



**Commissioner of Domestic Taxes v Seven Four Eight Air Services (K) Limited (Commercial Appeal E075 of 2023) [2024] KEHC 14736 (KLR) (Commercial and Tax) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14736 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E075 OF 2023  
MN MWANGI, J  
NOVEMBER 14, 2024**

**BETWEEN**

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

**AND**

**SEVEN FOUR EIGHT AIR SERVICES (K) LIMITED ..... RESPONDENT**

*(Being an Appeal from the whole judgment of the Tax Appeals Tribunal dated 12th May 2023 in the Tax Appeals Tribunal Appeal No. 139 of 2022)*

**RULING**

1. The Commissioner of Domestic Taxes, the applicant herein, filed an application dated 17<sup>th</sup> October, 2023 under the provisions of Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the *Civil Procedure Act*, and all other enabling provisions of the law, and Article 159(d)(sic) of *the Constitution* praying for the following orders –
  - a. Spent;
  - b. That the applicant be allowed to furnish a complete supplementary affidavit containing the judgment dated 12<sup>th</sup> May, 2023 and proceedings by the Tax Appeals Tribunal;
  - c. That alternatively, the Court to order the applicant to furnish it with a copy of the judgment dated 12<sup>th</sup> May, 2023 and proceedings by Tat (sic);
  - d. That the costs of this application be in the cause
2. The application is supported by an affidavit sworn on 17<sup>th</sup> October, 2023 by Lilian Nyaringita, the Advocate seized with the conduct of this matter. She deposed that on 11<sup>th</sup> October, 2023, the matter came up for highlighting of written submissions of the applicant’s application dated 1<sup>st</sup> August, 2023



before me, when she realized that the applicant's supplementary affidavit sworn on 2<sup>nd</sup> October, 2023 filed in support of said application was incomplete, in that the copy of the judgment by the Tribunal was not attached to the said affidavit, despite the same having been marked as JHZ. She averred that on 3<sup>rd</sup> October, 2023, she had instructed Mr. Wilson Kipees the applicant's Process Server to file the supplementary affidavit sworn on 2<sup>nd</sup> October, 2023, but he filed the applicant's Counsel's office copy, which did not contain all the annexures, instead of filing the Court's copy which had all the annexures attached.

3. She stated that the said action was a mistake on her part and the same was highly regretted. She urged this Court not to visit the mistake on the applicant.
4. Ms Nyaringita stated that she had filed a complete affidavit which contains all the annexures cited and urged this Court to consider the same before rendering its ruling. She stated that unless this Court exercises its discretion and allows the applicant to file the supplementary affidavit and/or judgment and proceedings, the applicant stands to suffer great prejudice as this Court will not have an opportunity to consider the order from which the applicant prays for extension, but the respondent will not be prejudiced as the applicant does not intend to introduce any new information save for what had been omitted in the supplementary affidavit sworn on 2<sup>nd</sup> October, 2023.
5. Ms Nyaringita averred that in order for this Court to render itself and for substantive justice to prevail, it is important for it to look at the judgment of the Tribunal. She contended that the applicant will suffer irreparable harm if the application is not granted as the Court will not be able to arrive at a just conclusion to the both parties. She added that the application has been filed without inordinate delay.
6. In opposing the application, the respondent filed a lengthy affidavit spanning 27 paragraphs. The said affidavit was sworn by Mr. Moses Mwangi, the Managing Director of the respondent. He stated that the application herein as per the advice of his Advocates is that it seeks to reopen the Notice of Motion application dated 1<sup>st</sup> August, 2023 which was scheduled for highlighting of submissions on 11<sup>th</sup> October, 2023 before this Court.
7. Mr. Mwangi gave a chronology of the processes taken by the parties herein to have the application dated 1<sup>st</sup> August, 2023 heard. He averred that the applicant's supplementary affidavit sworn on 2<sup>nd</sup> October, 2023 was served on the respondent on 3<sup>rd</sup> October, 2023, after the respondent's replying affidavit and written submissions had been filed and after the applicant had filed its written submissions.
8. Mr. Mwangi stated that on 11<sup>th</sup> October, 2023, he watched proceedings of the Court Online when the application dated 1<sup>st</sup> August, 2023 came up for hearing, and noted that his Advocate, Mr. Bahati Mwamuye drew the attention of the Court to the fact that the applicant's supplementary affidavit sworn on 2<sup>nd</sup> October, 2023 referred to Annexure "JH-2", supposedly containing the judgment and proceedings of the Tax Appeals Tribunal, was missing from both the physical copy served on the respondent as well as the filed version found on the Judiciary's Portal. He stated that his Counsel also drew to the Court's attention the fact that the applicant had multiple versions of supplementary affidavits sworn on 2<sup>nd</sup> October, 2023, none of which were the same, and none of which contained the judgment and/or proceedings of the Tax Appeals Tribunal against which the applicant was aggrieved.
9. Mr. Mwangi averred that the issue of the applicant's missing documents was raised in opposition to the application dated 1<sup>st</sup> August, 2023 vide the respondent's replying affidavit sworn on 21<sup>st</sup> August, 2023 and its submissions dated on 21<sup>st</sup> September, 2023. It was averred that there is no means by which this Court can ascertain if the draft Memorandum of Appeal discloses an arguable appeal warranting the favourable exercise of the Court's discretion due to the incomplete record, and that the applicant has filed the present application dated 17<sup>th</sup> October, 2023 seeking to either amend its



already filed supplementary affidavit sworn on 2<sup>nd</sup> October, 2023 to include the impugned judgment and proceedings, and to be granted leave to adduce the same.

10. Mr. Mwangi contended that the applicant is blaming Process Servers for failure to file documents which is a worrying habit of the applicant in these proceedings, as the applicant blames a Process Server by the name Jane Handa for whom no proof of registration was provided, for not filing the Memorandum of Appeal within the statutory period.
11. Mr. Mwangi pointed out that in the supplementary affidavit sworn on 2<sup>nd</sup> October, 2023, Jane Handa states that her affidavit contains the judgment and proceedings of the Tax Appeals Tribunal as an annexure JH – 2, but the same were not annexed.
12. Mr. Mwangi averred that in the Notice of Motion dated 17<sup>th</sup> October, 2023, Wilson Kipees, an alleged Process Server for whom no proof of registration was provided, was blamed for failure to upload a version of the applicant's supplementary affidavit sworn on 2<sup>nd</sup> October, 2023 that contains the impugned judgment and proceedings of the Tax Appeals Tribunal. Mr. Mwangi contended that the reasons advanced by the applicant are not compelling or acceptable for the favourable exercise of the Court's discretion.
13. The respondent regarded the foregoing state of affairs as being an admission by Counsel for the applicant of lack of exercise of diligence, care, or supervision to ensure that documents drawn and filed by her were accurate, because she only got to know of the omission on 11<sup>th</sup> October, 2023 when the issue was raised by the respondent's Counsel.
14. The respondent contended that lack of diligence on the part of Counsel for the applicant in following up, her lack of proper supervision and control of the alleged Licensed Process Servers allegedly working under her are not good and compelling reasons for this Court to exercise its discretion in favour of the applicant.
15. Mr. Mwangi deposed that the respondent will be greatly prejudiced if the orders sought in the Notice of Motion application dated 17<sup>th</sup> October, 2023 are granted because the said application is an admission that the respondent has almost certainly succeeded in opposing the applicant's Notice of Motion application dated 1<sup>st</sup> August 2023. He contended that the present application seeks to deny the respondent the imminent hard fought victory which was secured after a full hearing of the matter that included filing of affidavits, submissions, and the making of oral arguments.
16. The respondent's deponent averred that the respondent will also be prejudiced because allowing the applicant's Notice of Motion application dated 17<sup>th</sup> October, 2023 would require the respondent to similarly file an application seeking leave to file a supplementary replying affidavit and supplementary written submissions, since the heart of the defence against the applicant's application will have been neutered post hearing. He stated that supplementary documents will allow the respondent to adduce additional grounds of defence which it had not adduced earlier on, since it had an iron-clad defence, and that even the applicant has even conceded that the respondent was bound to succeed.
17. The respondent urged this Court to note that the applicant's repeated mis-steps and lack of diligence occasions extra costs on the respondent in terms of additional appearance fees charged by their Counsel and fees for perusal and drafting as required by law. Mr. Mwangi contended that the re-opening and hearing of an interlocutory matter on the unconvincing grounds relied upon by the applicant will expose the respondent to very high costs which cannot be recovered from the applicant.



18. The applicant filed a supplementary affidavit sworn on 18<sup>th</sup> December, 2023 by Lilian Nyaringita which is basically a reiteration of the earlier averments. The deponent annexed Mr. Wilson Kipee's Process Server's certificate to the said affidavit.
19. The applicant also filed written submissions dated 15<sup>th</sup> January, 2024 in support of its application.
20. Ms Nyaringita, learned Counsel for the applicant relied on the provisions of Sections 1A, 3A and the case of *Abdirahman Abdi v Safi Petroleum Products Ltd & 6 others* [2017] eKLR, in urging this Court to administer justice without procedural technicalities, as the applicant's Record of Appeal will be incomplete if this Court does not grant the orders sought in the application.
21. She submitted that this Court will not have the benefit of considering all the relevant documents, especially the judgment that forms the subject of the appeal, before this Court makes a determination of the Appeal.
22. Counsel also relied on the case of *James Mangeli Musoo v Ezedec Limited* [2014] eKLR, where the Court defined what a technicality is, and the said Court went on to expound on its understanding of Article 159(2)(d) of *the Constitution*. She also relied on the decisions in *James Muriithi Ngotho & 4 others v Judicial Service Commission* [2012] eKLR, and *Kenya Ports Authority v Kenya Power of Lighting Co. Limited* [2012] eKLR, where Courts defined the term "procedural technicalities".
23. Ms Nyaringita submitted that failure to attach annexures to its supplementary affidavit is a procedural technicality capable of being cured under Article 159 of *the Constitution* of Kenya, the oxygen principles and/or the overriding objective of the *Civil Procedure Act*. She urged this Court to focus on substantive justice.
24. She contended that the respondent will suffer no prejudice if the application is allowed, and that it did not object to production of the proceedings and judgment of the Tribunal when they were served with the supplementary affidavit. She stated that the respondent can now therefore not be seen to object to an application for the applicant to furnish copies of the same.
25. She submitted that the applicant will suffer untold prejudice if it is not allowed to furnish the complete supplementary affidavit as the Court will determine the Appeal without the benefit of considering the proceedings and judgment of the Tax Appeals Tribunal. She prayed for the application to be allowed.
26. The respondent filed written submissions dated 5<sup>th</sup> February, 2024. Mr. B. Mwamuye, learned Counsel for the respondent referenced Rule 5(e) of the Tax Appeals Tribunals (Appeals to the High Court) Rules, 2015 which provides that a Memorandum of Appeal shall be accompanied by a copy of the decision of the Tribunal and the Notice of Appeal. He contended that the applicants second application is a violation of Rule 5(e) of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015.
27. He relied on the case of *Josephine Wambui Mwangi v Michael Mukundi Ngugi* [2021] eKLR, where the appellant failed to include proceedings of the Trial Court in the Record of Appeal and the Appeal therein was struck out. He also relied on the case of *Bwana Mohammed Bwana v Silvano Buko Bonaya & 2 others*, Malindi Court of Appeal Election Petition Appeal No. 40 of 2013, on the same issue.
28. Mr. Mwamuye expressed the view that the applicant's Counsel failed to act with diligence as she only came to learn of the fact that the judgment and proceedings were not annexed to the applicant's supplementary affidavit sworn on 2<sup>nd</sup> October, 2023 when he raised the same during the hearing.



29. The respondent's Counsel cited the case of Rupa Savings & Credit Cooperative Society v Violet Shidogo [2022] eKLR, to support the contention that the applicant's Counsel failed to exercise diligence in ensuring the quality of the documents drawn and filed by her.
30. He submitted that allowing the present application will be re-opening the hearing of the appeal yet the applicant has not shown any principle for reopening of the Appeal. Mr. Mwamuye relied on the case of Susan Wavinya Mutavi v Isaac Njoroge & another [2020] eKLR, to support the said argument. He concluded his submissions by stating that by the applicant seeking to re-open its case, it was indirectly inviting the Court to rubber stamp the illegality. He prayed for dismissal of the application with costs.

### **Analysis And Determination.**

31. I have considered the averments made in support of each party's case and the submissions relied on. The issue of determination is if the applicant should be allowed to furnish a complete supplementary affidavit containing the judgment of the Tax Appeals Tribunal dated 12<sup>th</sup> May, 2023 and proceedings by the said Tribunal, or in the alternative, for the Court to order the applicant to furnish it with a copy of the judgment dated 12<sup>th</sup> May, 2023 and proceedings by the Tribunal.
32. A brief background of the matter before me is that on 28<sup>th</sup> July, 2023, Judge A. Mabeya gave directions for the application filed by the applicant seeking leave to file its Memorandum of Appeal out of time to be served and responded to. The Judge also gave directions for the filing of written submissions.
33. At the time the Advocates for the parties appeared before me on 11<sup>th</sup> October, 2023, they had complied. When the respondent's Advocate was highlighting his written submissions to the application dated 1<sup>st</sup> August, 2023, he opposed the same and pointed out that in paragraph 3 of the applicant's supplementary affidavit, the applicant had stated that it had attached to the said affidavit and marked JHZ, a copy of the judgment and proceedings, but none were attached. Mr. B. Mwamuye submitted that the proceedings and judgment would have enabled this Court to satisfy itself if the applicant had an arguable appeal.
34. I do agree with Mr. B. Mwamuye that it was indeed negligent for Counsel for the applicant to proceed to highlight her written submissions for the application dated 1<sup>st</sup> August, 2023 without counter-checking if all the requisite documents that she was relying on to support the said application had been uploaded and were available on the CTS portal. It points to the fact that she applied a hands off approach to a matter she had been instructed to pursue on behalf of her employer, the applicant herein. It is the said error that has given rise to the present application. The said Counsel wants to patch up the said shortcomings since the Process Server she instructed to upload the supplementary affidavit failed to upload annexures to its application. As it is, without the proceedings before the Tribunal and the judgment therefrom, the applicant's application dated 1<sup>st</sup> August, 2023 is incomplete and defective.
35. I am however of the considered view that the applicant would be able to remedy the situation by being given an opportunity to file a supplementary affidavit to attach the proceedings before the Tribunal and the judgment rendered by the said Tribunal.
36. This Court notes that although Mr. B. Mwamuye, would like this Court to take drastic action by not allowing the applicant's Advocate to patch up the application dated 1<sup>st</sup> August, 2023, I however equally note that Ms Nyaringita for the applicant has owned up to the oversight on the part of the applicant's Process Server who uploaded the said application without the supporting documents.



37. In this instance, I have been called upon to exercise my discretion so as to allow the instant application. In the case of *Osborne v Bank of the United States* 22 U.S. 738 [1824], Chief Justice John Marshall the 4<sup>th</sup> Chief Justice of the United States delivered himself thus on the issue of judicial discretion -

“Judicial Power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law, and, when that is discerned, it is the duty of the Court to follow it. Judicial Power is never exercised for the purpose of giving effect to the will of the Judge, always for the purpose of giving effect to the will of the legislature; or, in other words to the will of the law”.

38. While exercising my discretion in this matter, I have to consider if the mistake made by the applicant’s Counsel was an excusable mistake or not. In the case of *Tana & Athi Rivers Development Authority v Jeremiah Kirigho Mwakio & 3 others* [2015] eKLR, the Court of Appeal held that in determining whether to exercise discretion in a party’s favour, the Court pays regard to the damage sought to be forestalled vis-à-vis the prejudice to be visited on the opposing party.

39. On the issue of mistakes of Counsel not being visited on an innocent litigant, the Court of Appeal in the case of *Tana & Rivers Development Authority v Jeremiah Kirigho Mwakio* (supra), continued to state as follows–

“From past decision of this Court, it is without doubt that Courts will readily excuse a mistake of Counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the excision of such discretion is by no means automatic. While acknowledging that mistake of Counsel should not be visited on a client, it should be remembered that Counsel’s duty is not limited to his client; he has a corresponding duty to the Court in which he practices and even to the other side.”

40. What is required of this Court is the exercise of its discretion judiciously in either allowing the application dated 17<sup>th</sup> October, 2023 or not allowing the same. I agree with Ms Nyaringita that I should not allow a procedural technicality to overshadow substantive justice. Article 159(2)(d) of *the Constitution* applies in this instance.

41. In as much as the respondent’s Counsel was of the view that the applicant should not be given the opportunity to remedy its error, I will give the applicant the opportunity to prosecute its application dated 1<sup>st</sup> August, 2023 on merits. In this instance, the applicant’s Counsel, Ms Lilian Nyaringita will however personally bear the costs of the application dated 17<sup>th</sup> October, 2023 due to her lack of diligence. Such costs cannot be borne from the money Taxpayers pay to the applicant herein.

42. In the result, I hereby allow the application dated 17<sup>th</sup> October, 2023 in the following terms –

1. The applicant will file and serve a supplementary affidavit annexing the proceedings of the Tax Appeals Tribunal and its judgment dated 12<sup>th</sup> May, 2023 within 14 days from today;
2. The submissions filed by the Advocates for the parties in respect to the said application are hereby expunged from the Record;
3. The applicant’s Advocate will file and serve their written submissions to the application dated 1<sup>st</sup> August, 2023 contemporaneously with the applicant’s supplementary affidavit;



4. The respondent's Counsel will file and serve their written submissions within 14 days of service;
5. Ms Lilian Nyaringita Advocate will personally pay the respondent Kshs.10,000/= being the costs of the application dated 17<sup>th</sup> October, 2023; and
6. Mention on 18<sup>th</sup> December, 2024 to take a ruling date for the application dated 1<sup>st</sup> August, 2023.

It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS DAY OF 14<sup>TH</sup> NOVEMBER, 2024.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Ms Nyaringita for the appellant/applicant

Ms Mwanyika holding brief for Mr. Odenyi Kachero for the respondent

Ms B. Wokabi – Court Assistant.

