



**Commissioner of Customs & Border Control v Wire Products Limited
(Commercial Appeal E031 of 2023) [2024] KEHC 15964 (KLR)
(Commercial & Admiralty) (13 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15964 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
COMMERCIAL APPEAL E031 OF 2023
MN MWANGI, J
DECEMBER 13, 2024**

BETWEEN

COMMISSIONER OF CUSTOMS & BORDER CONTROL APPELLANT

AND

WIRE PRODUCTS LIMITED RESPONDENT

RULING

1. The respondent filed a Notice of Motion application dated 18th September 2023 pursuant to the provisions of Section 32(1A) of the *Tax Appeals Tribunal Act*, Rule 17 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015, and all other enabling provisions of the law. The respondent seeks for orders inter alia, that the appellant's Notice of Appeal dated 5th July 2023 be struck out for being filed out of time, and that the Record of Appeal filed herein be struck out as the appellant defaulted to serve its Notice of Appeal within the statutory timelines.
2. The application is supported by an affidavit sworn on the same day by Timothy Mutuma, the respondent's Chief Accountant. He stated that the Tax Appeals Tribunal allowed the respondent's appeal on 9th June 2023, thereby setting aside the appellant's objection decision dated 6th April 2022. He averred that being dissatisfied with the said judgment, the appellant filed a Notice of Appeal dated 5th July 2023, which was received by the Tax Appeals Tribunal on the same day. He further stated that the said Notice was served to the respondent on 11th July 2023, six days later, instead of within the required two-day period provided under Section 32(1A) of the *Tax Appeals Tribunal Act*. He also averred the said delay constitutes non-compliance with a necessary condition, thus affecting the appeal's validity.



3. In opposition to the application, the appellant filed a replying affidavit sworn on 25th October 2023 by Collins Onyango Owuocha, a licensed Process Server employed by the Kenya Revenue Authority. He stated that on 5th July 2023, the appellant's Counsel filed a Notice of Appeal and a letter requesting typed proceedings at the Tax Appeals Tribunal, intending to serve them on RSM (Eastern Africa) Consulting Limited, but due to the Tribunal's relocation, services were disrupted. He further stated that on 6th July, a retrieval attempt was unsuccessful as the Tribunal could not locate the documents, and that a follow-up letter sent on 7th July to the Tribunal's Secretary went unanswered, but following further efforts, the documents, including the Notice of Appeal were finally retrieved on 11th July 2023.
4. He attributed the delay in serving the Notice of Appeal to the Tax Appeals Tribunal's relocation, which disrupted the processing of documents, and asserted that upon retrieving the Notice of Appeal on 11th July 2023, it was immediately served electronically to the respondent. He argued that the delay was not willful but as a result of a bona fide mistake caused by circumstances beyond their control. Mr. Owuocha invoked the provisions of Article 159(d) of *the Constitution*, emphasizing that procedural technicalities should not impede justice. He contended that the respondent would not be prejudiced if the appeal proceeds on merit, as it would allow the issues to be fully addressed. He urged this Court to deem the Notice of Appeal as being properly served.
5. The instant application was canvassed by way of written submissions which were highlighted on 5th June 2024. The respondent's submissions were filed on 16th January 2024 by the law firm of Oraro & Company Advocates, whereas the appellant's submissions were filed on 4th March 2024, by Ms Wanjiru Njuguna, Advocate.
6. Ms. Renee Omondi, learned Counsel for the respondent submitted that the appellant failed to satisfactorily explain the delay in serving the Notice of Appeal dated 5th July 2023 to the respondent. She noted that the Tribunal had directed litigants to file matters online during its relocation and provided email addresses for that purpose. She contended that the appellant could have easily filed the Notice of Appeal via email, copied the respondent, and explained any difficulties in serving a hard copy, thus avoiding the delay. She relied on the Court of Appeal case of Mistry Premji Ganji (Investments) Limited v Kenya National Highways Authority [2019] eKLR, and the case of Salama Beach Hotel Limited & 4 others v Kenyariri & Associates Advocates & 4 others [2016] eKLR, and asserted that statutory timelines must be strictly adhered to, and violations without plausible justification should be sanctioned.
7. Counsel argued that the appellant failed to provide a valid explanation for the delay in serving the Notice of Appeal dated 5th July 2023 within the prescribed timelines, thus warranting its dismissal. She relied on the Supreme Court decisions in Law Society of Kenya v Centre for Human Rights & Democracy & 12 others [2014] eKLR and Equitable Party & 2 others v Independent Electoral and Boundaries Commission [2022] eKLR. She contended that the appellant's non-compliance with Section 32(1A) of the *Tax Appeals Tribunal Act* affects the Court's jurisdiction to hear and determine the instant appeal, hence it cannot be regarded as a technicality capable of being cured by the provisions of Article 159(2)(d) of *the Constitution* of Kenya, 2010.
8. Ms. Njuguna, learned Counsel for the appellant acknowledged a four-day delay in serving the Notice of Appeal dated 5th July 2023 but argued that the delay was unintentional and caused by circumstances beyond the appellant's control. She explained that although the Tribunal had directed online filing, the appellant's Process Servers were accustomed to physical filing due to the Tribunal's previous location in the same building as the appellant's offices. She emphasized that the respondent would not suffer any prejudice if the application herein is disallowed, as it had already filed responses to the appeal.



9. She referred to the Court of Appeal case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR, and stated that the appellant complied with the provisions of Section 32(1A) of the [Tax Appeals Tribunal Act](#), and that the delay in serving the Notice of Appeal on 11th July 2023 was not fatal. She urged this Court to uphold the validity of the Notice of Appeal. She invoked Article 159(2)(d) of [the Constitution](#), 2010 and Section 1A of the [Civil Procedure Act](#), emphasizing the importance of substantive justice over procedural technicalities.

Analysis And Determination.

10. I have considered the application filed herein, and the affidavit filed in support thereof. I have also considered the replying affidavit filed by the appellant and the written submissions by Counsel for the parties. The issue that arises for determination is whether there is a valid appeal on record.

If the application herein is merited.

11. Section 32(1A) of the [Tax Appeals Tribunal Act](#) provides that -

A party that has appealed against the decision of the Tribunal in subsection (1) shall within two days of lodging a notice of appeal, serve a copy of the notice on the other party.

12. It is not in contest that the appellant having filed a Notice of Appeal dated 5th July 2023 on the same day, ought to have served it upon the respondent on or before 7th July 2023. However, the appellant served the said Notice on 11th July 2023 which was 4 days outside the timelines provided for under the provisions of Section 32(1A) of the [Tax Appeals Tribunal Act](#). The appellant contended that the delay in serving the said Notice of Appeal was not intentional, as the same was occasioned by the fact that upon filing the Notice of Appeal at the Tax Appeals Tribunal, the appellant was unable to get a copy of the lodged Notice, for purposes of effecting service on the respondent, since services at the Tribunal were disrupted by its move to new offices.
13. The appellant averred that when it visited the Tribunal on 6th July 2023, the Notice could not be traced. Consequently, it wrote a letter to the Tribunal's Secretary on 7th July 2023 requesting for assistance in retrieving the said Notice, but the said letter elicited no response. The appellant stated that after further follow ups with the Tribunal Registry, they were able to retrieve the Notice on 11th July 2023 and immediately served it upon the respondent. In support of the averments that at the time it filed the said Notice, the Tribunal was moving offices, the appellant produced a copy of the Tribunal's Notice to that effect. Upon perusal of the Notice, I agree with the respondent that the Tribunal had directed litigants to file matters online during its relocation and provided email addresses for that purpose.
14. The appellant asserted that failure to comply with the aforesaid directives was as a result of the fact that its Process Servers were accustomed to physical filing of documents due to the Tribunal's previous location in the same building. On perusal of the provisions of Section 32(1A) of the [Tax Appeals Tribunal Act](#), it is evident that it is couched in mandatory terms. Further, the Supreme Court in the case of Moses Mwigigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] eKLR, considered the importance of adherence to laid down procedures in approaching a Court of law as hereunder -

This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a



procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2) (d) of *the constitution*, which proclaims that, "...courts and tribunals shall be guided by... [the principle that] justice shall be administered without undue regard to procedural technicalities". This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts.

15. In view of the above decision, and noting the short timelines within which the appellant was required to serve the respondent with the Notice of Appeal dated 5th July 2023, the explanation proffered by the appellant for failure to comply with and/or take advantage of the directives issued by the Tribunal in regard to filing of pleadings is not sufficient to warrant this Court to exercise its discretion in its favour.
16. Having received a copy of the duly lodged Notice of Appeal outside the timelines prescribed by law, if at all the appellant was keen on prosecuting the instant appeal, it would have first approached this Court with an application for extension of time to comply with the provisions of Section 32(1A) of the *Tax Appeals Tribunal Act*, which was not done even after the respondent filed the instant application seeking to strike out the said Notice of Appeal. Instead, the appellant chose to urge this Court in its replying affidavit to find that the said Notice of Appeal was properly served. This Court finds that this is not a proper way of approaching the Court, more so knowing that it had not complied with the law. I reiterate that the appellant ought to have filed an application seeking orders for extension of time, and/or to have the Notice of Appeal to be deemed as being properly served, albeit late.
17. In the premise, and being bound by the Supreme Court's decision in the case of *Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* (supra) under the doctrine of stare decisis, this Court finds that the respondent has made out a case to warrant this Court to exercise its discretion in its favour.
18. In the end, this Court is persuaded that the instant application is merited. As a result, it is allowed as prayed, with costs to the respondent. The Notice of Appeal and Record of Appeal filed by the appellant are hereby struck out.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF DECEMBER 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Lemaiyan h/b for Ms Njuguna for the appellant/respondent

Mr. Ochieng for the respondent/applicant

Ms B. Wokabi - Court Assistant.

