayne Nyandieka, had taken a six-month leave of absence from 1st September 2024 and the resultant a delay in handover and reassignment. To court, the applicant is a public agency, created by statute to perform public duty vested and thus bound, like all public entities, to act with efficiency and promptitude. It cannot be viewed with same lens like a sole legal practitioner whose office may fall sick with the advocate or goes on holiday with the proprietor. The applicant is a corporate expected of good governance and not to be stalled just because an officer is sick or has left office. Here it is not even clear what duration was needed or taken to have the file reallocated.
45. The other reason given to justify the delay is that the reassigned counsel, Ms. Maren Masai, was indisposed from 11th to 18th September 2024 when she operated under false belief that a colleague had filed the appeal documents intime, yet it is double spoken that the lapse was only discovered upon receipt of the Respondent's application to strike out the appeal on 20th May 2025.
46. To the court, when to file an appeal being a prescription of the law is a matter that requires no reminder to an advocate. The counsel when duly in control of his docket ought to have the timelines on the fingertips. In so far as it is asserted that it is the application for striking out which notified the counsel of the default, the court sees a case of indolence and lack of candour.
47. To the court, the rigid timelines set under the *Tax procedures Act* and the *Tax Appeals Tribunal Act* are themselves derivative norms of the imperative that justice shall not be delayed as buttressed with the understanding that tax collection drives the state and need to be executed efficiently and promptly. The court thus concurs with the respondent that there is a glare of dexterity and laidback conduct on the part of the applicant.
48. The court has therefore duly considered the explanation for delay to justify extension of time, weighed same against the disclosed facts and the prevailing circumstances of the case and finds that the explanation offered is indeed unconvincing. The court thus holds that the delay has not been plausibly explained to the satisfaction of the court.

a. Prejudice to the Respondent and undue delay in bringing the application

49. It is the Respondent's case that allowing the extension sought would cause extreme prejudice and injustice by subjecting it to unforeseen litigation due to the Applicant's complacency, lack of seriousness and omission. The Respondent also asserts that the Applicant's application for extension is an afterthought and brought with undue and inordinate delay. That is indubitable when the court takes into account the concession that the applicant only moved after the Respondent filed its application to strike out the appeal. Being an equitable remedy intended to serve justice by excusing mistake or explicable inadvertence, the applicant deserves not the remedy for exhibiting indolence rather than diligence.
50. On the arguability, or otherwise, of the appeal, the court appreciates that its jurisdiction is limited to questions of law only and that the tribunal being the truer of facts remains the master thereof. The court is hesitant to accept the invitation to consider whether or not the review of the facts leading to the determination was not properly done.



51. For the inordinate and unexplained delay of more than 10 months, failure to plausibly explain the delay and demonstrated prospects of prejudice to the respondent, the court finds that it has no basis to grant the application for extension of time. The application fails and is dismissed with costs.
52. Having dismissed the application for extension of time, the position remains that the appeal was filed out of time without leave. The question then is, what fate confronts it! Such an appeal is obviously incompetent. It is only salvageable by time being extended but that remedy has been determined to be unmerited here.
53. To the contrary, there is in the file an application to strike out the appeal for the same defect, being incompetent for having been filed out of time without leave. The law is that the reasons for extending time are the same for refusing an application to strike out. Upon refusal to extend time for the reasons disclosed becomes the axiomatic basis to allow the application for striking out.
54. The inevitable consequence of denial of extension is that the appeal must be struck out on the strength of the Respondent's Notice of Motion dated 20th May 2025. That motion is allowed with the result that the appeal is struck out with costs.
55. The respondent has emerged successful in both applications hence the court awards it the costs of both applications.
56. It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 7TH DAY OF JULY, 2025.

PATRICK J O OTIENO

JUDGE

